

Provisions on international relations in EU competition policy

Situation as of 1 January 2008



EU Competition Law

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in EU competition policy**

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European Commission
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FOREWORD BY NEELIE KROES

Member of the Commission in charge of competition policy

Competition policy enjoys more prominence today than it has ever done; this has, to a large extent, been a product of the economic changes we have witnessed in recent times. World-wide economic trends over the past two decades have seen a progressive move toward an ever wider acceptance and adoption of the market system.

These trends have been most clearly exhibited in the economies of the developing world and in the remarkable transformation of so many centrally-planned economies. But the trends have also been evident in our own economies here in Europe and across the industrialised world: the process of liberalisation has opened up large segments of our economies which had previously been sealed off from the benefits of competitive forces, to the benefit of business and consumers alike. In this newly liberalised world, there is an increasing recognition that a robust competition policy is indispensable, to ensure that the competitive playing field is not distorted by anti-competitive behaviour.

Globalisation presents major challenges for competition authorities around the world and requires close cooperation between them. The Commission has therefore concluded numerous international agreements in recent years, both bilaterally and in the framework of international forums. This cooperation and the gradual convergence of approaches which it naturally encourages are very much welcome.

In that context I am pleased to introduce this comprehensive overview of competition rules in the international field, which I hope will be a useful reference for market operators and law enforcers.

Neelie Kroes
Competition Commissioner

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I – European Economic Area*

* The most recent updates of the Protocols to the EEA agreement are available on the website of the EFTA secretariat at <http://www.efta.int/content/legal-texts/eea/protocols>

PART IV COMPETITION AND OTHER COMMON RULES

CHAPTER 1 RULES APPLICABLE TO UNDERTAKINGS

Article 53

1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

1 See also: - Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation* (94/1/ECSC, EC) (OJ L 1, 3.1.1994, p. 1)

* *The present agreement has not been ratified by the Swiss Confederation.*

- Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.94, p. 6)

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 54

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of this Agreement in so far as it may affect trade between Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 55

1. Without prejudice to the provisions giving effect to Articles 53 and 54 as contained in Protocol 21 and Annex XIV of this Agreement, the EC Commission and the EFTA Surveillance Authority provided for in Article 108(1) shall ensure the application of the principles laid down in Articles 53 and 54.

The competent surveillance authority, as provided for in Article 56, shall investigate cases of suspected infringement of these principles, on its own initiative, or on application by a State within the respective territory or by the other surveillance authority. The competent surveillance authority shall carry out these investigations in cooperation with the competent national authorities in the respective territory and in cooperation with the other surveillance authority, which shall give it its assistance in accordance with its internal rules.

If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the competent surveillance authority shall record such infringement of the principles in a reasoned decision.

The competent surveillance authority may publish its decision and authorize States within the respective territory to take the measures, the conditions and details of which

it shall determine, needed to remedy the situation. It may also request the other surveillance authority to authorize States within the respective territory to take such measures.

Article 56

1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

(a) individual cases where only trade between EFTA States is affected shall be decided upon by the EFTA Surveillance Authority;

(b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by this Agreement;

(c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraph (c) of paragraph 1, whose effects on trade between EC Member States or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms ‘undertaking’ and ‘turnover’ are, for the purposes of this Article, defined in Protocol 22.

Article 57

1. Concentrations the control of which is provided for in paragraph 2 and which create or strengthen a dominant position as a result of which effective competition would be significantly impeded within the territory covered by this Agreement or a substantial part of it, shall be declared incompatible with this Agreement.

2. The control of concentrations falling under paragraph 1 shall be carried out by:

(a) the EC Commission in cases falling under Regulation (EEC) No 4064/89 in accordance with that Regulation and in accordance with Protocols 21 and 24 and Annex XIV to this Agreement. The EC Commission shall, subject to the review of the EC Court of Justice, have sole competence to take decisions on these cases;

(b) the EFTA Surveillance Authority in cases not falling under subparagraph (a) where the relevant thresholds set out in Annex XIV are fulfilled in the territory of the EFTA

States in accordance with Protocols 21 and 24 and Annex XIV. This is without prejudice to the competence of EC Member States.

Article 58

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and to promoting a homogeneous implementation, application and interpretation of the provisions of this Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocols 23 and 24.

Article 59

1. In the case of public undertakings and undertakings to which EC Member States or EFTA States grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement, in particular to those rules provided for in Articles 4 and 53 to 63.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Agreement, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

3. The EC Commission as well as the EFTA Surveillance Authority shall ensure within their respective competence the application of the provisions of this Article and shall, where necessary, address appropriate measures to the States falling within their respective territory.

Article 60

Annex XIV contains specific provisions giving effect to the principles set out in Articles 53, 54, 57 and 59.

CHAPTER 2 STATE AID

Article 61

1. Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement.

2. The following shall be compatible with the functioning of this Agreement:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the functioning of this Agreement:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of an EC Member State or an EFTA State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII.

Article 62

1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out:

- (a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community;
- (b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26.

2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27.

Article 63

Annex XV contains specific provisions on State aid.

Article 64

1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f).

If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition.

Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution.

If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA.

2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement.

CHAPTER 3 OTHER COMMON RULES

Article 65

1. Annex XVI contains specific provisions and arrangements concerning procurement which, unless otherwise specified, shall apply to all products and to services as specified.

2. Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services.

Surveillance procedure

Article 108

1. The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

2. The EFTA States shall establish a court of justice (EFTA Court).

The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:

- (a) actions concerning the surveillance procedure regarding the EFTA States;
- (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;
- (c) the settlement of disputes between two or more EFTA States.

Article 109

1. The fulfilment of the obligations under this Agreement shall be monitored by, on the one hand, the EFTA Surveillance Authority and, on the other, the EC Commission acting in conformity with the Treaty establishing the European Economic Community{ }.

2. In order to ensure a uniform surveillance throughout the EEA, the EFTA Surveillance Authority and the EC Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases.

3. The EC Commission and the EFTA Surveillance Authority shall receive any complaints concerning the application of this Agreement. They shall inform each other of complaints received.

4. Each of these bodies shall examine all complaints falling within its competence and shall pass to the other body any complaints which fall within the competence of that body.

5. In case of disagreement between these two bodies with regard to the action to be taken in relation to a complaint or with regard to the result of the examination, either of the bodies may refer the matter to the EEA Joint Committee which shall deal with it in accordance with Article 111.

Article 110

Decisions under this Agreement by the EFTA Surveillance Authority and the EC Commission which impose a pecuniary obligation on persons other than States, shall be enforceable. The same shall apply to such judgments under this Agreement by the Court of Justice of the European Communities, the Court of First Instance of the European Communities and the EFTA Court.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the authority which each Contracting Party shall designate for this purpose and shall make known to the other Contracting Parties, the EFTA Surveillance Authority,

the EC Commission, the Court of Justice of the European Communities, the Court of First Instance of the European Communities and the EFTA Court.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement, in accordance with the law of the State in the territory of which enforcement is to be carried out, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court of Justice of the European Communities, as far as decisions by the EC Commission, the Court of First Instance of the European Communities or the Court of Justice of the European Communities are concerned, or by a decision of the EFTA Court as far as decisions by the EFTA Surveillance Authority or the EFTA Court are concerned. However, the courts of the States concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

[...]

PROTOCOL 21 ON THE IMPLEMENTATION OF COMPETITION RULES APPLICABLE TO UNDERTAKINGS

Article 1

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community, enabling the EFTA Surveillance Authority to give effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25.

The Community shall, where necessary, adopt the provisions giving effect to the principles laid down in Articles 1(2)(e) and 53 to 60 of the Agreement, and in Protocol 25, in order to ensure that the EC Commission has equivalent powers and similar functions under this Agreement to those which it has, at the time of the signature of the Agreement, for the application of the competition rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community.

Article 2

If, following the procedures set out in Part VII of the Agreement, new acts for the implementation of Articles 1(2)(e) and 53 to 60 and of Protocol 25, or on amendments of the acts listed in Article 3 of this Protocol are adopted, corresponding amendments shall be made in the agreement setting up the EFTA Surveillance Authority so as to ensure that the EFTA Surveillance Authority will be entrusted simultaneously with equivalent powers and similar functions to those of the EC Commission.

Article 3

1. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC

Commission for the application of the competition rules of the Treaty establishing the European Economic Community:

Control of concentrations

1.² **32004 R 0139**: Article 4(4) and (5) and Articles 6 to 26 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

2 Text of point 1 (Council Regulation (EEC) No 4064/89) replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004, and subsequently replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

- 2.³ **398 R 0447**: Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 61, 2.3.1998, p. 1), as amended by:
- ⁴ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

General procedural rules

- 3.⁵ **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1), as amended by:
- ⁶ **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1),
- ⁷ **32006 R 1419**: Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269, 28.9.2006, p. 1).
- 4.⁸ **32004 R 0773**: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18).
5. []⁹

Transport

6. []¹⁰

3 This point, introduced by Decision No 77/98 (OJ No L 172, 8.7.1999, p. 56 and EEA Supplement No 30, 8.7.1999, p. 153), e.i.f. 1.9.1998, replaces former point 2. See also Decision No 13/97 (OJ No L 182, 10.7.1997, p. 44 and EEA Supplement No 29, 10.7.1997, p. 59), e.i.f. 1.4.1997.

4 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ No L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

5 Text replaced by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

6 Indent and words “, as amended by:” above, added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

7 Indent added by Decision No 153/2006 (OJ No L [to be published]), e.i.f. 9.12.2006.

8 Text of point 4 (Commission Regulation (EC) No 3385/94) replaced by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

9 Text of point 5 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

10 Text of point 6 (Council Regulation (EEC) No 141/62) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

7. [] ¹¹
8. [] ¹²
9. [] ¹³
10. **374 R 2988**: Council Regulation (EEC) No 2988/74 of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ No L 319, 29.11.1974, p. 1), as amended by:
- ¹⁴ **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1).
11. [] ¹⁵ []
12. ¹⁶
13. **387 R 3975**: Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ No L 374, 31.12.1987, p. 1), as amended by:
- **391 R 1284**: Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ No L 122, 17.5.1991, p. 2),
- ¹⁷ **392 R 2410**: Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ No L 240, 24.8.1992, p. 18),
- ¹⁸ **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1),
- ¹⁹ **32004 R 0411**: Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68, 6.3.2004, p. 1).

11 Text of point 7 (Article 6 and articles 10 to 31 of Council Regulation (EEC) No 1017/68) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

12 Text of point 8 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

13 Text of point 9 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

14 Indent and words", as amended by:"above, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

15 Text of point 11 (Section II of Council Regulation (EEC) No 4056/86) deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

16 Text of point 12 deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

17 Indent added by Decision No 3/94 (OJ No L 85, 30.3.1994, p. 65 and EEA Supplement No 1, 30.3.1994, p. 5), e.i.f. 1.7.1994.

18 Indent and words", as amended by:"above, added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

19 Indent added by Decision No 40/2005 (OJ No L 198, 28.7.2005, p. 38 and EEA Supplement No 38, 28.7.2005, p. 22), e.i.f. 19.5.2005.

14. ²⁰

15. [] ²¹

16. [] ²²

2. In addition to the acts listed in Annex XIV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules of the Treaty establishing the European Coal and Steel Community (ECSC):

1. Article (ECSC) 65(2), subparagraphs 3 to 5, (3), (4), subparagraph 2, and (5).
2. Article (ECSC) 66(2), subparagraphs 2 to 4, and (4) to (6).
3. **354 D 7026**: High Authority Decision No 26/54 of 6 May 1954 laying down in implementation of Article 66(4) of the Treaty a regulation concerning information to be furnished (OJ of the European Coal and Steel Community No 9, 11.5.1954, p. 350/54).
4. **378 S 0715**: Commission Decision No 715/78/ECSC of 6 April 1978 concerning limitation periods in proceedings and the enforcement of sanctions under the Treaty establishing the European Coal and Steel Community (OJ No L 94, 8.4.1978, p. 22).
5. **384 S 0379**: Commission Decision No 379/84/ECSC of 15 February 1984 defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof (OJ No L 46, 16.2.1984, p. 23).

Article 4 ²³

Article 5 ²⁴

Article 6 ²⁵

Article 7 ²⁶

20 Text deleted by Decision No 60/1999 (OJ No L 284, 9.11.2000, p. 38 and EEA Supplement No 50, 9.11.2000, p. 118), e.i.f. 1.5.1999.

21 Text of point 15 (Commission Regulation (EC) No 2842/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

22 Text of point 16 (Commission Regulation (EC) No 2843/98) deleted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

23 Text of article 4 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

24 Text of article 5 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

25 Text of article 6 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

26 Text of article 7 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

Article 8²⁷

Applications submitted to the EC Commission prior to the date of entry into force of the Agreement shall be deemed to comply with the provisions on application under the Agreement.

The competent surveillance authority pursuant to Article 56 of the Agreement and Article 10 of Protocol 23 may require a duly completed form as prescribed for the implementation of the Agreement to be submitted to it within such time as it shall appoint. In that event, applications shall be treated as properly made only if the forms are submitted within the prescribed period and in accordance with the provisions of the Agreement.

Article 9²⁸**Article 10**

The Contracting Parties shall ensure that the measures affording the necessary assistance to officials of the EFTA Surveillance Authority and the EC Commission, in order to enable them to make their investigations as foreseen under the Agreement, are taken within six months of the entry into force of the Agreement.

Article 11

As regards agreements, decisions and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53(1), the prohibition in Article 53(1) shall not apply where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as to fulfil the conditions contained in the block exemptions provided for in Annex XIV.

Article 12

As regards agreements, decisions of associations of undertakings and concerted practices already in existence at the date of entry into force of the Agreement which fall under Article 53 (1), the prohibition in Article 53(1) shall not apply, from the date of entry into force of the Agreement, where the agreements, decisions or practices are modified within six months from the date of entry into force of the Agreement so as not to fall under the prohibition of Article 53(1) any more.

Article 13

Agreements, decisions of associations of undertakings and concerted practices which benefit from an individual exemption granted under Article 85(3) of the Treaty estab-

27 Words “and notifications” deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

28 Text of article 9 deleted by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

lishing the European Economic Community before the entry into force of the Agreement shall continue to be exempted as regards the provisions of the Agreement, until their date of expiry as provided for in the decisions granting these exemptions or until the EC Commission otherwise decides, whichever date is the earlier.

*Review clause*²⁹

By the end of 2005 and at the request of one of the Contracting Parties, the Parties shall review the mechanisms for the enforcement of Articles 53 and 54 of the Agreement as well as the co-operation mechanisms of Protocol 23 to the Agreement, with a view to ensuring the homogenous and effective application of those Articles. The Parties shall in particular review the decision of the EEA Joint Committee No 130/2004 of 24 September 2004 in light of the Parties' experiences with the new system of enforcing the competition rules and explore the possibility of mirroring in the EEA the system established in the EU by Council Regulation (EC) No 1/2003 as regards the application of Articles 81 and 82 of the Treaty by national competition authorities, the horizontal co-operation between national competition authorities and the mechanism for ensuring uniform application of the competition rules by national authorities.

29 Review clause added by Decision No 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

PROTOCOL 22 CONCERNING THE DEFINITION OF ‘UNDERTAKING’ AND ‘TURNOVER’ (ARTICLE 56)

Article 1

For the purposes of the attribution of individual cases pursuant to Article 56 of the Agreement, an ‘undertaking’ shall be any entity carrying out activities of a commercial or economic nature.

Article 2

‘Turnover’ within the meaning of Article 56 of the Agreement shall comprise the amounts derived by the undertakings concerned, in the territory covered by the Agreement, in the preceding financial year from the sale of products and the provision of services falling within the undertaking’s ordinary scope of activities after deduction of sales rebates and of value-added tax and other taxes directly related to turnover.

Article 3³⁰

In place of turnover the following shall be used:

- (a) for credit institutions and other financial institutions, the sum of the following income items as defined in Council Directive 86/635/EEC, after deduction of value added tax and other taxes directly related to those items, where appropriate:
 - (i) interest income and similar income;
 - (ii) income from securities:
 - income from shares and other variable yield securities,
 - income from participating interests,
 - income from shares in affiliated undertakings;
 - (iii) commissions receivable;
 - (iv) net profit on financial operations;
 - (v) other operating income.

The turnover of a credit or financial institution in the territory covered by the Agreement shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the territory covered by the Agreement;

30 Text of Article 3 replaced by Decision No 78/2004 (OJ No L 219, 16.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.

- (b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1(2)(b) and (3)(b), (c) and (d) and the final part of Article 1(2) and (3) of Council Regulation (EC) No 139/2004, gross premiums received from residents in the territory covered by the Agreement shall be taken into account.

Article 4

1. In derogation from the definition of the turnover relevant for the application of Article 56 of the Agreement, as contained in Article 2 of this Protocol, the relevant turnover shall be constituted:

- (a) as regards agreements, decisions of associations of undertakings and concerted practices related to distribution and supply arrangements between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which are the subject matter of the agreements, decisions or concerted practices, and from the other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use;
- (b) as regards agreements, decisions of associations of undertakings and concerted practices related to arrangements on transfer of technology between non-competing undertakings, of the amounts derived from the sale of goods or the provision of services which result from the technology which is the subject matter of the agreements, decisions or concerted practices, and of the amounts derived from the sale of those goods or the provision of those services which that technology is designed to improve or replace.
2. However, where at the time of the coming into existence of arrangements as described in paragraph 1(a) and (b) turnover as regards the sale of goods or the provision of services is not in evidence, the general provision as contained in Article 2 shall apply.

Article 5

1. Where individual cases concern products falling within the scope of application of Protocol 25, the relevant turnover for the attribution of those cases shall be the turnover achieved in these products.
2. Where individual cases concern products falling within the scope of application of Protocol 25 as well as products or services falling within the scope of application of Articles 53 and 54 of the Agreement, the relevant turnover is determined by taking into account all the products and services as provided for in Article 2.

PROTOCOL 23 ³¹

CONCERNING THE COOPERATION BETWEEN THE SURVEILLANCE AUTHORITIES (ARTICLE 58)

GENERAL PRINCIPLES

Article 1

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.
2. The EFTA Surveillance Authority and the EC Commission, in accordance with their internal rules, respecting Article 56 of the Agreement and Protocol 22 and the autonomy of both sides in their decisions, shall cooperate in the handling of individual cases falling under Article 56(1)(b) and (c), (2), second sentence and (3), as provided for in the provisions below.
3. For the purposes of this Protocol, the term ‘territory of a surveillance authority’ shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

Article 1A ³²

In the interests of homogeneous interpretation by the EFTA Surveillance Authority and the EC Commission of Articles 53 and 54 of the Agreement and of Articles 81 and 82 of the Treaty, the EFTA Surveillance Authority and the competent authorities of the EFTA States may also be allowed to participate in meetings of the network of public authorities referred to in recital 15 of Council Regulation (EC) No 1/2003 for the purposes of discussion of general policy issues only. The EFTA Surveillance Authority, the EC Commission and the competent authorities of the EFTA states and of the EC Member States shall have the power to make available all information necessary for the purpose of such general policy discussion in that network. Information made available in this context shall not be used for enforcement purposes. This participation shall be without prejudice to rights of participation of the EFTA States and the EFTA Surveillance Authority granted under the EEA Agreement.

31 Text of protocol 23 replaced by Decision No 130/2004 (OJ L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

32 Article inserted by Decision No 147/2007 (OJ No L 100, 10.4.2008, p. 99 and EEA Supplement No 19, 10.4.2008, p. 96), e.i.f. 27.10.2007.

THE INITIAL PHASE OF THE PROCEEDINGS

Article 2

1. In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other complaints to the extent that it is not apparent that these have been addressed to both surveillance authorities. They shall also inform each other when opening *ex officio* procedures.
2. The EFTA Surveillance Authority and the EC Commission shall without undue delay forward to each other information received from the national competition authorities within their respective territories concerning the commencement of the first formal investigative measure in cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement.
3. The surveillance authority which has received information as provided for in the first paragraph may present its comments thereon within 30 working days of its receipt.

Article 3

1. The competent surveillance authority shall, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, consult the other surveillance authority when:
 - addressing to the undertakings or associations of undertakings concerned its statement of objections,
 - publishing its intention to adopt a decision declaring Article 53 or 54 of the Agreement not applicable, or
 - publishing its intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.
2. The other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections.
3. Observations received from the undertakings concerned or third parties shall be transmitted to the other surveillance authority.

Article 4

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall transmit to the other surveillance authority the administrative letters by which a file is closed or a complaint rejected.

Article 5

In cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall invite the other surveillance authority

to be represented at hearings of the undertakings concerned. The invitation shall also extend to the States falling within the competence of the other surveillance authority.

ADVISORY COMMITTEES

Article 6

1. In cases falling under Article 56 (1)(b) and (c), (2), second sentence and (3) of the Agreement, the competent surveillance authority shall, in due time, inform the other surveillance authority of the date of the meeting of the Advisory Committee and transmit the relevant documentation.
2. All documents forwarded for that purpose from the other surveillance authority shall be presented to the Advisory Committee of the surveillance authority which is competent to decide on a case in accordance with Article 56 together with the material sent out by that surveillance authority.
3. Each surveillance authority and the States falling within its competence shall be entitled to be present in the Advisory Committees of the other surveillance authority and to express their views therein; they shall not have, however, the right to vote.
4. Consultations may also take place by written procedure. However, if the surveillance authority which is not competent to decide on a case in accordance with Article 56 so requests, the competent surveillance authority shall convene a meeting.

REQUEST FOR DOCUMENTS AND THE RIGHT TO MAKE OBSERVATIONS

Article 7

The surveillance authority which is not competent to decide on a case in accordance with Article 56 of the Agreement may request from the other surveillance authority at all stages of the proceedings copies of the most important documents concerning cases falling under Article 56(1)(b) and (c), (2) second sentence and (3) of the Agreement, and may furthermore, before a final decision is taken, make any observations it considers appropriate.

ADMINISTRATIVE ASSISTANCE

Article 8

1. When the competent surveillance authority, as defined in Article 56 of the Agreement, by simple request or by decision requires an undertaking or association of undertakings located within the territory of the other surveillance authority to supply information, it shall at the same time forward a copy of the request or decision to the other surveillance authority.
2. At the request of the competent surveillance authority, as defined in Article 56 of the Agreement, the other surveillance authority shall, in accordance with its internal rules,

undertake inspections within its territory in cases where the competent surveillance authority so requesting considers it to be necessary.

3. The competent surveillance authority is entitled to be represented and take an active part in inspections carried out by the other surveillance authority in respect of paragraph 2.
4. All information obtained during such inspections on request shall be transmitted to the surveillance authority which requested the inspections immediately after their finalization.
5. Where the competent surveillance authority, in cases falling under Article 56(1)(b) and (c), (2), second sentence and (3) of the Agreement, carries out inspections within its territory, it shall inform the other surveillance authority of the fact that such inspections have taken place and, on request, transmit to that authority the relevant results of the inspections.
6. When the competent surveillance authority as defined in Article 56 of the Agreement interviews a consenting natural or legal person in the territory of the other surveillance authority, the latter shall be informed thereof. The surveillance authority which is not competent may be present during such an interview, as well as officials from the competition authority on whose territory the interviews are conducted.

EXCHANGE AND USE OF INFORMATION

Article 9

1. For the purpose of applying Articles 53 and 54 of the Agreement, the EFTA Surveillance Authority and the EC Commission shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.
2. Information acquired or exchanged pursuant to this Protocol shall only be used in evidence for the purpose of procedures under Articles 53 and 54 of the Agreement and in respect of the subject matter for which it was collected.
3. Where the information referred to in Article 2 (1) and (2) concerns a case which has been initiated as a result of an application for leniency, that information cannot be used by the receiving surveillance authority as the basis for starting an inspection on its own behalf. This is without prejudice to any power of the surveillance authority to open an inspection on the basis of information received from other sources.
4. Save as provided under paragraph 5, information voluntarily submitted by a leniency applicant will only be transmitted to the other surveillance authority with the consent of the applicant. Similarly other information that has been obtained during or following an inspection or by means of or following any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application will only be transmitted to the other surveillance authority if the applicant has consented to the transmission to that authority of information it has voluntarily submitted in its application for leniency. Once the leniency applicant has given consent to the transmission of information to the other surveillance authority, that consent may not be withdrawn.

This paragraph is without prejudice, however, to the responsibility of each applicant to file leniency applications to whichever authorities it may consider appropriate.

5. Notwithstanding paragraph 4, the consent of the applicant for the transmission of information to the other surveillance authority is not required in any of the following circumstances:

- a) no consent is required where the receiving surveillance authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting surveillance authority, provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving surveillance authority;
- b) no consent is required where the receiving surveillance authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the date and time of transmission as noted by the transmitting surveillance authority, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme or on any employee or former employee of the leniency applicant or of any of the aforementioned persons. A copy of the receiving authority's written commitment will be provided to the applicant.
- c) in the case of information collected by a surveillance authority under Article 8(2) at the request of the surveillance authority to whom the leniency application was made, no consent is required for the transmission of such information to, and its use by, the surveillance authority to whom the application was made.

PROFESSIONAL SECRECY

Article 10

1. For the purpose of carrying out the tasks entrusted to it by this Protocol, the EC Commission and the EFTA Surveillance Authority can forward to the States falling within their respective territories all information acquired or exchanged by them pursuant to this Protocol.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and the EFTA States, their officials, servants and other persons working under the supervision of these authorities as well as officials and servants of other authorities of the States shall not disclose information acquired or exchanged by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or in the legislation of the Contracting Parties shall not prevent exchange of information as set out in this Protocol.

ACCESS TO THE FILE³³

Article 10A

When a surveillance authority grants access to the file to the parties to whom it has addressed a statement of objections, the right of access to the file shall not extend to internal documents of the other surveillance authority or of the competition authorities of the EC Member States and the EFTA States. The right of access to the file shall also not extend to correspondence between the surveillance authorities, between a surveillance authority and the competition authorities of the EC Member States or EFTA States or between the competition authorities of the EC Member States or EFTA States where such correspondence is contained in the file of the competent surveillance authority.

COMPLAINTS AND TRANSFERRAL OF CASES

Article 11

1. Complaints may be addressed to either surveillance authority. Complaints addressed to the surveillance authority which, pursuant to Article 56, is not competent to decide on a given case shall be transferred without delay to the competent surveillance authority.
2. If, in the preparation or initiation of *ex officio* proceedings, it becomes apparent that the other surveillance authority is competent to decide on a case in accordance with Article 56 of the Agreement, this case shall be transferred to the competent surveillance authority.
3. Once a case is transferred to the other surveillance authority as provided for in paragraphs 1 and 2, the case may not be transferred back. A case may not be transferred after
 - the statement of objections has been sent to the undertakings or associations of undertakings concerned,
 - a letter has been sent to the complainant informing him that there are insufficient grounds for pursuing the complaint,
 - the publication of the intention to adopt a decision declaring Article 53 or 54 not applicable, or the publication of the intention to adopt a decision making commitments offered by the undertakings binding on the undertakings.

LANGUAGES

Article 12

Any natural or legal person shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the European Community which they choose as regards complaints. This shall also cover all instances of a proceeding, whether it be opened following a complaint or *ex officio* by the competent surveillance authority.

33 Heading and article 10A inserted by Decision No 178/2004 (OJ No L 133, 26.5.2005, p. 35 and EEA Supplement No 26, 26.5.2005, p. 25), e.i.f. 1.7.2005.

PROTOCOL 24³⁴ ON COOPERATION IN THE FIELD OF CONTROL OF CONCENTRATIONS

GENERAL PRINCIPLES

Article 1

1. The EFTA Surveillance Authority and the EC Commission shall exchange information and consult each other on general policy issues at the request of either of the surveillance authorities.
2. In cases falling under Article 57(2)(a) of the Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in the handling of concentrations as provided for in the provisions set out below.
3. For the purposes of this Protocol, the term ‘territory of a surveillance authority’ shall mean for the EC Commission the territory of the EC Member States to which the Treaty establishing the European Community applies, upon the terms laid down in that Treaty, and for the EFTA Surveillance Authority the territories of the EFTA States to which the Agreement applies.

Article 2

1. Cooperation shall take place, in accordance with the provisions set out in this Protocol, where:
 - (a) the combined turnover of the undertakings concerned in the territory of the EFTA States equals 25 per cent or more of their total turnover within the territory covered by the Agreement, or
 - (b) each of at least two of the undertakings concerned has a turnover exceeding EUR 250 million in the territory of the EFTA States, or
 - (c) the concentration is liable to significantly impede effective competition, in the territories of the EFTA States or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.
2. Cooperation shall also take place where:
 - (a) the concentration fulfils the criteria for referral pursuant to Article 6.
 - (b) an EFTA State wishes to adopt measures to protect legitimate interests as set out in Article 7.

34 Protocol 24 replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.

INITIAL PHASE OF THE PROCEEDINGS

Article 3

1. The EC Commission shall transmit to the EFTA Surveillance Authority copies of notifications of the cases referred to in Article 2(1) and (2)(a) within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the EC Commission.

2. The EC Commission shall carry out the procedures set out for the implementation of Article 57 of the Agreement in close and constant liaison with the EFTA Surveillance Authority. The EFTA Surveillance Authority and EFTA States may express their views upon those procedures. For the purposes of Article 6(1) of this Protocol, the EC Commission shall obtain information from the competent authority of the EFTA State concerned and give it the opportunity to make known its views at every stage of the procedures up to the adoption of a decision pursuant to that Article. To that end, the EC Commission shall give it access to the file.

Documents to be transmitted from the Commission to an EFTA State and from an EFTA State to the Commission pursuant to this Protocol shall be submitted via the EFTA Surveillance Authority.

HEARINGS

Article 4

In cases referred to in Article 2(1) and (2)(a), the EC Commission shall invite the EFTA Surveillance Authority to be represented at the hearings of the undertakings concerned. The EFTA States may likewise be represented at those hearings.

THE EC ADVISORY COMMITTEE ON CONCENTRATIONS

Article 5

1. In cases referred to in Article 2(1) and (2)(a), the EC Commission shall in due time inform the EFTA Surveillance Authority of the date of the meeting of the EC Advisory Committee on Concentrations and transmit the relevant documentation.

2. All documents forwarded for that purpose from the EFTA Surveillance Authority, including documents emanating from EFTA States, shall be presented to the EC Advisory Committee on Concentrations together with the other relevant documentation sent out by the EC Commission.

3. The EFTA Surveillance Authority and the EFTA States shall be entitled to be present in the EC Advisory Committee on Concentrations and to express their views therein; they shall not have, however, the right to vote.

RIGHTS OF INDIVIDUAL STATES

Article 6

1. The EC Commission may, by means of a decision notified without delay to the undertakings concerned, to the competent authorities of the EC Member States and to the EFTA Surveillance Authority, refer a notified concentration, in whole or in part, to an EFTA State where:

- (a) a concentration threatens to affect significantly competition in a market within that EFTA State, which presents all the characteristics of a distinct market, or
- (b) a concentration affects competition in a market within that EFTA State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the territory covered by the Agreement.

2. In cases referred to in paragraph 1, any EFTA State may appeal to the European Court of Justice, on the same grounds and conditions as an EC Member State under Articles 230 and 243 of the Treaty establishing the European Community, and in particular request the application of interim measures, for the purpose of applying its national competition law.

3. ³⁵ Where the concentration may affect trade between one or more EC Member States and one or more EFTA States, the EC Commission shall inform the EFTA Surveillance Authority of any request received from an EC Member State pursuant to Article 22 of Regulation (EC) No 139/2004 without delay.

One or more EFTA States may join a request as referred to in subparagraph 1 where the concentration affects trade between one or more EC Member States and one or more EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States joining the request.

Upon receipt of a copy of a request as referred to in subparagraph 1, all national time limits relating to the concentration shall be suspended in the EFTA States until it has been decided where the concentration shall be examined. As soon as an EFTA State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

Where the Commission decides to examine the concentration, the EFTA State or States having joined the request shall no longer apply their national legislation on competition to the concentration.

4. Prior to the notification of a concentration within the meaning of Article 4(1) of Regulation (EC) No 139/2004 the persons or undertakings referred to in Article 4(2) of Regulation (EC) No 139/2004 may inform the EC Commission, by means of a reasoned submission, that the concentration may significantly affect competition

35 Paragraph 3 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

in a market within an EFTA State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State.

The EC Commission shall transmit all submissions pursuant to Article 4(4) of Regulation (EC) No 139/2004 and this paragraph to the EFTA Surveillance Authority without delay.

5. With regard to a concentration as defined in Article 3 of Regulation (EC) No 139/2004 which does not have a Community dimension within the meaning of Article 1 of that Regulation and which is capable of being reviewed under the national competition laws of at least three EC Member States and at least one EFTA State, the persons or undertakings referred to in Article 4(2) of that Regulation may, before any notification to the competent authorities, inform the EC Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The EC Commission shall transmit all submissions pursuant to Article 4(5) of Regulation (EC) No 139/2004 to the EFTA Surveillance Authority without delay.

Where at least one such EFTA State has expressed its disagreement as regards the request to refer the case, the competent EFTA State(s) shall retain their competence, and the case shall not be referred from the EFTA States pursuant to this paragraph.

Article 7

1. Notwithstanding the sole competence of the EC Commission to deal with concentrations of a Community dimension as set out in Council Regulation (EC) No 139/2004, EFTA States may take appropriate measures to protect legitimate interests other than those taken into consideration according to the above Regulation and compatible with the general principles and other provisions as provided for, directly or indirectly, under the Agreement.

2. Public security, plurality of media and prudential rules shall be regarded as legitimate interests within the meaning of paragraph 1.

3 Any other public interest must be communicated to the EC Commission and shall be recognized by the EC Commission after an assessment of its compatibility with the general principles and other provisions as provided for, directly or indirectly, under the Agreement before the measures referred to above may be taken. The EC Commission shall inform the EFTA Surveillance Authority and the EFTA State concerned of its decision within 25 working days of that communication.

ADMINISTRATIVE ASSISTANCE

Article 8

1. When the EC Commission requires by decision a person, an undertaking or an association of undertakings located within the territory of the EFTA Surveillance Authority

to supply information, it shall without delay forward a copy of the decision to the EFTA Surveillance Authority. At the specific request of the EFTA Surveillance Authority, the EC Commission shall also forward to the EFTA Surveillance Authority copies of simple requests for information relating to a notified concentration.

2. At the request of the EC Commission, the EFTA Surveillance Authority and the EFTA States shall provide the EC Commission with all necessary information to carry out the duties assigned to it by Article 57 of the Agreement.

3. When the EC Commission interviews a consenting natural or legal person in the territory of the EFTA Surveillance Authority, the EFTA Surveillance Authority shall be informed in advance thereof. The EFTA Surveillance Authority may be present during the interview, as well as officials from the competition authority on whose territory the interviews are conducted.

4.³⁶ At the request of the EC Commission, the EFTA Surveillance Authority shall undertake inspections within its territory.

5.³⁷ The EC Commission is entitled to be represented and take an active part in inspections carried out pursuant to paragraph 4.

6.³⁸ All information obtained during such inspections on request shall be transmitted to the EC Commission immediately after their finalization.

7. Where the EC Commission carries out investigations within the territory of the Community, it shall, as

regards cases falling under Article 2(1) and (2)(a), inform the EFTA Surveillance Authority of the fact that such inspections³⁹ have taken place and on request transmit in an appropriate way the relevant results of the investigations.

PROFESSIONAL SECRECY

Article 9

1. Information acquired as a result of the application of this Protocol shall be used only for the purpose of procedures under Article 57 of the Agreement.

36 Paragraph 4 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.

37 Paragraph 5 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.

38 Paragraph 6 inserted by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005, as corrected by Corrigendum noted by the EEA Joint Committee Meeting on 24.09.2004.

39 Word 'investigations' replaced by the word 'inspections' by Corrigendum Decision No 78/2004, e.i.f. 9.6.2004, noted by the EEA Joint Committee Meeting on 24.09.2004.

2. The EC Commission, the EFTA Surveillance Authority, the competent authorities of the EC Member States and of the EFTA States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States and of the EFTA States shall not disclose information acquired by them as a result of the application of this Protocol and of the kind covered by the obligation of professional secrecy.

3. Rules on professional secrecy and restricted use of information provided for in the Agreement or the legislation of the Contracting Parties shall not prevent the exchange and use of information as set out in this Protocol.

NOTIFICATIONS

Article 10

1. Undertakings shall address their notifications to the competent surveillance authority in accordance with Article 57(2) of the Agreement.

2. Notifications or complaints addressed to the authority which, pursuant to Article 57 of the Agreement, is not competent to take decisions on a given case shall be transferred without delay to the competent surveillance authority.

Article 11

The date of submission of a notification shall be the date on which it is received by the competent surveillance authority.

LANGUAGES

Article 12

1. Undertakings shall be entitled to address and be addressed by the EFTA Surveillance Authority and the EC Commission in an official language of an EFTA State or the Community which they choose as regards notifications. This shall also cover all instances of a proceeding.

2. If undertakings choose to address a surveillance authority in a language which is not one of the official languages of the States falling within the competence of that authority, or a working language of that authority, they shall simultaneously supplement all documentation with a translation into an official language of that authority.

3. As far as undertakings are concerned which are not parties to the notification, they shall likewise be entitled to be addressed by the EFTA Surveillance Authority and the EC Commission in an appropriate official language of an EFTA State or of the Community or in a working language of one of those authorities. If they choose to address a surveillance authority in a language which is not one of the official languages of the

States falling within the competence of that authority, or a working language of that authority, paragraph 2 shall apply.

4. The language which is chosen for the translation shall determine the language in which the undertakings may be addressed by the competent authority.

TIME LIMITS AND OTHER PROCEDURAL QUESTIONS

Article 13

As regards time limits and other procedural provisions, including the procedures for referral of a concentration between the EC Commission and one or more EFTA States, the rules implementing Article 57 of the Agreement shall apply also for the purpose of the cooperation between the EC Commission and the EFTA Surveillance Authority and EFTA States, unless otherwise provided for in this Protocol.

The calculation of the time limits referred to in Article 4(4) and (5), Article 9(2) and (6) and Article 22(2) of Regulation (EC) No 139/2004 shall start, for the EFTA Surveillance Authority and the EFTA States, upon receipt of the relevant documents by the EFTA Surveillance Authority⁴⁰.

TRANSITION RULE

Article 14

Article 57 of the Agreement shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired before the date of entry into force of the Agreement. It shall not in any circumstances apply to a concentration in respect of which proceedings were initiated before that date by a national authority with responsibility for competition.

40 In second paragraph, the words 'Article 4(4) and (5) and Article 9(2) and (6)' replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

PROTOCOL 25 ON COMPETITION REGARDING COAL AND STEEL

Article 1

1. All agreements between undertakings, decisions by associations of undertakings and concerted practices in respect of particular products referred to in Protocol 14 which may affect trade between Contracting Parties tending directly or indirectly to prevent, restrict or distort normal competition within the territory covered by this Agreement shall be prohibited, and in particular those tending:

- (a) to fix or determine prices,
- (b) to restrict or control production, technical development or investment,
- (c) to share markets, products, customers or sources of supply.

2. However, the competent surveillance authority, as provided for in Article 56 of the Agreement, shall authorize specialization agreements or joint-buying or joint-selling agreements in respect of the products referred to in paragraph 1, if it finds that:

- (a) such specialization or such joint-buying or joint-selling will make for a substantial improvement in the production or distribution of those products;
- (b) the agreement in question is essential in order to achieve these results and is not more restrictive than is necessary for that purpose; and
- (c) the agreement is not liable to give the undertakings concerned the power to determine the prices, or to control or restrict the production or marketing, of a substantial part of the products in question within the territory covered by the Agreement, or to shield them against effective competition from other undertakings within the territory covered by the Agreement.

If the competent surveillance authority finds that certain agreements are strictly analogous in nature and effect to those referred to above, having particular regard to the fact that this paragraph applies to distributive undertakings, it shall authorize them also when satisfied that they meet the same requirements.

3. Any agreement or decision prohibited by paragraph 1 shall be automatically void and may not be relied upon before any court or tribunal in the EC Member States or the EFTA States.

Article 2

1. Any transaction shall require the prior authorization of the competent surveillance authority, as provided for in Article 56 of the Agreement, subject to the provisions of paragraph 3 of this Article, if it has in itself the direct or indirect effect of bringing about within the territory covered by the Agreement, as a result of action by any person or undertaking or group of persons or undertakings, a concentration between undertak-

ings at least one of which is covered by Article 3, which may affect trade between Contracting Parties, whether the transaction concerns a single product or a number of different products, and whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control.

2. The competent surveillance authority, as provided for in Article 56 of the Agreement, shall grant the authorization referred to in paragraph 1 if it finds that the proposed transaction will not give to the persons or undertakings concerned the power, in respect of the product or products within its jurisdiction:

- to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market for those products, or
- to evade the rules of competition instituted under this Agreement, in particular by establishing an artificially privileged position involving a substantial advantage in access to supplies or markets.

3. Classes of transactions may, in view of the size of the assets or undertakings concerned, taken in conjunction with the kind of concentration to be effected, be exempted from the requirement of prior authorization.

4. If the competent surveillance authority, as provided for in Article 56 of the Agreement, finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the territory covered by this Agreement are using that position for purposes contrary to the objectives of this Agreement and if such abuse may affect trade between Contracting Parties, it shall make to them such recommendations as may be appropriate to prevent the position from being so used.

Article 3

For the purposes of Articles 1 and 2 as well as for the purposes of information required for their application and proceedings in connection with them, ‘undertaking’ means any undertaking engaged in production in the coal or the steel industry within the territory covered by the Agreement, and any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.

Article 4

Annex XIV to the Agreement contains specific provisions giving effect to the principles set out in Articles 1 and 2.

Article 5

The EFTA Surveillance Authority and the EC Commission shall ensure the application of the principles laid down in Articles 1 and 2 of this Protocol in accordance with the provisions giving effect to Articles 1 and 2 as contained in Protocol 21 and Annex XIV to the Agreement.

Article 6

Individual cases referred to in Articles 1 and 2 of this Protocol shall be decided upon by the EC Commission or the EFTA Surveillance Authority in accordance with Article 56 of the Agreement.

Article 7

With a view to developing and maintaining a uniform surveillance throughout the European Economic Area in the field of competition and of promoting a homogeneous implementation, application and interpretation of the provisions of the Agreement to this end, the competent authorities shall cooperate in accordance with the provisions set out in Protocol 23.

PROTOCOL 26⁴¹ ON THE POWERS AND FUNCTIONS OF THE EFTA SURVEILLANCE AUTHORITY IN THE FIELD OF STATE AID

Article 1

The EFTA Surveillance Authority shall, in an agreement between the EFTA States, be entrusted with equivalent powers and similar functions to those of the EC Commission, at the time of the signature of the Agreement, for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community, enabling the EFTA Surveillance Authority to give effect to the principles expressed in Articles 1(2)(e), 49 and 61 to 63 of the Agreement. The EFTA Surveillance Authority shall also have such powers to give effect to the competition rules applicable to State aid relating to products falling under the Treaty establishing the European Coal and Steel Community as referred to in Protocol 14.

Article 2

⁴² In addition to the acts listed in Annex XV, the following acts reflect the powers and functions of the EC Commission for the application of the competition rules applicable to State aid of the Treaty establishing the European Economic Community:

1. ⁴³ **399 R 0659**: Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1), as amended by:

-⁴⁴ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

2. ⁴⁵ **32004 R 0794**: Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1), as corrected by OJ L 25, 28.1.2005, p. 74 and OJ L 131, 25.5.2005, p. 45.

41 Entire text of Protocol 26 replaced by Decision No 164/2001 (OJ L 65, 7.3.2002, p. 46 and EEA Supplement No 13, 7.3.2002, p. 26), e.i.f. 1.2.2003.

42 The words "the following act" replaced by "the following acts" by Decision No 123/2005 (OJ L 339, 22.12.2005, p. 32 and EEA Supplement No 66, 22.12.2005, p. 18), e.i.f. 1.10.2005.

43 Numbered as point 1 by Decision No 123/2005 (OJ L 339, 22.12.2005, p. 32 and EEA Supplement No 66, 22.12.2005, p. 18), e.i.f. 1.10.2005.

44 Indent and words ", as amended by:" added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

45 Point inserted by Decision No 123/2005 (OJ L 339, 22.12.2005, p. 32 and EEA Supplement No 66, 22.12.2005, p. 18), e.i.f. 1.10.2005.

PROTOCOL 27

ON COOPERATION IN THE FIELD OF STATE AID

In order to ensure a uniform implementation, application and interpretation of the rules on State aid throughout the territory of the Contracting Parties as well as to guarantee their harmonious development, the EC Commission and the EFTA Surveillance Authority shall observe the following rules:

- (a) exchange of information and views on general policy issues such as the implementation, application and interpretation of the rules on State aid set out in the Agreement shall be held periodically or at the request of either surveillance authority;
- (b) the EC Commission and the EFTA Surveillance Authority shall periodically prepare surveys on State aid in their respective States. These surveys shall be made available to the other surveillance authority;
- (c) if the procedure referred to in the first and second subparagraphs of Article 93(2) of the Treaty establishing the European Economic Community or the corresponding procedure set out in an agreement between the EFTA States establishing the EFTA Surveillance Authority is opened for State aid programmes and cases, the EC Commission or the EFTA Surveillance Authority shall give notice to the other surveillance authority as well as to the parties concerned to submit their comments;
- (d) the surveillance authorities shall inform each other of all decisions as soon as they are taken;
- (e) the opening of the procedure referred to in paragraph (c) and the decisions referred to in paragraph (d) shall be published by the competent surveillance authorities;
- (f) notwithstanding the provisions of this Protocol, the EC Commission and the EFTA Surveillance Authority shall, at the request of the other surveillance authority, provide on a case-by-case basis information and exchange views on individual State aid programmes and cases;
- (g) information obtained in accordance with paragraph (f) shall be treated as confidential.

ANNEX XIV

COMPETITION LIST PROVIDED FOR IN ARTICLE 60

INTRODUCTION

When the acts referred to in this Annex contain notions or refer to procedures which are specific to the Community legal order, such as

- preambles;
- the addressees of the Community acts;
- references to territories or languages of the EC;
- references to rights and obligations of EC Member States, their public entities, undertakings or individuals in relation to each other; and
- references to information and notification procedures; Protocol 1 on horizontal adaptations shall apply, unless otherwise provided for in this Annex.

SECTORAL ADAPTATIONS

Unless otherwise provided for, the provisions of this Annex shall, for the purposes of the present Agreement, be read with the following adaptations:

- I. the term “Commission” shall read “competent surveillance authority”;
- II. the term “common market” shall read “the territory covered by the EEA Agreement”;
- III. the term “trade between Member States” shall read “trade between Contracting Parties”;
- IV. the term “the Commission and the authorities of the Member States” shall read “the EC Commission, the EFTA Surveillance Authority, the authorities of the EC Member States and of the EFTA States”;
- V. References to Articles of the Treaty establishing the European Economic Community (EEC) or the Treaty establishing the European Coal and Steel Community (ECSC) shall be read as references to the EEA Agreement (EEA) as follows:
Article 85 (EEC)–Article 53 (EEA),
Article 86 (EEC)–Article 54 (EEA),
Article 90 (EEC)–Article 59 (EEA),
Article 66 (ECSC)–Article 2 of Protocol 25 to the EEA Agreement,
Article 80 (ECSC)–Article 3 of Protocol 25 to the EEA Agreement.
- VI. the term “this Regulation” shall read “this Act”;

- VII. the term “the competition rules of the Treaty” shall read “the competition rules of the EEA Agreement”;
- VIII. the term “High Authority” shall read “competent surveillance authority”.

Without prejudice to the rules on control of concentrations, the term “competent surveillance authority” as referred to in the rules below shall read “the surveillance authority which is competent to decide on a case in accordance with Article 56 of the EEA Agreement”.

ACTS REFERRED TO

A. MERGER CONTROL

1.⁴⁶ **32004 R 0139**: Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1).

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a)⁴⁷ In Article 1 (1), the phrase “or the corresponding provisions in Protocol 21 and Protocol 24 to the EEA Agreement” shall be inserted after the words “Without prejudice to Article 4(5) and Article 22”;

furthermore, the term “Community dimension” shall read “Community or EFTA dimension”;

(b) In Article 1(2), the term “Community dimension” shall read “Community or EFTA dimension respectively”;

furthermore, the term “Community-wide turnover” shall read “Community-wide turnover or EFTA wide turnover”;

in the last subparagraph, the term “Member State” shall read “EC Member State or EFTA State”;

(c) In Article 1(3), the “Community dimension” shall read “Community or EFTA dimension respectively”;

furthermore, the term “Community-wide turnover” shall read “Community-wide turnover or EFTA-wide turnover”;

in Article 1(3)(b) and (c), the term “Member States” shall read “EC Member States or in each of at least three EFTA States”;

46 Text of point 1 (Council Regulation (EEC) No 4064/89) replaced by Decision No 78/2004 (OJ No L 219, 19.6.2004, p. 13 and EEA Supplement No 32, 19.6.2004, p. 1), e.i.f. 9.6.2004.

47 Text of adaptation (a) replaced by Decision No 79/2004 (OJ No L 219, 19.6.2004, p. 24 and EEA Supplement No 32, 19.6.2004, p. 10), e.i.f. 1.7.2005.

in the last subparagraph, the term “Member State” shall read “EC Member State or EFTA State”;

- (d) Article 1(4) and (5) shall not apply;
- (e) In Article 2(1), first subparagraph, the term “common market” shall read “functioning of the EEA Agreement”;
- (f) In Article 2(2), at the end, the term “common market” shall read “functioning of the EEA Agreement”;
- (g) In Article 2(3), at the end, the term “common market” shall read “functioning of the EEA Agreement”;
- (h) In Article 2(4), at the end, the term “common market” shall read “functioning of the EEA Agreement”;
- (i) In Article 3(5)(b), the term “Member State” shall read “EC Member State or EFTA State”;
- (j) In Article 4 (1), first subparagraph, the term “Community dimension” shall read “Community or EFTA dimension”;

furthermore, in the first sentence, the phrase “in accordance with Article 57 of the EEA Agreement” shall be inserted after the words “shall be notified to the Commission”; in Article 4(1), second subparagraph, the term “Community dimension” shall read “Community or EFTA dimension”;

- (k) In Article 5(1), the last subparagraph shall read:

“Turnover, in the Community or in an EC Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that EC Member State as the case may be. The same shall apply as regards turnover in the territory of the EFTA States as a whole or in an EFTA State.”;
- (l) In Article 5(3)(a), the last subparagraph shall read:

“The turnover of a credit or financial institution in the Community or in an EC Member State shall comprise the income items, as defined above, which are received by the branch or division of that institution established in the Community or the EC Member State in question as the case may be. The same shall apply as regards turnover of a credit or financial institution in the territory of the EFTA States as a whole or in an EFTA State.”;
- (m) In Article 5(3)(b), the last phrase “, ... gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.” shall read:

“, ... gross premiums received from Community residents and from residents of one EC Member State respectively shall be taken into account. The same shall apply as regards gross premiums received from residents in the territory of the EFTA States as a whole and from residents in one EFTA State, respectively.”

B. VERTICAL AGREEMENTS AND CONCERTED PRACTICES^{3}

2.⁴⁸ **399 R 2790:** Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21), as amended by:

-⁴⁹ **1 03 T:** Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

The provisions of the Regulation shall, for the purpose of the Agreement, be read with the following adaptations:

(a) in Article 6, the phrase “pursuant to Article 7(1) of Regulation No 19/65/EEC” shall read

“either on its own initiative or at the request of the other surveillance authority or a State falling within its competence or of natural or legal persons claiming a legitimate interest”;

(b)⁵⁰ the following paragraph shall be added at the end of Article 6:

“The competent surveillance authority may in such cases issue a decision in accordance with Article 10 of Regulation (EC) No 1/2003, or the corresponding provisions envisaged in Protocol 21 to the EEA Agreement”.

(c)⁵¹ The following shall be added at the end of Article 8:

“Pursuant to the provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority may by recommendation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market in the EFTA States, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

A recommendation pursuant to paragraph 1 shall be addressed to the EFTA State or EFTA States comprising the relevant market in question. The Commission shall be informed of the issuance of such a recommendation.

48 Title of Chapter B replaced by Decision No 18/2000 (OJ L 103, 12.4.2001, p. 36 and EEA Supplement No 20, 12.4.2001 p. 179) e.i.f. 29.1.2000.

49 Text of point 2 replaced by Decision No 18/2000 (OJ No L 103, 12.4.2001, p. 36 and EEA Supplement No 20, 12.4.2001 p. 179), e.i.f. 29.1.2000.

50 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

51 Words “Articles 6 and 8 of Regulation (EEC) No 17/62” replaced by the words “Article 10 of Regulation (EC) No 1/2003” and words “without any notification from the undertakings concerned being required” deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

Within three months from the issuance of a recommendation pursuant to paragraph 1, all EFTA States addressees shall notify the EFTA Surveillance Authority whether they accept the recommendation. If the three months deadline expires without a response, this shall be understood as an acceptance of the EFTA State not responding timely.

If an EFTA State addressee of the recommendation either accepts the recommendation or does not respond in time, a legal obligation under the Agreement to implement the recommendation within three months from its issuance shall be bestowed upon it.

If within the three months deadline, an EFTA State addressee notifies the EFTA Surveillance Authority that it does not accept its recommendation, the EFTA Surveillance Authority shall notify the Commission of this response. Should the Commission disagree with the position of the EFTA State in question, Article 92(2) of the Agreement shall apply.

The EFTA Surveillance Authority and the Commission shall exchange information and consult each other in the application of this provision.

Where parallel networks of similar vertical restraints cover more than 50% of a relevant market within the territory of the EEA Agreement, the two surveillance authorities can initiate cooperation with the aim of adopting separate measures. If the two surveillance authorities agree on a relevant market and the appropriateness of adopting a measure pursuant to this provision, the Commission shall adopt a regulation addressed to the EC Member States and the EFTA Surveillance Authority a recommendation of corresponding substance to the EFTA State or EFTA States comprising the relevant market in question.”

3. [] ⁵²

4. [] ⁵³

4a. [] ⁵⁴

4b.⁵⁵ **32002 R 1400**: Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, 1.8.2002, p. 30), as amended by:

52 Text added by Decision 29/2004 (OJ No 127, 29.4.2004, p. 137 and EEA Supplement No 22, 29.4.2004, p. 16), e.i.f. 20.3.2004.

53 Text of point 3 deleted by Decision No 18/2000 (OJ No L 103, 12.4.2001, p. 36 and EEA Supplement No 20, 12.4.2001p. 179), e.i.f. 29.1.2000.

54 Point deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005

55 Point inserted by Decision 136/2002 (OJ No L 336, 12.12.2002, p. 38 and EEA Supplement No 61, 12.12.2002, p. 31), e.i.f. 28.9.2002.

-⁵⁶ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a) In Article 6(1), the phrase “pursuant to Article 7(1) of Regulation No 19/65/EEC” shall read “either on its own initiative or at the request of the other surveillance authority or a State falling within its competence or of natural or legal persons claiming legitimate interest”;

(b)⁵⁷ The following shall be added at the end of Article 6(1):

“The competent surveillance authority may in such cases issue a decision in accordance with Article 10 of Regulation (EC) No 1/2003, or the corresponding provisions in Protocol 21 to the EEA Agreement.”

(c)⁵⁸ The following shall be added at the end of Article 7:

“Pursuant to the provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority may by recommendation declare that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market in the EFTA States, this Regulation shall not apply to vertical agreements containing specific restraints relating to that market.

A recommendation pursuant to paragraph 1 shall be addressed to the EFTA State or EFTA States comprising the relevant market in question. The Commission shall be informed of the issuance of such a recommendation.

Within three months from the issuance of a recommendation pursuant to paragraph 1, all EFTA States addressees shall notify the EFTA Surveillance Authority whether they accept the recommendation. If the three months deadline expires without a response, this shall be understood as an acceptance of the EFTA State not responding timely.

If an EFTA State addressee of the recommendation either accepts the recommendation or does not respond in time, a legal obligation under the Agreement to imple-

56 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

57 Words “Articles 6 and 8 of Regulation (EEC) No 17/62” replaced by the words “Article 10 of Regulation (EC) No 1/2003” and words “without any notification from the undertakings concerned being required” deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

58 Text added by Decision 29/2004 (OJ No 127, 29.4.2004, p. 137 and EEA Supplement No 22, 29.4.2004, p. 16), e.i.f. 20.3.2004.

ment the recommendation within three months from its issuance shall be bestowed upon it.

If within the three months deadline, an EFTA State addressee notifies the EFTA Surveillance Authority that it does not accept its recommendation, the EFTA Surveillance Authority shall notify the Commission of this response. Should the Commission disagree with the position of the EFTA State in question, Article 92(2) of the Agreement shall apply.

The EFTA Surveillance Authority and the Commission shall exchange information and consult each other in the application of this provision.

Where parallel networks of similar vertical restraints cover more than 50% of a relevant market within the territory of the EEA Agreement, the two surveillance authorities can initiate cooperation with the aim of adopting separate measures. If the two surveillance authorities agree on a relevant market and the appropriateness of adopting a measure pursuant to this provision, the Commission shall adopt a regulation addressed to the EC Member States and the EFTA Surveillance Authority a recommendation of corresponding substance to the EFTA State or EFTA States comprising of the relevant market in question.”

C. TECHNOLOGY TRANSFER AGREEMENTS⁵⁹

5.⁶⁰ **32004 R 0772**: Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (OJ L 123, 27.4.2004, p. 11), as corrected by OJ L 127, 29.4.2004, p. 158.

The provisions of the Regulation shall, for the purposes of the present Agreement, be read with the following adaptations:

- (a) In Article 6, paragraph 1, the following shall be added after the words “pursuant to Article 29(1) of Council Regulation (EC) No 1/2003”: “or the corresponding provision in Article 29 (1) of Chapter II of Part I of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”
- (b) In Article 6, paragraph 2, the following shall be added after the words “pursuant to Article 29(2) of Council Regulation (EC) No 1/2003”: “or the corresponding provision in Article 29 (2) of Chapter II of Part I of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”
- (c) The following shall be added at the end of Article 7:

59 Title “Patent licensing agreement” replaced by “Technology transfer agreements” by Decision No 12/97 (OJ No L 182, 10.7.1997, p. 42 and EEA Supplement No 29, 10.7.1997, p. 46), e.i.f. 1.4.1997.

60 Text of point 5 (Commission Regulation (EC) No 240/96) replaced by Decision No 42/2005 (OJ No L 198, 28.7.2005, p. 42 and EEA Supplement No 38, 28.7.2005, p. 24), e.i.f. 19.5.2005.

“Pursuant to the provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority may by recommendation declare that, where parallel networks of similar technology transfer agreements cover more than 50% of a relevant market in the EFTA States, this Regulation shall not apply to technology transfer agreements containing specific restraints relating to that market.

A recommendation pursuant to paragraph 1 shall be addressed to the EFTA State or EFTA States comprising the relevant market in question. The Commission shall be informed of the issuance of such a recommendation.

Within three months from the issuance of a recommendation pursuant to paragraph 1, all EFTA States addressees shall notify the EFTA Surveillance Authority whether they accept the recommendation. If the three months deadline expires without a response, this shall be understood as an acceptance by the EFTA State not responding in time.

If an EFTA State addressee of the recommendation either accepts the recommendation or does not respond in time, a legal obligation under the Agreement to implement the recommendation within three months from its issuance shall be bestowed upon it.

If within the three months deadline, an EFTA State addressee notifies the EFTA Surveillance Authority that it does not accept its recommendation, the EFTA Surveillance Authority shall notify the Commission of this response. Should the Commission disagree with the position of the EFTA State in question, Article 92(2) of the Agreement shall apply.

The EFTA Surveillance Authority and the Commission shall exchange information and consult each other on the application of this provision.

Where parallel networks of similar technology transfer agreements cover more than 50% of a relevant market within the territory of the EEA Agreement, the two surveillance authorities can initiate cooperation with the aim of adopting separate measures. If the two surveillance authorities agree on a relevant market and the appropriateness of adopting a measure pursuant to this provision, the Commission shall adopt a regulation addressed to the EC Member States and the EFTA Surveillance Authority a recommendation of corresponding substance to the EFTA State or EFTA States comprising the relevant market in question.”

D. SPECIALIZATION AND RESEARCH AND DEVELOPMENT AGREEMENTS

6.⁶¹ **32000 R 2658**: Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (OJ L 304, 5.12.2000, p. 3), as amended by:

61 Text of point 6 replaced by Decision No 113/2000 (OJ No L 52, 22.2.2001, p. 38 and EEA Supplement No 9, 22.2.2001, p. 5)), e.i.f. 1.1.2001.

-⁶² **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a) in Article 7, introductory paragraph, the phrase “pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest” shall read “, where, either on its own initiative or at the request of the other surveillance authority or a State falling within its competence or of a natural or legal person claiming a legitimate interest”;

(b)⁶³ the following paragraph shall be added at the end of Article 7:

“The competent surveillance authority may in such cases issue a decision in accordance with Article 10 of Regulation (EC) No 1/2003, or the corresponding provisions envisaged in Protocol 21 to the EEA Agreement.”

7.⁶⁴ **32000 R 2659**: Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7), as amended by:

-⁶⁵ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33).

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a) in Article 7, introductory paragraph, the phrase “pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a

62 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

63 Words “Articles 6 and 8 of Regulation (EEC) No 17/62” replaced by the words “Article 10 of Regulation (EC) No 1/2003” and words “without any notification from the undertakings concerned being required” deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

64 Text of point 7 replaced by Decision No 113/2000 (OJ No L 52, 22.2.2001, p. 38 and EEA Supplement No 9, 22.2.2001, p. 5)), e.i.f. 1.1.2001.

65 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

Member State or of a natural or legal person claiming a legitimate interest” shall read “; where, either on its own initiative or at the request of the other surveillance authority or a State falling within its competence or of a natural or legal person claiming a legitimate interest”;

(b)⁶⁶ the following paragraph shall be added at the end of Article 7:

“The competent surveillance authority may in such cases issue a decision in accordance with Article 10 of Regulation (EC) No 1/2003, or the corresponding provisions envisaged in Protocol 21 to the EEA Agreement.”

E. []⁶⁷

8. []⁶⁸

F. []⁶⁹

9. []⁷⁰

G. TRANSPORT

10.⁷¹ **368 R 1017**: Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ No L 175, 23.7.1968, p. 1), as amended by:

- **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1),

-⁷² **1 94 N**: Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments of the Treaties on which the European Union is founded (OJ C 241, 29.8.1994, p. 21 as amended by OJ L 1, 1.1.1995, p. 1).

66 Words “Articles 6 and 8 of Regulation (EEC) No 17/62” replaced by the words “Article 10 of Regulation (EC) No 1/2003” and words “without any notification from the undertakings concerned being required” deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

67 Title “Franchising agreements” deleted by Decision No 18/2000 (OJ No L 103, 12.4.2001, p. 36 and EEA Supplement No 20, 12.4.2001 p. 179), e.i.f. 29.1.2000.

68 Text of point 8 deleted by Decision No 18/2000 (OJ No L 103, 12.4.2001, p. 36 and EEA Supplement No 20, 12.4.2001 p. 179), e.i.f. 29.1.2000.

69 Title “Know-how licensing agreements” deleted by Decision No 12/97 (OJ No L 182, 10.7.1997, p. 42 and EEA Supplement No 29, 10.7.1997, p. 46), e.i.f. 1.4.1997.

70 Text of point 9 (Commission Regulation (EEC) No 556/89) deleted by Decision No 12/97 (OJ No L 182, 10.7.1997, p. 42 and EEA Supplement No 29, 10.7.1997, p. 46), e.i.f. 1.4.1997.

71 Text of point 10 (Council Regulation (EEC) 1917/68) replaced by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

72 Indent added by Decision No 43/2005 (OJ No L 198, 28.7.2005, p. 45 and EEA Supplement No 38, 28.7.2005, p. 26), e.i.f. 12.3.2005.

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptation:

Article 3 (2) shall not apply.

11. **386 R 4056**: Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ No L 378, 31.12.1986, p. 4), as amended by:

⁻⁷³ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33),

⁻⁷⁴ **32003 R 0001**: Council Regulation (EC) No 1/2003 of 16 December 2002 (OJ L 1, 4.1.2003, p. 1),

⁻⁷⁵ **1 94 N**: Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments of the Treaties on which the European Union is founded (OJ C 241, 29.8.1994, p. 21 as amended by OJ L 1, 1.1.1995, p. 1).

The provisions of Section I of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a) in Article 1 (2), the term “Community ports” shall read “ports in the territory covered by the EEA Agreement”;

(b) Article 2 (2) shall not apply;

(c)⁷⁶ in Article 7(1), introductory paragraph, the term “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty” shall read “Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty or the corresponding provisions envisaged in Protocol 21 to the Agreement;

73 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

74 Indent added by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

75 Indent added by Decision No 43/2005 (OJ No L 198, 28.7.2005, p. 45 and EEA Supplement No 38, 28.7.2005, p. 26), e.i.f. 12.3.2005.

76 Text of adaptation (c) replaced by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

(d)⁷⁷ in Article 7(2)(a), the term “Council Regulation (EC) No 1/2003” shall read “Council Regulation (EC) No 1/2003 or the corresponding provisions envisaged in Protocol 21 to the Agreement”;

(e)⁷⁸ in Article 7(2)(c)(i), second sentence of the second subparagraph, the term “Article 9 of Regulation (EC) No 1/2003 ” shall read “Article 9 of Regulation (EC) No 1/2003 or the corresponding provisions envisaged in Protocol 21 to the Agreement”;

(f) the following subparagraphs shall be added to Article 7 (2) (c) (i):

“If any of the Contracting Parties intends to undertake consultations with a third country in accordance with this Regulation, it shall inform the EEA Joint Committee.

Whenever appropriate, the Contracting Party initiating the procedure may request the other Contracting Parties to cooperate in these procedures.

If one or more of the other Contracting Parties object to the intended action, a satisfactory solution will be sought within the EEA Joint Committee. If the Contracting Parties do not reach agreement, appropriate measures may be taken to remedy subsequent distortions of competition.”;

(g)⁷⁹ in Article 8, the term “at the request of a Member State” shall read “at the request of a State falling within its competence”. Furthermore, the term “Regulation (EC) No 1/2003” shall read “Regulation (EC) No 1/2003 or the corresponding provisions envisaged in Protocol 21 to the Agreement”;

(h) in Article 9 (1), the term “Community trading and shipping interests” shall read the “trading and shipping interests of the Contracting Parties”;

(i) the following paragraph shall be added to Article 9:

“4. If any of the Contracting Parties intends to undertake consultations with a third country in accordance with this Regulation, it shall inform the EEA Joint Committee.

Whenever appropriate, the Contracting Party initiating the procedure may request the other Contracting Parties to cooperate in these procedures.

If one or more of the other Contracting Parties object to the intended action, a satisfactory solution will be sought within the EEA Joint Committee. If the Contracting Parties do not reach agreement, appropriate measures may be taken to remedy subsequent distortions of competition.”

77 Text of adaptation (d) replaced by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

78 Adaptation text added and previous adaptations (e), (f), (g) and (h) renamed as adaptations (f), (g), (h) and (i) respectively by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

79 Text of adaptation replaced by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

11a. []⁸⁰

11b. []⁸¹

11c.⁸² **32000 R 0823**: Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24), as amended by:

-⁸³ **1 03 T**: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded adopted on 16 April 2003 (OJ L 236, 23.9.2003, p. 33),

-⁸⁴ **32004 R 0463**: Commission Regulation (EC) No 463/2004 of 12 March 2004 (OJ L 77, 13.3.2004, p. 23),

-⁸⁵ **32005 R 0611**: Commission Regulation (EC) No 611/2005 of 20 April 2005 (OJ L 101, 21.4.2005, p. 10), as corrected by OJ L 103, 22.4.2005, p. 41.

The provisions of the Regulation shall, for the purposes of the Agreement, be read with the following adaptations:

(a) In Article 1 the words “Community ports” shall read “ports in the territory covered by the EEA Agreement”;

(b)⁸⁶ In Article 12, paragraph 1, the following shall be added after the words “in accordance with Article 29 of Council Regulation (EC) No 1/2003”: “or the corresponding provision in Article 29 (1) of Chapter II of Part I of Protocol 4 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”

(c)⁸⁷ In Article 13, paragraph 2, the words “as from 1 May 2004” shall be deleted.

80 Text of point 11a (Commission Regulation (EEC) No 3652/93) deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

81 Text of point 11b (Commission Regulation (EEC) No 1617/93) deleted by Decision 156/2006 (OJ No L [to be published]), e.i.f. 9.12.2006.

82 Point inserted by Decision No 12/96 (OJ No L 124, 23.5.1996, p. 13 and EEA Supplement No 22, 23.5.1996, p. 54), e.i.f. 1.4.1996. Text replaced by Decision No 49/2000 (OJ No L 237, 21.9.2000, p. 60 and EEA Supplement No 42, 21.9.2000, p. 3), e.i.f. 1.6.2000.

83 Indent and words “, as amended by:” above, added by the EEA Enlargement Agreement (OJ L 130, 29.4.2004, p. 3 and EEA Supplement No 23, 29.4.2004, p. 1), e.i.f. 1.5.2004.

84 Indent added by Decision No 17/2005 (OJ No L 161, 23.6.2005, p. 39 and EEA Supplement No 32, 23.6.2005, p. 23), e.i.f. 19.5.2005.

85 Indent added by Decision No 106/2005 (OJ No L 306, 24.11.2005, p. 43 and EEA Supplement No 60, 24.11.2005, p. 27), e.i.f. 9.7.2005.

86 Former adaptations (b) to (g) replaced by adaptations (b) and (c) by Decision No 17/2005 (OJ No L 161, 23.6.2005, p. 39 and EEA Supplement No 32, 23.6.2005, p. 23), e.i.f. 19.5.2005.

87 Former adaptations (b) to (g) replaced by adaptations (b) and (c) by Decision No 17/2005 (OJ No L 161, 23.6.2005, p. 39 and EEA Supplement No 32, 23.6.2005, p. 23), e.i.f. 19.5.2005.

11d.⁸⁸ **32006 R 1419**: Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p. 1).

11e.^{45}⁸⁹ **32006 R 1459**: Commission Regulation (EC) No 1459/2006 of 28 September 2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports (OJ L 272, 3.10.2006, p. 3).

The provisions of the Regulation shall, for the purpose of this Agreement, be read with the following adaptation:

In Article 1(b) the words ‘Community or between points in the Community, on the one hand, and points in Switzerland, Norway, Iceland or Liechtenstein, on the other’ shall be replaced by ‘territory of the Contracting parties, or between points in the territory of the Contracting parties, on the one hand, and points in Switzerland on the other’.

H. PUBLIC UNDERTAKINGS

12. **388 L 0301**: Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment (OJ No L 131, 27.5.1988, p. 73), as amended by:

⁻⁹⁰ **394 L 0046**: Commission Directive 94/46/EC of 13 October 1994 (OJ No L 268, 19.10.1994, p. 15).

The provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

- (a) in the second subparagraph of Article 2, the phrase “notification of this Directive” shall be replaced by “entry into force of the EEA Agreement”;
- (b) Article 10 shall not apply;
- (c) in addition, the following shall apply:

as regards EFTA States, it is understood that the EFTA Surveillance Authority shall be the addressee of all the information, communications, reports and notifications which according to this Directive are, within the Community, addressed to the EC Commission.

As regards the different transition periods provided for in this act, a general transition period of six months as from the entry into force of the EEA Agreement shall apply.

88 Point inserted by Decision No 153/2006 (OJ No L [to be published]), e.i.f. 9.12.2006.

89 Point inserted by Decision No 156/2006 (OJ No L [to be published]), e.i.f. 9.12.2006.

90 Indent added by Decision No 25/95 (OJ No L 251, 19.10.1995, p. 31 and EEA Supplement No 39, 19.10.1995, p. 1), e.i.f. 1.9.1995.

13.⁹¹

13a.⁹² **32002 L 0077**: Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ L 249, 17.9.2002, p. 21).

The provisions of the Directive shall, for the purposes of the present Agreement, be read with the following adaptation:

In Article 7(2), the words “competition rules of the EC Treaty” shall read “the competition rules of the EEA Agreement”.

I. COAL AND STEEL

14. **354 D 7024**: High Authority Decision No 24/54 of 6 May 1954 laying down in implementation of Article 66 (1) of the Treaty a regulation on what constitutes control of an undertaking (OJ of the ECSC No 9, 11.5.1954, p. 345/54).

The provisions of the Decision shall, for the purposes of the Agreement, be read with the following adaptation:

Article 4 shall not apply.

15. **367 D 7025**: High Authority Decision No 25/67 of 22 June 1967 laying down in implementation of Article 66 (3) of the Treaty a regulation concerning exemption from prior authorization (OJ No 154, 14.7.1967, p. 11), as amended by:

- **378 S 2495**: Commission Decision No 2495/78/ECSC of 20 October 1978 (OJ No L 300, 27.10.1978, p. 21),
- ⁹³ **391 S 3654**: Commission Decision No 3654/91/ECSC of 13 December 1991 (OJ No L 348, 17.12.1991, p. 12).

The provisions of the Decision shall, for the purposes of the Agreement, be read with the following adaptations:

- (a) in Article 1 (2), the phrase “and within the EFTA States” shall be inserted after “... within the Community”;
- (b) in the heading of Article 2, the phrase “the scope of the Treaty” shall read “the scope of Protocol 25 to the EEA Agreement”;
- (c) in the heading of Article 3, the phrase “the scope of the Treaty” shall read “the scope of Protocol 25 to the EEA Agreement”;
- (d) Article 11 shall not apply.

91 Point deleted with effect from 25 July 2003 by Decision No 153/2003 (OJ No L 41, 12.02.2004, p. 45 and EEA Supplement No 7, 12.02.2004, p. 32), e.i.f. 1.11.2004.

92 Point inserted by Decision No 153/2003 (OJ No L 41, 12.02.2004, p. 45 and EEA Supplement No 7, 12.02.2004, p. 32), e.i.f. 1.11.2004.

93 Indent added by Decision No 7/94.

J. INSURANCE SECTOR⁹⁴

15a. []⁹⁵

15b.⁹⁶ **32003 R 0358:** Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 53, 28.2.2003, p. 8), as amended by:

-⁹⁷ **32004 R 0886:** Commission Regulation (EC) No 886/2004 of 4 March 2004 (OJ L 168, 1.5.2004, p. 14).

The provisions of the Regulation shall, for the purposes of the present Agreement, be read with the following adaptations:

- (a) In Article 10, introductory paragraph, the phrase “pursuant to Article 7 of Regulation (EEC) No 1534/91, ” shall read “either on its own initiative or at the request of the other surveillance authority or a State falling within its competence or of a natural or legal person claiming a legitimate interest”;
- (b)⁹⁸ the following paragraph shall be added at the end of Article 10: “The competent surveillance authority may in such cases issue a decision in accordance with Article 10 of Regulation (EC) No 1/2003, or the corresponding provisions envisaged in Protocol 21 to the EEA Agreement”.

ACTS OF WHICH THE EC COMMISSION AND THE EFTA SURVEILLANCE AUTHORITY SHALL TAKE DUE ACCOUNT

In the application of Articles 53 to 60 of the Agreement and the provisions referred to in this Annex, the EC Commission and the EFTA Surveillance Authority shall take due account of the principles and rules contained in the following acts:

Control of concentrations

16. C/203/90/p. 5: Commission Notice regarding restrictions ancillary to concentrations (OJ No C 203, 14.8.1990, p. 5).

94 Chapter and point 15a inserted by Decision No 7/94.

95 Text of point 15a (Commission Regulation (EEC) No 3932/92) deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

96 Point inserted by Decision No 82/2003 (OJ No L257, 9.10.2003, p. 37 and EEA Supplement No 51, 9.10.2003, p. 24), e.i.f. 21.6.2003.

97 Indent and words: “, as amended by:” above, added by Decision No 107/2005 (OJ No L 306, 24.11.2005, p. 45 and EEA Supplement No 60, 24.11..2005, p. 28), e.i.f. 9.7.2005.

98 Words “Articles 6 and 8 of Regulation (EEC) No 17/62” replaced by the words “Article 10 of Regulation (EC) No 1/2003” and words “without any notification from the undertakings being required” deleted by Decision 130/2004 (OJ No L 64, 10.3.2005, p. 57 and EEA Supplement No 12, 10.3.2005, p. 42), e.i.f. 19.5.2005.

17. C/203/90/p. 10: Commission Notice regarding the concentrative and co-operative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ No C 203, 14.8.1990, p. 10).

Exclusive dealing agreements

18. C/101/84/p. 2: Commission Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements (OJ No C 101, 13.4.1984, p. 2).

19. C/17/85/p. 4: Commission Notice concerning Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ No C 17, 18.1.1985, p. 4).

Other

20. 362 X 1224(01): Commission Notice on exclusive dealing contracts with commercial agents (OJ No 139, 24.12.1962, p. 2921/62).

21. C/75/68/p. 3: Commission Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises (OJ No C 75, 29.7.1968, p. 3) as corrected by OJ No C 84, 28.8.1968, p. 14.

22. C/111/72/p. 13: Commission Notice concerning imports into the Community of Japanese goods falling within the scope of the Rome Treaty (OJ No C 111, 21.10.1972, p. 13).

23. C/1/79/p. 2: Commission Notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty (OJ No C 1, 3.1.1979, p. 2).

24. C/231/86/p. 2: Commission Notice on agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community (OJ No C 231, 12.9.1986, p. 2).

25. C/233/91/p. 2: Guidelines on the application of EEC competition rules in the telecommunication sector (OJ No C 233, 6.9.1991, p. 2).

*General*⁹⁹

I. The above acts were adopted by the EC Commission up to 31 July 1991. Upon entry into force of the Agreement, corresponding acts are to be adopted by the EFTA Surveillance Authority under Articles 5 (2) (b) and 25 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. They are to be published in accordance with the exchange of letters on publication of EEA relevant information.

II. As regards EEA relevant acts adopted by the EC Commission after 31 July 1991, the EFTA Surveillance Authority, in accordance with the powers vested in it under the

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, is to adopt, after consultations with the EC Commission, corresponding acts in order to maintain equal conditions of competition. The acts adopted by the Commission will not be integrated into this Annex but a reference to their publication in the *Official Journal of the European Communities* will be made in the EEA Supplement to the Official Journal. The corresponding acts adopted by the EFTA Surveillance Authority are to be published in the EEA Supplement to, and the EEA Section of, the Official Journal. Both surveillance authorities shall take due account of these acts in cases where they are competent under the Agreement.

II – Bilateral agreements with Candidate Countries and Western Balkan Countries

Candidate countries

STABILISATION AND ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF CROATIA, OF THE OTHER PART¹⁰⁰

TITLE IV FREE MOVEMENT OF GOODS

CHAPTER III COMMON PROVISIONS

Article 40–State monopolies

Croatia shall progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the fourth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Croatia. The Stabilisation and Association Council shall be informed about the measures adopted to attain this objective.

[...]

TITLE VI APPROXIMATION OF LAWS, LAW ENFORCEMENT AND COMPETITION RULES

Article 69

1. The Parties recognise the importance of the approximation of Croatia's existing legislation to that of the Community. Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*.
2. This approximation will start on the date of signing of the Agreement, and will gradually extend to all the elements of the Community *acquis* referred to in this Agreement by the end of the period defined in article 5 of this Agreement. In particular, at an early stage, it will focus on fundamental elements of the Internal Market *acquis* as well as on other trade-related areas, on the basis of a programme to be agreed between the Commission of the European Communities and Croatia.

100 OJ L 26, 28.1.2005, p.3. Approved by Council and Commission Decision of 13 December 2004 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (2005/40/EC, Euratom), OJ L 26, 28.1.2005, p.1

Croatia will also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken.

Article 70–Competition and other economic provisions

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Croatia:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Croatia as a whole or in a substantial part thereof;
- (iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.

3. The Parties shall ensure that an operationally independent public body is entrusted with the powers necessary for the full application of paragraph 1 (i) and (ii) of this article, regarding private and public undertakings and undertakings to which special rights have been granted.

4. Croatia shall establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1 (iii) of this Article within one year from the date of entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorise State aid schemes and individual aid grants in conformity with paragraph 2 of this Article, as well as the powers to order the recovery of State aid that has been unlawfully granted.

5. Each Party shall ensure transparency in the area of State aid, *inter alia* by providing to the other Party a regular annual report, or equivalent, following the methodology and the presentation of the Community survey on State aid. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

6. Croatia shall establish a comprehensive inventory of aid schemes instituted before the establishment of the authority referred to in paragraph 4 and shall align such aid schemes with the criteria referred to in paragraph 2 within a period of no more than four years from the entry into force of this Agreement.

7. (a) For the purposes of applying the provisions of paragraph 1(iii), the Parties recognise that during the first four years after the entry into force of this Agreement, any public aid granted by Croatia shall be assessed taking into account the fact that Croatia

shall be regarded as an area identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community.

(b) Within three years from the entry into force of this Agreement, Croatia shall submit to the Commission of the European Communities its GDP per capita figures harmonised at NUTS II level. The authority referred to in paragraph 4 and the Commission of the European Communities shall then jointly evaluate the eligibility of the regions of Croatia as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant Community guidelines.

8. With regard to products referred to in Chapters II of Title IV:

- paragraph 1 (iii) shall not apply;
- any practices contrary to paragraph 1(i) shall be assessed according to the criteria established by the Community on the basis of Articles 36 and 37 of the Treaty establishing the European Community and specific Community instruments adopted on this basis.

9. If one of the Parties considers that a particular practice is incompatible with the terms of paragraph 1 of this Article, it may take appropriate measures after consultation with the Stabilisation and Association Council or after thirty working days following referral for such consultation.

Nothing in this Article shall prejudice or affect in any way the taking, by either Party, of antidumping or countervailing measures in accordance with the relevant Articles of GATT 1994 and WTO Agreement on Subsidies and Countervailing Measures or related internal legislation.

PROTOCOL 2 ON STEEL PRODUCTS¹⁰¹

Article 1

This Protocol shall apply to the products listed in Chapters 72 of the Common Customs Tariff. It shall also apply to other finished steel products that may originate in future in Croatia under the above chapter.

Article 2

Customs duties on imports applicable in the Community on steel products originating in Croatia shall be abolished on the date of entry into force of the Agreement.

Article 3

1. Customs duties applicable in Croatia on imports of steel products originating in the Community other than those listed in Annex I shall be abolished at the entry into force of the Agreement.

2. Customs duties applicable in Croatia on imports of steel products listed in Annex I, shall be progressively abolished in accordance with the following timetable:

- on the date of entry into force of the Agreement, duty shall be reduced to 65 % of the basic duty
- on 1 January 2003, duty shall be reduced to 50 % of the basic duty
- on 1 January 2004, duty shall be reduced to 35 % of the basic duty
- on 1 January 2005, duty shall be reduced to 20 % of the basic duty
- on 1 January 2006, the remaining duties shall be abolished.

Article 4

1. Quantitative restrictions on imports into the Community of steel products originating in Croatia as well as measures having equivalent effect shall be abolished on the date of entry into force of the Agreement.

2. Quantitative restrictions on imports into Croatia of steel products originating in the Community, as well as measures having equivalent effect, shall be abolished on the date of entry into force of the Agreement.

Article 5

1. In view of the disciplines stipulated by Article 70 of the Agreement, the Parties recognise the need and urgency that each Party addresses promptly any structural weak-

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OJ L 26, 28.1.2005, p. 103

nesses of its steel sector to ensure the global competitiveness of its industry. Croatia shall therefore establish within two years the necessary restructuring and conversion programme for its steel industry to achieve viability of this sector under normal market conditions. Upon request, the Community shall provide Croatia with the appropriate technical advice to achieve this objective.

2. Further to the disciplines stipulated by Article 70 of the Agreement, any practices contrary to this Article shall be assessed on the basis of specific criteria arising from the application of the State aid disciplines of the Community, including secondary legislation, and including any specific rules on State aid control applicable to the steel sector after the expiry of the ECSC Treaty.

3. For the purposes of applying the provisions of paragraph 1(iii) of Article 70 of the Agreement with regard to steel products, the Community recognises that during five years after the entry into force of the Agreement Croatia may exceptionally grant State aid for restructuring purposes provided that:

- it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced, and
- the restructuring programme is linked to a global rationalisation and reduction of capacity in Croatia.

4. Each Party shall ensure full transparency with respect to the implementation of the necessary restructuring and conversion programme by a full and continuous exchange of information to the other Party, including details on the restructuring plan as well as amount, intensity and purpose for any State aid granted on the basis of paragraphs 2 and 3 of this Article.

5. The Stabilisation and Association Council shall monitor the implementation of the requirements set out in paragraphs 1 to 4 above.

6. If one of the Parties considers that a particular practice of the other Party is incompatible with the terms of this article, and if that practice causes or threatens to cause prejudice to the interests of the first Party or material injury to its domestic industry, this Party may take appropriate measures after consultation within the contact group referred to in Article 7 or after thirty working days following referral for such consultation.

Article 6

The provisions of Articles 19, 20 and 21 of the Agreement shall apply to trade between the Parties in steel products.

Article 7

The Parties agree that for the purpose of following and reviewing the proper implementation of this Protocol, a Contact Group shall be created in accordance with Article 115 of the Agreement.

ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF TURKEY, OF THE OTHER PART

DECISION NO 1/95 OF THE EC-TURKEY ASSOCIATION COUNCIL OF 22 DECEMBER 1995 ON IMPLEMENTING THE FINAL PHASE OF THE CUSTOMS UNION (CE-TR 106/1/95) ¹⁰²

CHAPTER IV – APPROXIMATION OF LAWS

[...]

SECTION II—COMPETITION

A – COMPETITION RULES OF THE CUSTOMS UNION

Article 32

1. The following shall be prohibited as incompatible with the proper functioning of the Customs Union, in so far as they may affect trade between the Community and Turkey: all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their objective or effect the prevention, restriction or distortion of competition, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall automatically be void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

102 OJ L 35, 13.2.1996, p. 1.

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 33

1. Any abuse by one of more undertakings of a dominant position in the territories of the Community and/or Turkey as a whole or in a substantial part thereof shall be prohibited as incompatible with the proper functioning of the Customs Union, in so far as it may affect trade between the Community and Turkey.

2. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 34

1. Any aid granted by Member States of the Community or by Turkey through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Community and Turkey, be incompatible with the proper functioning of the Customs Union.

2. The following shall be compatible with the functioning of the Customs Union:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division;

(d) for a period of five years from the entry into force of this Decision, aid to promote economic development of Turkey's less-developed regions, provided that such aid does not adversely affect trading conditions between the Community and Turkey to an extent contrary to the common interest.

3. The following may be considered to be compatible with the functioning of the Customs Union:

(a) in conformity with Article 43(2) of the Additional Protocol, aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State of the Community or of Turkey;

(c) for a period of five years after the entry into force of this Decision, in conformity with Article 43(2) of the Additional Protocol, aids aiming at accomplishing structural adjustment necessitated by the establishment of the Customs Union. The Association Council shall review the application of that clause after the aforesaid period;

(d) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions between the Community and Turkey to an extent contrary to the common interest;

(e) aid to promote culture and heritage conservation where such aid does not adversely affect trading conditions between the Community and Turkey to an extent contrary to the common interest;

(f) such other categories of aid as may be specified by the Association Council.

Article 35

Any practices contrary to Articles 32, 33 and 34 shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation.

Article 36

The Parties shall exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 37

1. The Association Council shall, within two years following the entry into force of the Customs Union, adopt by decision the necessary rules for the implementation of Articles 32, 33 and 34 and related parts of Article 35. These rules shall be based upon those already existing in the Community and shall *inter alia* specify the role of each competition authority.

2. Until these rules are adopted:

- (a) the authorities of the Community or Turkey shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in accordance with Articles 32 and 33;
- (b) the provisions of the GATT Subsidies Code shall be applied as the rules for the implementation of Article 34.

Article 38

1. If the Community or Turkey considers that a particular practice is incompatible with the terms of Article 32, 33 or 34, and:

- is not adequately dealt with under the implementing rules referred to in Article 37, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry,

it may take appropriate measures after consultation within the Joint Customs Union Committee or after 45 working days following referral for such consultation. Priority shall be given to such measures that will least disturb the functioning of the Customs Union.

2. In the case of practices incompatible with Article 34, such appropriate measures may, where the General Agreement on Tariffs and Trade applies thereto, only be adopted in conformity with the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which are applicable between the Parties.

B – APPROXIMATION OF LEGISLATION

Article 39

1. With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.

2. To comply with the obligations of paragraph 1, Turkey shall:

- (a) before the entry into force of the Customs Union, adopt a law which shall prohibit behaviours of undertakings under the conditions laid down in Articles 85 and 86 of the EC Treaty. It shall also ensure that, within one year after the entry into force of the Customs Union, the principles contained in block exemption regulations in force in the Community, as well as in the case-law developed by EC authorities, shall be applied in Turkey. The Community shall inform Turkey as soon as possible of any procedure related to the adoption, abolition, or modification of block exemption

regulations by the EC after the entry into force of the Customs Union. After such information has been given, Turkey shall have one year to adapt its legislation, if necessary;

- (b) before the entry into force of the Customs Union, establish a competition authority which shall apply these rules and principles effectively;
- (c) before the entry into force of this Decision, adapt all its aids granted to the textile and clothing sector to the rules laid down in the relevant Community frameworks and guidelines under Articles 92 and 93 of the EC Treaty. Turkey shall inform the Community of all its aid schemes to this sector as adapted in accordance with these frameworks and guidelines. The Community shall inform Turkey as soon as possible of any procedure related to the adoption, abolition or modification of such frameworks and guidelines by the Community after the entry into force of the Customs Union. After such information has been given, Turkey shall have one year to adapt its legislation;
- (d) within two years after the entry into force of this Decision, adapt all aid schemes other than those granted to the textile and clothing sector to the rules laid down in Community frameworks and guidelines under Articles 92 and 93 of the EC Treaty. The Community shall inform Turkey as soon as possible of any procedure related to the adoption, abolition or modification of such frameworks and guidelines by the Community. After such information has been given, Turkey shall have one year to adapt its legislation;
- (e) within two years after the entry into force of the Customs Union, inform the Community of all aid schemes in force in Turkey as adapted in accordance with point (d). If a new scheme is to be adopted, Turkey shall inform the Community as soon as possible of the content of such scheme;
- (f) notify the Community in advance of any individual aid to be granted to an enterprise or a group of enterprises that would be notifiable under Community frameworks or guidelines had it been granted by a Member State, or of individual aid awards outside of Community frameworks or guidelines above an amount of ECU 12 million and which would have been notified under EC law had it been granted by a Member State.

Regarding individual aids granted by Member States and subject to the analysis by the Commission, on the basis of Article 93 of the EC Treaty, Turkey will be informed on the same basis as the Member States.

3. The Community and Turkey shall communicate to each other all amendments to their laws concerning restrictive practices by undertakings. They shall also inform each other of the cases when these laws have been applied.

4. In relation to information supplied under paragraph 2, points (c), (e) and (f), the Community shall have the right to raise objections against an aid granted by Turkey which it would have deemed unlawful under EC law had it been granted by a Member State. If Turkey does not agree with the Community's opinion, and if the case is not re-

solved within 30 days, the Community and Turkey shall each have the right to refer the case to arbitration.

5. Turkey shall have the right to raise objections and seize the Association Council against an aid granted by a Member State which it deems to be unlawful under EC law. If the case is not resolved by the Association Council within three months, the Association Council may decide to refer the case to the Court of Justice of the European Communities.

Article 40

1. The Community shall inform Turkey as soon as possible of the adoption of any decision under Articles 85, 86 and 92 of the EC Treaty which might affect Turkey's interests.

2. Turkey shall be entitled to ask for information about any specific case decided by the Community under Articles 85, 86 and 92 of the EC Treaty.

Article 41

With regard to public undertakings to which special or exclusive rights have been granted, Turkey shall ensure that, by the end of the first year following the entry into force of the Customs Union, the principles of the Treaty establishing the European Economic Community, notably Article 90, as well as the principles contained in the secondary legislation and the case-law developed on this basis, are upheld.

Article 42

Turkey shall progressively adjust, in accordance with the conditions and the timetable laid down by the Association Council, any State monopolies of a commercial character so as to ensure that, by the end of the second year following the entry into force of this Decision, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Turkey.

Article 43

1. If the Community or Turkey believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its interests or the interests of its undertakings, the first Party may notify the other Party and may request that the other Party's competition authority initiate appropriate enforcement action. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer for such further information and other cooperation as the notifying Party is able to provide.

2. Upon receipt of a notification under paragraph 1 and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authority of the notified Party will consider whether or not to initiate enforcement

action, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement action is initiated, the notified Party will advise the notifying Party of its outcome and, to the extent possible, of significant interim developments.

3. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement action with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement action with respect to such anticompetitive activities.

[...]

COMMISSION DECISION OF 29 FEBRUARY 1996 ON THE CONCLUSION OF AN AGREEMENT BETWEEN THE EUROPEAN COAL AND STEEL COMMUNITY AND THE REPUBLIC OF TURKEY ON TRADE IN PRODUCTS COVERED BY THE TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY¹⁰³

[...]

COMPETITION, CONCENTRATIONS AND STATE AIDS

Article 7

1. The following shall be incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Turkey:

- (i) all agreements of cooperative or concentrative nature between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Turkey as a whole or in a substantial part thereof;
- (iii) public aid in any form whatsoever except derogations allowed pursuant to the ECSC Treaty.

2. Any practices contrary to paragraph 1 (i), (ii) and (iii) shall be assessed on the basis of the relevant criteria arising from the application of the rules of Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (and, where relevant, Article 85 of the Treaty establishing the European Community) and the rules on State aid in the ECSC sector, together with its secondary legislation.

3. Turkey shall notify the Community in sufficient time of any public aid proposed to be granted in the ECSC steel sector. The Community shall have the right to raise objections against any such aid which would have been deemed unlawful under Community law had it been granted by a Member State. If Turkey does not agree with the Community's opinion, and if the case is not resolved within 30 days, the Community and Turkey shall each have the right to refer the case to arbitration.

4. Each Party shall ensure transparency in the area of public aid by a full and continuous exchange of information to the other Party, including amount, intensity and purpose of any proposed aid.

5. The ECSC/Turkey Joint Committee shall, within two years from the entry into force of this Agreement adopt the necessary rules for the implementation of paragraphs 1 to

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OJ L 227, 7.9.1996, p. 1, Decision 96/528/ECSC

4. These rules shall be based on those already existing in the Community and shall, *inter alia*, specify the role of the respective competition or State aid authorities.

6. If the Community or Turkey considers that a particular practice is incompatible with the terms of paragraph 1 to 4, and - is not adequately dealt with under the rules adopted pursuant to paragraph 5, or - in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to its domestic industry, or a substantial part thereof, it may take appropriate action following consultation of the ECSC/Turkey Joint Committee or after 45 days of the referral for such consultations. Priority shall be given to measures which least disturb the functioning of this Agreement. In the case of practices incompatible with paragraph 1 (iii) such appropriate measures may, where the Agreement establishing the World Trade Organization applies thereto, only be adopted in conformity with the procedures and under the conditions laid down by the World Trade Organization and any other relevant instrument negotiated under its auspices which are applicable between the Parties.

7. Turkey shall have the right to raise objections and seize the ECSC/Turkey Joint Committee in respect of aid granted by a Member State which it deems to be unlawful under Community law. If the case is not resolved within three months the ECSC/Turkey Joint Committee may decide to refer it to the Court of Justice of the European Communities.

Article 8

1. The Parties recognize that during five years after the entry into force of this Agreement, and by way of derogation from Article 7, paragraph 1 (iii), Turkey may, exceptionally, as regards the products covered by this Agreement, grant public aid on a case-by-case basis for restructuring or conversion purposes, provided that:

- transparency is ensured by a full and continuous exchange of information concerning the implementation of the restructuring programme including amount, intensity and purpose of the aid and a detailed restructuring plan;
- the restructuring programme is linked to rationalizing not involving an overall increase in capacity for hot-rolled products;
- the aid leads to viability determined according to the usual viability criteria implying modernization with the sole aim to improve efficiency of the benefiting firms under normal market conditions at the end of the restructuring period;
- the amount of aid granted is not out of proportion to its objectives and is strictly limited, in amount and intensity, to what is absolutely necessary to restore viability;
- Turkey notifies the Community in sufficient time of any aid proposed to be granted under this Article. The Community shall have the right to raise reasoned objections in respect of any such aid which does not comply with the criteria set out above.

2. If, during a period equal to the derogation for subsidies pursuant to paragraph 1 above and given the particular sensitivity of steel market, imports of specific steel prod-

ucts originating in one Party cause or threaten to cause serious injury to domestic producers of like products or serious disturbances to the steel markets of the other Party, both Parties shall enter into consultation immediately to find an appropriate solution. Pending such a solution and notwithstanding other provisions of the Agreement and in particular when exceptional circumstances require immediate action, the importing Party may adopt forthwith quantitative or other solutions strictly necessary to deal with the situation, in accordance with its international and multilateral obligations. Such action may include quantitative restrictions limited to one or more regions that are affected by imports of the steel products in question.

Article 9

The Parties shall exchange information, taking into account the limitations imposed by the requirements of professional and business secrecy.

STABILISATION AND ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA OF THE OTHER PART¹⁰⁴

TITLE IV FREE MOVEMENTS OF GOODS

CHAPTER III COMMON PROVISIONS

Article 39–State monopolies

The former Yugoslav Republic of Macedonia shall progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of the former Yugoslav Republic of Macedonia. The Stabilisation and Association Council shall be informed about the measures adopted to attain this objective.

[...]

TITLE VI APPROXIMATION OF LAWS AND LAW ENFORCEMENT

Article 68

1. The Parties recognise the importance of the approximation of the existing and future laws of the former Yugoslav Republic of Macedonia to those of the Community. The former Yugoslav Republic of Macedonia shall endeavour to ensure that its laws will be gradually made compatible with those of the Community.
2. This gradual approximation of law will take place in two stages.
3. Starting on the date of signing of the Agreement and lasting as explained in Article 5, the approximation of laws shall extend to certain fundamental elements of the Internal Market *acquis* as well as to other trade-related areas, along a programme to be defined in coordination with the Commission of the European Communities. The former Yugoslav Republic of Macedonia will also define, in coordination with the Commission of

104 OJ L 84, 20.3.2004, p. 13 Approved by Council and Commission Decision of 23 February 2004 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (2004/239/EC, Euratom) (OJ L 84, 20.3.2004, p.1)

the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken, including reform of the judiciary. Deadlines will be set for competition law, intellectual property law, standards and certification law, public procurement law and data protection law. Legal approximation in other sectors of the internal market will be an obligation to be met at the end of the transition period.

4. During the second stage of the transitional period laid down in Article 5 the approximation of laws shall extend to the elements of the *acquis* that are not covered by the previous paragraph.

Article 69–Competition and other economic provisions

1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and the former Yugoslav Republic of Macedonia:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of the former Yugoslav Republic of Macedonia as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 81, 82 and 87 of the Treaty establishing the European Community.

3.(a) For the purposes of applying the provisions of paragraph 1(iii), the Parties recognise that during the first four years after the entry into force of this Agreement, any public aid granted by the former Yugoslav Republic of Macedonia shall be assessed taking into account the fact that the former Yugoslav Republic of Macedonia shall be regarded as an area identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community.

(b) Each Party shall ensure transparency in the area of public aid, *inter alia* by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

Each Party shall ensure that the provisions of this Article are applied within five years of the Agreement's entry into force.

4. With regard to products referred to in Chapter II of Title IV:

- paragraph 1 (iii) shall not apply;

- any practices contrary to paragraph 1(i) shall be assessed according to the criteria established by the Community on the basis of Articles 36 and 37 of the Treaty establishing the European Community and specific Community instruments adopted on this basis.

5. If the Community or the former Yugoslav Republic of Macedonia considers that a particular practice is incompatible with the terms of paragraph 1, and:

- if such practice causes or threatens to cause serious injury to the interests of the other Party or material injury to its domestic industry, including its services industry, it may take appropriate measures after consultation within the Stabilisation and Association Council or after thirty working days following referral for such consultation.

In the case of practices incompatible with paragraph 1(iii), such appropriate measures may, where the WTO Agreement applies thereto, only be adopted in accordance with the procedures and under the conditions laid down thereby or the relevant Community internal legislation.

6. The Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business confidentiality.

Article 70

With regard to public undertakings, and undertakings to which special or exclusive rights have been granted, each Party shall ensure that as from the third year following the date of entry into force of this Agreement, the principles of the Treaty establishing the European Community, in particular Article 86 thereof, are upheld.

PROTOCOL 2 ON STEEL PRODUCTS¹⁰⁵

Article 1

This Protocol shall apply to the products listed in Chapters 72 of the Common Customs Tariff. It shall also apply to other finished steel products that may originate in future in the former Yugoslav Republic of Macedonia under the above chapter.

Article 2

Customs duties on imports applicable in the Community on steel products originating in the former Yugoslav Republic of Macedonia shall be abolished on the date of the entry into force of the Agreement.

Article 3

Customs duties applicable in the former Yugoslav Republic of Macedonia on imports of steel products originating in the Community shall be progressively abolished in accordance with the following timetable:

1. each duty shall be reduced to 80 % of the basic duty at the beginning of the first year after the entry into force of the Agreement;
2. further reductions to 60 %, 40 %, 20 % and 0 % of the basic duty shall be made at the beginning of the second, third, fourth and fifth year respectively after the entry into force of the Agreement.

Article 4

1. Quantitative restrictions on imports into the Community of steel products originating in the former Yugoslav Republic of Macedonia as well as measures having equivalent effect shall be abolished on the date of entry into force of the Agreement.
2. Quantitative restrictions on imports into the former Yugoslav Republic of Macedonia of steel products originating in the Community, as well as measures having equivalent effect, shall be abolished on the date of entry into force of the Agreement.

Article 5

1. In view of the disciplines stipulated by Article 69 of this Agreement, the Parties recognise the need and urgency that each Party addresses promptly any structural weaknesses of its steel sector to ensure the global competitiveness of its industry. The former Yugoslav Republic of Macedonia shall therefore establish within two years the necessary restructuring and conversion programme for its steel industry to achieve viability of this

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OJ L 84, 20.3.2004, p. 86

sector under normal market conditions. Upon request, the Community shall provide former Yugoslav Republic of Macedonia with the appropriate technical advice to achieve this objective.

2. Further to the disciplines stipulated by Article 69 of this Agreement, any practices contrary to that Article shall be assessed on the basis of specific criteria arising from the application of the State aid disciplines of the Community, including its secondary legislation, and including any specific rules on State aid control applicable to the steel sector after the expiry of the ECSC Treaty.

3. For the purposes of applying the provisions of paragraph 1(iii) of Article 69 of this Agreement with regard to steel

products, the Community recognises that during five years after the entry into force of this Agreement, the former Yugoslav Republic of Macedonia may exceptionally grant State aid for restructuring purposes provided that:

- it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced, and
- the restructuring programme is linked to a global rationalisation and reduction of capacity in the former Yugoslav Republic of Macedonia.

4. Each Party shall ensure full transparency with respect to the implementation of the necessary restructuring and conversion programme by a full and continuous exchange of information to the other Party, including details on the restructuring plan as well as amount, intensity and purpose for any State aid granted on the basis of paragraph 2 and 3 of this Article.

5. The Stabilisation and Association Council shall monitor the implementation of the requirements set out at paragraphs (1) to (4) above.

6. If one of the Parties considers that a particular practice of the other Party is incompatible with the terms of this Article, and if that practice causes or threatens to cause prejudice to the interests of the first Party or material injury to its domestic industry, this Party may take appropriate measures after consultation within the Contact Group referred to in Article 8, or after thirty working days following referral for such consultation.

Article 6

The provisions of Articles 19, 20 and 34 of the Agreement shall apply to trade between the Parties in steel products.

Article 7

1. The Contracting Parties recognise the need for an administrative procedure having as its purpose the rapid provision of information on the trend in trade flows in respect of

the trade in steel products originating in the former Yugoslav Republic of Macedonia in order to increase transparency and to avoid possible diversions of trade.

2. The Contracting Parties therefore agree to establish a double-checking system, without quantitative limits, for the import into the Community of steel products originating in the former Yugoslav Republic of Macedonia; to exchange statistical information on export and surveillance documents and to hold consultations promptly on any problems arising from the operation of such a system.

3. The details of the double-checking system are contained in Annex I to this Protocol. The continuing need for this system shall be regularly reviewed. The Annex may subsequently be amended or the double-checking system abolished by means of a Decision of the Stabilisation and Association Council.

Article 8

The Parties agree that one of the special bodies established by the Stabilisation and Association Council shall be a contact group, which will discuss the implementation of this Protocol.

**STABILISATION AND ASSOCIATION AGREEMENT
BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER
STATES, OF THE ONE PART, AND THE REPUBLIC OF ALBANIA,
OF THE OTHER PART¹⁰⁶**

**TITLE IV
FREE MOVEMENT OF GOODS**

**CHAPTER III
COMMON PROVISIONS**

Article 40

State monopolies

Albania shall progressively adjust any State monopolies of a commercial character so as to ensure that, by the end of the fourth year following the date of entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Albania. The Stabilisation and Association Council shall be informed about the measures adopted to attain this objective.

**TITLE VI
APPROXIMATION OF LAWS,
LAW ENFORCEMENT AND COMPETITION RULES**

Article 71¹⁰⁷

Competition and other economic provisions

1. The following shall be incompatible with the proper functioning of this Agreement, insofar as they may affect trade between the Community and Albania:
 - (i) all agreements between undertakings, decisions by Associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

106 The Agreement was signed on 12 June 2006. Pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions on trade and trade-related matters are implemented by means of an Interim Agreement (Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Albania, of the other part)

107 Article 37 of the Interim Agreement.

- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Albania as a whole or in a substantial part thereof;
- (iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.

3. The Parties shall ensure that an operationally independent public body is entrusted with the powers necessary for the full application of paragraph 1(i) and (ii), regarding private and public undertakings and undertakings to which special rights have been granted.

4. Albania shall establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1(iii) within four years from the date of entry into force of this Agreement. This authority shall have, *inter alia*, the powers to authorise State aid schemes and individual aid grants in conformity with paragraph 2, as well as the powers to order the recovery of State aid that has been unlawfully granted.

5. Each Party shall ensure transparency in the area of State aid, *inter alia* by providing to the other Party a regular annual report, or equivalent, following the methodology and the presentation of the Community survey on State aid. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

6. Albania shall establish a comprehensive inventory of aid schemes instituted before the establishment of the authority referred to in paragraph 4 and shall align such aid schemes with the criteria referred to in paragraph 2 within a period of no more than four years from the date of entry into force of this Agreement.

7. For the purposes of applying the provisions of paragraph 1(iii), the Parties recognise that during the first ten years after the date of entry into force of this Agreement, any public aid granted by Albania shall be assessed taking into account the fact that Albania shall be regarded as an area identical to those areas of the Community described in Article 87(3)(a) of the Treaty establishing the European Community.

Within five years from the date of entry into force of this Agreement, Albania shall submit to the Commission of the European Communities its GDP per capita figures harmonised at NUTS II level. The authority referred to in paragraph 4 and the Commission of the European Communities shall then jointly evaluate the eligibility of the regions of Albania as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant Community guidelines.

8. With regard to products referred to in Chapter II of Title IV:

- paragraph 1(iii) shall not apply;

- any practices contrary to paragraph 1(i) shall be assessed according to the criteria established by the Community on the basis of Articles 36 and 37 of the Treaty establishing the European Community and specific Community instruments adopted on this basis.

9. If one of the Parties considers that a particular practice is incompatible with the terms of paragraph 1, it may take appropriate measures after consultation within the Stabilisation and Association Council or after thirty working days following referral for such consultation.

Nothing in this Article shall prejudice or affect in any way the taking, by either Party, of antidumping or countervailing measures in accordance with the relevant Articles of GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures or related internal legislation.

Article 72¹⁰⁸

Public undertakings

By the end of the third year following the date of entry into force of this Agreement, Albania shall apply to public undertakings and undertakings to which special and exclusive rights have been granted the principles set out in the Treaty establishing the European Community, with particular reference to Article 86 thereof.

Special rights of public undertakings during the transitional period shall not include the possibility of imposing quantitative restrictions or measures having an equivalent effect on imports from the Community into Albania.

PROTOCOL 1 ON IRON AND STEEL PRODUCTS

Article 1

This Protocol shall apply to the products listed in Chapters 72 and 73 of the Combined Nomenclature. It shall also apply to other finished iron and steel products that may originate in future in Albania under the above Chapters.

Article 2

Customs duties on imports applicable in the Community on iron and steel products originating in Albania shall be abolished on the date of entry into force of the Agreement.

Article 3

1. Upon the date of entry into force of the Agreement, customs duties applicable in Albania on imports of iron and steel products originating in the Community that are referred to in Article 19 of the Agreement and listed in Annex I thereto shall be progressively reduced in accordance with the timetable contained therein.
2. Upon the date of entry into force of the Agreement, customs duties applicable in Albania on imports of all other iron and steel products originating in the Community shall be abolished.

Article 4

1. Quantitative restrictions on imports into the Community of iron and steel products originating in Albania as well as measures having equivalent effect shall be abolished on the date of entry into force of the Agreement.
2. Quantitative restrictions on imports into Albania of iron and steel products originating in the Community, as well as measures having equivalent effect, shall be abolished on the date of entry into force of the Agreement.

Article 5

1. In view of the disciplines stipulated by Article 71 of the Agreement, the Parties recognise the need and urgency for each Party to address promptly any structural weaknesses in its iron and steel sector to ensure the global competitiveness of its industry. Albania shall therefore establish within three years the necessary restructuring and conversion programme for its iron and steel industry to achieve viability of this sector under normal market conditions. Upon request, the Community shall provide Albania with the appropriate technical advice to achieve this objective.

2. Further to the disciplines stipulated by Article 71 of the Agreement, any practices contrary to this Article shall be assessed on the basis of specific criteria arising from the application of the State aid disciplines of the Community, including secondary legislation, and including any specific rules on State aid control applicable to the iron and steel sector after the expiry of the Treaty establishing the European Coal and Steel Community.

3. For the purposes of applying the provisions of paragraph 1(iii) of Article 71 of the Agreement with regard to iron and steel products, the Community recognises that during five years after the date of entry into force of the Agreement Albania may exceptionally grant State aid for restructuring purposes provided that:

- it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced, and
- the restructuring programme is linked to a global rationalisation and compensatory measures to counter the distorting effect of the aid granted in Albania.

4. Each Party shall ensure full transparency with respect to the implementation of the necessary restructuring and conversion programme by a full and continuous exchange of information to the other Party, including details of the restructuring plan as well as the amount, intensity and purpose of any State aid granted on the basis of paragraphs 2 and 3.

5. The Stabilisation and Association Council shall monitor the implementation of the requirements set out in paragraphs 1 to 4.

6. If one of the Parties considers that a particular practice of the other Party is incompatible with the terms of this Article, and if that practice causes or threatens to cause prejudice to the interests of the first Party or material injury to its domestic industry, this Party may take appropriate measures after consultation within the contact group referred to in Article 7 or after thirty working days following referral for such consultation.

Article 6

The provisions of Articles 20, 21 and 22 of the Agreement shall apply to trade between the Parties in iron and steel products.

Article 7

The Parties agree that for the purpose of following and reviewing the proper implementation of this Protocol, a Contact Group shall be created in accordance with Article 120(4) of the Agreement.

STABILISATION AND ASSOCIATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF MONTENEGRO, OF THE OTHER PART¹⁰⁹

TITLE IV FREE MOVEMENT OF GOODS

CHAPTER III COMMON PROVISIONS

Article 43

State monopolies

With regard to any state monopolies of a commercial character, Montenegro shall ensure that, by the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States of the European Union and Montenegro.

TITLE VI APPROXIMATION OF LAWS, LAW ENFORCEMENT AND COMPETITION RULES

Article 73¹¹⁰

Competition and other economic provisions

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Montenegro:

- (i) all Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Montenegro as a whole or in a substantial part thereof;

109 The Agreement was signed on 15 October 2007. Pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions on trade and trade-related matters are implemented by means of an Interim Agreement (Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Montenegro, of the other part) which entered into force on 1 January 2008.

110 Article 38 of the Interim Agreement

(iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.

3. The Parties shall ensure that an operationally independent public body is entrusted with the powers necessary for the full application of paragraph 1 (i) and (ii) of this Article, regarding private and public undertakings and undertakings to which special rights have been granted.

4. Montenegro shall establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1 (iii) of this Article within 1 year from the date of entry into force of this Agreement. This authority shall have, inter alia, the powers to authorise State aid schemes and individual aid grants in conformity with paragraph 2 of this Article, as well as the powers to order the recovery of State aid that has been unlawfully granted.

5. The Community on one side and Montenegro on the other side shall ensure transparency in the area of State aid, inter alia by providing to the other Parties a regular annual report, or equivalent, following the methodology and the presentation of the Community survey on State aid. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

6. Montenegro shall establish a comprehensive inventory of aid schemes instituted before the establishment of the authority referred to in paragraph 4 and shall align such aid schemes with the criteria referred to in paragraph 2 of this Article within a period of no more than 4 years from the entry into force of this Agreement.

7. (a) For the purposes of applying the provisions of paragraph 1(iii), the Parties recognise that during the first 5 years after the entry into force of this Agreement, any public aid granted by Montenegro shall be assessed taking into account the fact that Montenegro shall be regarded as an area identical to those areas of the Community described in Article 87(3) (a) of the Treaty establishing the European Community.

(b) Within 4 years from the entry into force of this Agreement, Montenegro shall submit to the Commission of the European Communities its GDP per capita figures harmonised at NUTS II level. The authority referred to in paragraph 4 and the Commission of the European Communities shall then jointly evaluate the eligibility of the regions of Montenegro as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant Community guidelines.

8. As appropriate, Protocol 5 establishes the rules on state aid in the steel industry. This protocol establishes the rules applicable in the event restructuring aid is granted to the steel industry. It would stress the exceptional character of such aid and the fact that the aid would be limited in time and would be linked to capacity reductions within the framework of feasibility programmes.

9. With regard to products referred to in Chapter II of Title IV:

- paragraph 1 (iii) shall not apply;
- any practices contrary to paragraph 1(i) shall be assessed according to the criteria established by the Community on the basis of Articles 36 and 37 of the Treaty establishing the European Community and specific Community instruments adopted on this basis.

10. If one of the Parties considers that a particular practice is incompatible with the terms of paragraph 1 of this Article, it may take appropriate measures after consultation within the Stabilisation and Association Council or after thirty working days following referral for such consultation. Nothing in this Article shall prejudice or affect in any way the taking, by the Community or Montenegro, of countervailing measures in accordance with the relevant Articles of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures and the respective related internal legislation.

Article 74¹¹¹

Public undertakings

By the end of the third year following the entry into force of this Agreement, Montenegro shall apply to public undertakings and undertakings to which special and exclusive rights have been granted the principles set out in the Treaty establishing the European Community, with particular reference to Article 86.

Special rights of public undertakings during the transitional period shall not include the possibility to impose quantitative restrictions or measures having an equivalent effect on imports from the Community into Montenegro.

111 Article 39 of the Interim Agreement

PROTOCOL 5 ON STATE AID TO THE STEEL INDUSTRY

1. The Parties recognise the need that Montenegro addresses promptly any structural weaknesses of its steel sector to ensure the global competitiveness of its industry.
2. Further to the disciplines stipulated by Article 38 paragraph 1(iii) of this Agreement [SAA Article 73 paragraph 1(iii)], the assessment of the compatibility of State aid to the steel industry as defined in Annex I of the Guidelines on national regional aid for 2007-2013 shall be made on the basis of the criteria arising from the application of Article 87 of the EC Treaty to the steel sector, including secondary legislation.
3. For the purposes of applying the provisions of Article 38 paragraph 1(iii) of this Agreement [SAA Article 73 paragraph 1(iii)] with regard to the steel industry, the Community recognises that, during five years after the entry into force of this Agreement, Montenegro may exceptionally grant State aid for restructuring purposes to steel producing firms in difficulties, provided that
 - (a) it leads to the long-term viability of the benefiting firms under normal market conditions at the end of the restructuring period, and
 - (b) the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability, and aid is where appropriate progressively reduced;
 - (c) Montenegro presents restructuring programmes that are linked to a global rationalisation which includes the closing of inefficient capacity. Every steel producing firm benefiting from restructuring aid shall, as far as possible, provide for compensatory measures balancing the distortion of competition caused by the aid.
4. Montenegro shall submit to the European Commission for assessment a National Restructuring Programme and individual business plans for each of the companies benefiting from restructuring aid which demonstrate that the above conditions are fulfilled.

The individual business plans shall have been assessed and agreed by the State aid monitoring authority of Montenegro in view of their compliance with paragraph 3 of this Protocol.

The European Commission shall confirm that the National Restructuring Programme is in compliance with the requirements of paragraph 3.

5. The European Commission shall monitor the implementation of the plans, in close cooperation with the competent national authorities, in particular the State aid monitoring authority of Montenegro.
6. If the monitoring indicates that aid to the beneficiaries which is not approved in the National Restructuring Programme or any restructuring aid to steel firms not identified in the National Restructuring Programme has been granted from the date of signature

of this Agreement onwards, the State aid monitoring authority of Montenegro shall ensure that any such aid is reimbursed.

7. Upon request, the Community shall provide Montenegro with technical support for the preparation of the National Restructuring Programme and the individual business plans.

8. Each Party shall ensure full transparency with respect to State aid. In particular, as regards State aid granted to steel production in Montenegro and the implementation of the restructuring programme and the business plans, a full and continuous exchange of information shall take place.

9. The Interim Committee shall monitor the implementation of the requirements set out in paragraphs 1 to 4 above. To this effect, the Interim Committee may draft implementing rules.

10. If one of the Parties considers that a particular practice of the other Party is incompatible with the terms of this Protocol, and if that practice causes or threatens to cause prejudice to the interests of the first Party or material injury to its domestic industry, this Party may take appropriate measures after consultation within the Sub-Committee dealing with competition matters or after thirty working days following referral for such consultation.

III - Dedicated Competition cooperation agreements

United States

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE COMMISSION OF THE EUROPEAN COMMUNITIES REGARDING THE APPLICATION OF THEIR COMPETITION LAWS¹¹²

The Government of the United States of America and the Commission of the European Communities,

Recognizing that the world's economies are becoming increasingly interrelated, and in particular that this is true of the economies of the United States of America and the European Communities;

Noting that the Government of the United States of America and the Commission of the European Communities share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Noting that the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting further that from time to time differences may arise between the Parties concerning the application of their competition laws to conduct or transactions that implicate significant interests of both Parties;

Having regard to the Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on June 5, 1986;

And

Having regard to the Declaration on US-EC Relations adopted on November 23, 1990,

Have agreed as follows:

Article I – Purpose and definitions

1. The purpose of this Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws.

2. For the purpose of this Agreement, the following terms shall have the following definitions:

A. 'competition law(s)' shall mean:

- (i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) No 4064/89 on

¹¹² OJ L 95, 27.4.1995 pp. 47-52 Approved by the decision of the Council and the Commission of 10 April 1995 (95/145/EC, ECSC)

the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations including High Authority Decision No 24-54, and

- (ii) for the United States of America, the Sherman Act (15 USC 1-7), the Clayton Act (15 USC 12-27), the Wilson Tariff Act (15 USC 8-11), and the Federal Trade Commission Act (15 USC 41-68, except as these sections relate to consumer protection functions),

as well as such other laws or regulations as the Parties shall jointly agree in writing to be a 'competition law' for purposes of this Agreement;

B. 'competition authorities' shall mean:

- (i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and
- (ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

C. 'enforcement activities' shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party; and

D. 'anticompetitive activities' shall mean any conduct or transaction that is impermissible under the competition laws of a Party.

Article II—Notification

1. Each Party shall notify the other whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party.

2. Enforcement activities as to which notification ordinarily will be appropriate include those that:

- (a) are relevant to enforcement activities of the other Party;
- (b) involve anticompetitive activities (other than a merger or acquisition) carried out in significant part in the other Party's territory;
- (c) involve a merger or acquisition which one or more of the parties to the transaction, or a company controlling one or more of the parties to the transaction, is a company incorporated or organized under the laws of the other Party or one of its States or Member States;
- (d) involve conduct believed to have been required, encouraged or approved by the other Party; or
- (e) involve remedies that would, in significant respects, require or prohibit conduct in the other Party's territory.

3. With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:

- (a) in the case of the Government of the United States of America,
 - (i) not later than the time its competition authorities request, pursuant to 15 USC paragraph 18a(e), additional information or documentary material concerning the proposed transaction,
 - (ii) when its competition authorities decide to file a complaint challenging the transaction, and
 - (iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and
- (b) in the case of the Commission of the European Communities,
 - (i) when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation (EEC) No 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,
 - (ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation (EEC) No
 - (iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.

4. With respect to other matters, notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of:

- (a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America; and
 - (b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America;
- to enable the other Party's views to be taken into account.

5. Each Party shall also notify the other whenever its competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to:

- (a) regulatory or judicial proceedings that are public;
- (b) intervention or participation that is public and pursuant to formal procedures; and
- (c) in the case of regulatory proceeding in the United States, only proceedings before federal agencies.

Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

6. Notification under this Article shall include sufficient information to permit an initial evaluation by the recipient Party of any effects on its interests.

Article III – Exchange of information

1. The Parties agree that it is in their common interest to share information that will (a) facilitate effective application of their respective competition laws, or (b) promote better understanding by them of economic conditions and theories relevant to their competition authorities' enforcement activities and interventions or participation of the kind described in Article II(5).

2. In furtherance of this common interest, appropriate officials from the competition authorities of each Party shall meet at least twice each year, unless otherwise agreed, to (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

3. Each Party will provide the other Party with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Upon receiving a request from the other Party, and within the limits of Articles VIII and IX, a Party will provide to the requesting Party such information within its possession as the requesting party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article IV – Cooperation and Coordination in enforcement activities

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

- (a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;
- (b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;

- (c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
 - (d) the possibility of reducing costs incurred by persons subject to the enforcement activities.
3. In any coordination agreement, each Party shall conduct its enforcement activities expeditiously and, in so far as possible, consistently with the enforcement objectives of the other Party.
4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Article V – Cooperation regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.
2. If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities. The notification shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the notifying Party, and shall include an offer of such further information and other cooperation as the notifying Party is able to provide.
3. Upon receipt of a notification under paragraph 2, and after such other discussion between the Parties as may be appropriate and useful in the circumstances, the competition authorities of the notified Party will consider whether or not to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the notification. The notified Party will advise the notifying Party of its decision. If enforcement activities are initiated, the notified Party will advise the notifying Party of their outcome and, to the extent possible, of significant interim developments.
4. Nothing in this Article limits the discretion of the notified Party under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anticompetitive activities.

Article VI – Avoidance of conflicts over enforcement activities

Within the framework of its own laws and to the extent compatible with its important interests, each Party will seek, at all stages in its enforcement activities, to take into ac-

count the important interests of the other Party. Each Party shall consider important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. In considering one another's important interests in the course of their enforcement activities, the Parties will take account of, but will not be limited to, the following principles:

1. While an important interest of a Party may exist in the absence of official involvement by the Party with the activity in question, it is recognized that such interests would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities.
2. A Party's important interests may be affected at any stage of enforcement activity by the other Party. The Parties recognize, however, that as a general matter the potential for adverse impact on one Party's important interests arising from enforcement activity by the other Party is less at the investigative stage and greater at the stage at which conduct is prohibited or penalized, or at which other forms of remedial orders are imposed.
3. Where it appears that one Party's enforcement activities may adversely affect important interests of the other Party, the Parties will consider the following factors, in addition to any other factors that appear relevant in the circumstances, in seeking an appropriate accommodation of the competing interests:
 - (a) the relative significance to the anticompetitive activities involved of conduct within the enforcing Party's territory as compared with conduct within the other Party's territory;
 - (b) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;
 - (c) the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared with the effects on the other Party's interests;
 - (d) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
 - (e) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies; and
 - (f) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

Article VII – Consultation

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultation regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefore

and shall state whether procedural time-limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Article VIII – Confidentiality of information

1. Notwithstanding any other provisions of this Agreement, neither Party is required to provide information to the other Party if disclosure of that information to the requesting Party (a) is prohibited by the law of the Party possessing the information, or (b) would be incompatible with important interests of the Party possessing the information.

2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other Party under this Agreement and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article IX – Existing law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States.

Article X – Communications under this agreement

Communications under this Agreement, including notifications under Articles II and V, may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authorities to the other Party's authority. Notifications under Articles II, V and XI, and requests under Article VII, shall be confirmed promptly in writing through diplomatic channels.

Article XI – Entry into force, termination and review

1. This Agreement shall enter into force upon signature.
2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.
3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved.

The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at Washington, in duplicate, this twenty-third day of September 1991, in the English language.

For the Commission of the European Communities

For the Government of the United States of America

EXCHANGE OF INTERPRETATIVE LETTERS BETWEEN THE EC/ ECSC AND GOVERNMENT OF THE UNITED STATES OF AMERICA

CORRIGENDA TO DECISION 95/145/EC, ECSC OF THE COUNCIL AND THE COMMISSION OF 10 APRIL 1995¹¹³

[...]

Dear [name],

As you are aware, on 9 August 1994, the Court of Justice of the European Communities held that the European Commission was not competent to conclude the 'Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition rules'.

In order to remedy this situation and to assure the continuation of the application of the Agreement, the Council has decided on [date] to conclude the Agreement. However, as the Agreement will now be concluded by the Council on behalf of the European Community and by the Commission on behalf of the European Coal and Steel Community, certain corrections to the text of the Agreement are necessary. These are set out in detail in the Annex to this letter, which forms an integral part of this letter.

As these corrections do not affect the substance of the Agreement, we consider that they can be made through an exchange of letters. We should therefore be grateful if you would confirm your acceptance of the corrections contained in this letter.

Moreover, in order to ensure a clear understanding of the European Communities' interpretation of the Agreement, we set out below two interpretative statements:

1. In the light of Article IX of the Agreement, Article VIII(1) should be understood to mean that the information covered by the provisions of Article 20 of Council Regulation 17/62 or by equivalent provisions in other regulations in the field of competition may not under any circumstances be communicated by the Commission to the US antitrust authorities, save with the express agreement of the source concerned.

Similarly, the information referred to in Articles II(6) and III of the Agreement may not include information covered by Article 20 of Regulation 17/62 nor by equivalent provisions in other regulations in the field of competition, save with the express agreement of the source concerned.

2. In the light of Article VIII(2) of the Agreement, all information provided in confidence by either of the Parties in accordance with the Agreement will be considered as confidential by the receiving party which should oppose any request for disclosure to a third party unless such disclosure is:

- (a) authorized by the Party supplying the information, or
- (b) required under the law of the receiving Party.

113 OJL 131, 15.6.1995, p. 38

This is understood to mean that:

- each Party assures the confidentiality of all information provided in confidence by the other Party in accordance with the receiving Party's applicable rules, including those rules intended to assure the confidentiality of information gathered during a Party's own enforcement activities,
- each Party shall use all the legal means at its disposal to oppose the disclosure of this information. The European Communities recall the principles which govern the relationship between the Commission and the Member States in the application of the competition rules as enshrined, for example, in Council Regulation 17/62. The Commission after notice to the US competition authorities, will inform the Member State or Member States whose interests are affected of the notifications sent to it by the US antitrust authorities. The Commission, after consultation with the US competition authorities, will also inform such Member State or Member States of any cooperation and coordination of enforcement activities. However, as regards such activities, either competition authorities will respect the other's request not to disclose the information which it provides when necessary to ensure confidentiality, subject to any contrary requirement of the applicable law.

We should be grateful if you would also confirm that these interpretative statements do not present any difficulties for the US Government.

Yours sincerely,

**ANNEX — CHANGES TO THE TEXT OF THE AGREEMENT
NECESSITATED BY THE CONCLUSION OF THE AGREEMENT
BY THE COMMISSION ON BEHALF OF THE EUROPEAN COAL
AND STEEL COMMUNITY AND BY THE COUNCIL
ON BEHALF OF THE EUROPEAN COMMUNITY***

Title

Agreement between *the European Communities* and the Government of the United States of America regarding the application of their competition laws

Parties

The European Community and the European Coal and Steel Community on the one hand (hereinafter referred to as ‘the European Communities’)

Recital No 2

Noting that *the European Communities* and the Government of the United States of America share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Execution

For the European Community

For the European Coal and Steel Community

For the Government of the United States of America.

* All changes have been underlined (italic in this publication).

DECISION OF THE COUNCIL AND THE COMMISSION OF 10 APRIL 1995 CONCERNING THE CONCLUSION OF THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE APPLICATION OF THEIR COMPETITION LAWS¹¹⁴

THE COUNCIL OF THE EUROPEAN UNION,

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Articles 87 and 235, in conjunction with the first subparagraph of Article 228 (3) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 65 and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament¹¹⁵,

Whereas Article 235 of the Treaty establishing the European Community must be invoked owing to the inclusion in the text of the Agreement of mergers and acquisitions which are covered by Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings¹¹⁶, which is essentially based on Article 235;

Whereas, given the increasingly pronounced international dimension to competition problems, international cooperation in this field should be strengthened;

Whereas, to this end, the Commission has negotiated an Agreement with the Government of the United States of America on the application of the competition rules of the European Communities and of the United States of America;

Whereas the Agreement, including the exchange of interpretative letters, should be approved,

HAVE DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, including the exchange of interpretative letters, is hereby approved on behalf of the European Community and the European Coal and Steel Community.

114 OJ L095, 27.04.1995 p. 45 (Decision 95/145/EC, ECSC)

115 Opinion delivered on 20 January 1995 (OJ No C 43, 20. 2. 1995) and 17 March 1995 (OJ No C 89, 10. 4. 1995).

116 OJ No L 395, 30. 12. 1989, p. 1 (corrected version: OJ No L 257, 21. 9. 1990, p. 13).

The texts of the Agreement and of the exchange of interpretative letters, drawn up in the English language, are attached to this Decision.

Article 2

The Agreement shall apply with effect from 23 September 1991.

Article 3

The President of the Council is hereby authorized to designate the person(s) empowered to notify the Government of the United States of America of approval of the Agreement, on behalf of the European Community, and to sign the exchange of interpretative letters.

The Commission shall designate the person(s) empowered to notify the Government of the United States of America of approval of the Agreement, on behalf of the European Coal and Steel Community, and to sign the exchange of interpretative letters.

Done at Luxembourg, 10 April 1995.

For the Council

The President

J. PUECH

For the Commission

The President

J. SANTER

AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE APPLICATION OF POSITIVE COMITY PRINCIPLES IN THE ENFORCEMENT OF THEIR COMPETITION LAWS¹¹⁷

The European Community and the European Coal and Steel Community of the one part (hereinafter “the European Communities”), and the Government of the United States of America of the other part:

Having regard to the September 23, 1991 Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws, and the exchange of interpretative letters dated May 31 and July 31, 1995 in relation to that Agreement (together hereinafter “the 1991 Agreement”);

Recognizing that the 1991 Agreement has contributed to coordination, cooperation, and avoidance of conflicts in competition law enforcement;

Noting in particular Article V of the 1991 Agreement, commonly referred to as the “Positive Comity” article, which calls for cooperation regarding anti-competitive activities occurring in the territory of one Party that adversely affect the interests of the other Party;

Believing that further elaboration of the principles of positive comity and of the implementation of those principles would enhance the 1991 Agreement’s effectiveness in relation to such conduct; and

Noting that nothing in this Agreement or its implementation shall be construed as prejudicing either Party’s position on issues of competition law jurisdiction in the international context;

Have agreed as follows:

Article I – Scope and Purpose of this Agreement

1. This Agreement applies where a Party satisfies the other that there is reason to believe that the following circumstances are present:

- (a) Anticompetitive activities are occurring in whole or in substantial part in the territory of one of the Parties and are adversely affecting the interests of the other Party; and
- (b) The activities in question are impermissible under the competition laws of the Party in the territory of which the activities are occurring.

2. The purposes of this Agreement are to:

- (a) Help ensure that trade and investment flows between the Parties and competition and consumer welfare within the territories of the Parties are not impeded by anti-

117 OJ L 173, 18.06.1998

competitive activities for which the competition laws of one or both Parties can provide a remedy, and

- (b) Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anti-competitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.

Article II – Definitions

As used in this Agreement:

1. "Adverse effects" and "adversely affected" mean harm caused by anti-competitive activities to:
 - (a) the ability of firms in the territory of a Party to export to, invest in, or otherwise compete in the territory of the other Party, or
 - (b) competition in a Party's domestic or import markets.
2. "Requesting Party" means a Party that is adversely affected by anti-competitive activities occurring in whole or in substantial part in the territory of the other Party.
3. "Requested Party" means a Party in the territory of which such anti-competitive activities appear to be occurring.
4. "Competition law(s)" means:
 - (a) for the European Communities, Articles 85, 86, and 89 of the Treaty establishing the European Community (EC), Articles 65 and 66(7) of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing instruments, to the exclusion of Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and
 - (b) for the United States of America, the Sherman Act (15 U.S.C. §§1-7), the Clayton Act (15 U.S.C. §§12-27, except as it relates to investigations pursuant to Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a), the Wilson Tariff Act (15 U.S.C. §§8-11), and the Federal Trade Commission Act (15 U.S.C. §§41-58, except as these sections relate to consumer protection functions),
as well as such other laws or regulations as the Parties shall jointly agree in writing to be a "competition law" for the purposes of this Agreement.
5. "Competition authorities" means:
 - (a) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and

(b) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission.

6. “Enforcement activities” means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party.

7. “Anti-competitive activities” means any conduct or transaction that is impermissible under the competition laws of a Party.

Article III – Positive Comity

The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anti-competitive activities in accordance with the Requested Party’s competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party’s competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws.

Article IV – Deferral or Suspension of Investigations in Reliance On Enforcement Activity by the Requested Party

1. The competition authorities of the Parties may agree that the competition authorities of the Requesting Party will defer or suspend pending or contemplated enforcement activities during the pendency of enforcement activities of the Requested Party.

2. The competition authorities of a Requesting Party will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party when the following conditions are satisfied:

(a) The anti-competitive activities at issue:

(i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party’s territory, or

(ii) where the anti-competitive activities do have such an impact on the Requesting Party’s consumers, they occur principally in and are directed principally towards the other Party’s territory;

(b) The adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party. The Parties recognize that it may be appropriate to pursue separate enforcement activities where anti-competitive activities affecting both territories justify the imposition of penalties within both jurisdictions; and

(c) The competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:

- (i) devote adequate resources to investigate the anti-competitive activities and, where appropriate, promptly pursue adequate enforcement activities;
- (ii) use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;
- (iii) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;
- (iv) promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;
- (v) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;
- (vi) fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and
- (vii) comply with any reasonable request that may be made by the competition authorities of the Requesting Party.

When the above conditions are satisfied, a Requesting Party which chooses not to defer or suspend its enforcement activities shall inform the competition authorities of the Requested Party of its reasons.

3. The competition authorities of the Requesting Party may defer or suspend their own enforcement activities if fewer than all of the conditions set out in paragraph 2 are satisfied.

4. Nothing in this Agreement precludes the competition authorities of a Requesting Party that choose to defer or suspend independent enforcement activities from later initiating or reinstating such activities. In such circumstances, the competition authorities of the Requesting Party will promptly inform the competition authorities of the Requested Party of their intentions and reasons. If the competition authorities of the Requested Party continue with their own investigation, the competition authorities of the two Parties shall, where appropriate, coordinate their respective investigations under the criteria and procedures of Article IV of the 1991 Agreement.

Article V – Confidentiality and Use of Information

Where pursuant to this Agreement the competition authorities of one Party provide information to the competition authorities of the other Party for the purpose of implementing this Agreement, that information shall be used by the latter competition authorities only for that purpose. However, the competition authorities that provided the information may consent to another use, on condition that where confidential information has been provided pursuant to Article IV.2 (c) (iii) on the basis of the consent of the source concerned, that source also agrees to the other use. Disclosure of such information shall be governed by the provisions of Article VIII of the 1991 Agreement and the exchange of interpretative letters dated May 31 and July 31, 1995.

Article VI – Relationship to the 1991 Agreement

This Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force.

Article VII – Existing Law

Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or Member States.

Article VIII – Entry Into Force and Termination

1. This Agreement shall enter into force upon signature.
2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Agreement.

DONE at Washington and Brussels, in duplicate, in the English language.

For the European Community (*signature, 3/6/98*)

For the European Coal and Steel Community (*signature, 4/6/98*)

For the Government of the United States of America (*signature, 4/6/98*)

EU-US MERGER WORKING GROUP BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS

This document sets forth best practices which the United States federal antitrust agencies and the Commission of the European Union will seek to apply, to the extent consistent with their respective laws and enforcement responsibilities, when they simultaneously review the same merger transaction.¹¹⁸ A number of these best practices already are routinely employed informally between the US and EU. With that in mind, this statement of best practices seeks to set out the conditions under which trans-Atlantic inter-agency cooperation in merger investigations should be conducted, while at the same time confirming and building upon current good practice.

Objectives

1. In today's global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes.¹¹⁹ Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives.
2. These best practices are designed to further enhance cooperation in merger review between the United States Department of Justice ("DOT") or the U.S. Federal Trade Commission ("FTC") (hereafter referred to as the "US"),¹²⁰ on the one hand, and the European Commission (hereafter referred to as the "EU"), on the other. They are intended to promote fully-informed decision-making on the part of both sides' authorities, to minimize the risk of divergent outcomes on both sides of the Atlantic, to facilitate coherence and compatibility in remedies, to enhance the efficiency of their respective investigations, to reduce burdens on merging parties and third parties, and to increase the overall transparency of the merger review processes.
3. Given legal constraints existing in both jurisdictions, effective inter-agency coordination between the US and the EU depends to a considerable extent on the cooperation and good will of the merging parties, and to a lesser extent on third parties. In

118 This document is intended to set forth an advisory framework for interagency cooperation. The agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.

119 Cooperation between the US and EU agencies is based primarily upon the 1991 US-EC Agreement on the Application of their Competition Laws, a principal purpose of which is to avoid conflict in the enforcement of their antitrust laws.

120 This document assumes that, consistent with past practice, only one US agency—either the DOJ or FTC—reviews each pertinent transaction and, accordingly, coordinates with the EU regarding that transaction.

particular, cooperation is more complete and effective when the merging parties allow the agencies to share information the disclosure of which is subject to confidentiality restrictions. In addition, coordination between the agencies is most effective when the investigation timetables of the US and the EU run more or less in parallel so that the investigative staffs of each agency can engage with one another and with the parties on substantive issues at similar points in their investigations. The agencies intend, therefore, to work cooperatively with one another and with the parties, as appropriate, to promote such timetable coordination. At the same time, the EU and US agencies recognize that many considerations go into confidentiality waiver and transaction timing and/or notification decisions and that these decisions are within the discretion of the merging parties. Accordingly, it should be emphasized that any party's choice not to abide by some or all of the agencies' recommendations will not in any way prejudice the conduct or outcome of the agencies' investigations.

Coordination on Timing

4. Cooperation is most effective when the investigation timetables of the reviewing agencies run more or less in parallel, recognizing there are differences between US and EU merger review processes. To that end, the agencies should endeavor to keep one another apprised of important developments related to the timing of their respective investigations throughout the course of their reviews of merger transactions subject to review by the US and the EU.

5. In appropriate cases, the reviewing agencies should offer the merging parties an opportunity to confer with the relevant EU and US staffs jointly to discuss timing issues. Such a conference will be most beneficial if held as soon as feasible after the transaction has been announced. At this conference, the agencies and parties should be prepared to discuss ways to synchronize the timing of the US and EU investigations, to the extent possible under EU and US law respectively. Topics addressed may include the appropriate times to file in the US and EU, suggested timeframes for the submission of documents or other information, and, where appropriate, the prospect of a timing agreement (in the US) and/or a waiver from the obligation to notify within seven days of the conclusion of a binding agreement (in the EU). The success of this effort depends on the active participation and cooperation of the parties, and would, in most cases, require the parties to discuss timing with the agencies before filing in either jurisdiction.

Collection and Evaluation of Evidence

6. In significant matters under review by both jurisdictions, the agencies should seek to coordinate with one another throughout the course of their investigations and keep one another apprised of their progress. This may include sharing publicly available information and, consistent with their confidentiality obligations, discussing their respective analyses at various stages of an investigation, including tentative market definitions, assessment of competitive effects, efficiencies, theories of competitive harm, eco-

conomic theories, and the empirical evidence needed to test those theories. Views on necessary remedial measures, and similar past investigations and cases, also may be discussed. The agencies also may discuss and coordinate information or discovery requests to the merging parties and third parties, including exchanging draft questionnaires to the extent permitted by the respective jurisdictions' laws and regulations.

7. Waivers of confidentiality executed by merging parties enable more complete communication between the reviewing agencies and with the merging parties regarding evidence that is relevant to the investigation. This results in more informed decision-making and more effective coordination between the reviewing agencies, thereby helping to avoid divergent analyses and outcomes, as well as expediting merger review. Accordingly, as soon as feasible after the announcement of a transaction that requires review by the US and EU, the staffs of the reviewing agencies should, in appropriate cases, enter into discussion with the parties with a view to requesting the possible execution by the merging parties of confidentiality waivers, providing sample waiver letters if necessary. The reviewing agencies should, where appropriate and feasible, also encourage the merging parties to allow joint EU/US agency interviews with party executives and joint conferences with the parties.

8. Similarly, waivers of confidentiality executed by third parties enable more complete communication between the reviewing agencies and with third parties and can reduce the investigative burden imposed on third parties. Where appropriate, the reviewing agencies may, therefore, request that third parties waive confidentiality, or simply request that third parties provide the same information divulged to one reviewing agency to the other. The agencies may also encourage joint interviews and conferences with third parties, where appropriate and feasible.

Communication Between the Reviewing Agencies

9. The reviewing agencies will, via liaison officers or otherwise, contact one other upon learning of a transaction that appears to require review by both the US and EU.

10. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, each agency should designate a contact person who will be responsible for: setting up a schedule for conferences between the relevant investigative staffs of each agency; discussing with the merging parties the possibility of coordinating investigation timetables (see Section II above); and coordinating information gathering or discovery efforts, including seeking waivers from the merging parties and from third-parties.

11. At the start of any investigation in which it appears that substantial cooperation between the US and EU may be beneficial, the relevant DOT Section Chiefs/FTC Assistant Directors and the EU Merger Task Force Unit Head (or their designees) should seek to agree on a tentative timetable for regular consultations between them on the progress of their investigations. The timetable for consultations will take into account the nature and timing of the transaction. Consultations normally should occur: (a) be-

fore the US closes its investigation without taking action; (b) before the US issues a second request; (c) no later than three weeks following the initiation of a Phase I investigation in the EU; (d) before the EU opens a Phase II investigation or clears the merger without going to Phase II; (e) before the EU closes a Phase II investigation without issuing a Statement of Objections or approximately two weeks before the EU anticipates issuing its Statement of Objections; (f) before the relevant US DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOT DAAG or the FTC Bureau Director; and (g) at the commencement of remedies negotiations with the merging parties. Discussions may also take place at any other point the DOT Chiefs/FTC Assistant Directors and the EU Unit Head find useful.

12. In some cases, consultations may be appropriate between senior competition officials for the EU (the Competition Commissioner, Director General for Competition, or Deputy Director General for Mergers, as appropriate) and their counterparts at the Antitrust Division of the Department of Justice (the Assistant Attorney General for Antitrust or the relevant DOT Deputy Assistant Attorney General (“DAAG”), as appropriate) or the Federal Trade Commission (the Chairman, Director of the Bureau of Competition, or Deputy Director of the Bureau of Competition, as appropriate). In such cases, consultations are likely to be particularly useful: (a) shortly before or after the US issues a second request and the EU initiates a Phase II investigation; (b) approximately one week before the EU anticipates issuing its Statement of Objections; (c) approximately one week after the relevant DOJ/FTC section/division investigating the merger makes its case recommendation to the relevant DOT DAAG or FTC Bureau Director; and (d) prior to a decision by the Antitrust Division or FTC to challenge a merger or by the Competition Commissioner to recommend that the European Commission prohibit a merger. Consultations may also take place between their economic counterparts. These officials may find it useful to confer at other points in the investigation as well.

13. Pursuant to the terms of the Administrative Arrangements on Attendance of 1999, the US and EU, as appropriate, may attend certain key events in the other’s investigative process. These include (a) the EU’s Oral Hearing and (b) the merging parties’ presentations to the Assistant Attorney General or Deputy Assistant Attorney General or to the Director or Deputy Director of the Bureau of Competition at which the parties present their arguments prior to the agency’s decision whether to take enforcement action.

Remedies/Settlements

14. The reviewing agencies recognize that the remedies offered by the merging parties may not always be identical, in particular because the effects of a transaction may be different in the US than in the EU. Nevertheless, a remedy accepted in one jurisdiction may have an impact on the other. To the extent consistent with their respective law enforcement responsibilities, the reviewing agencies should strive to ensure that the remedies they accept do not impose inconsistent obligations upon the merging parties. The agencies should, therefore, advise that the parties consider coordinating the timing

and substance of remedy proposals being made to the EU and US agencies, so as to minimize the risk of inconsistent results or subsequent difficulties in implementation.

15. Consistent with their confidentiality and/or non-disclosure obligations, the reviewing agencies should seek to keep one another informed of remedy offers being considered and of other relevant developments with respect to remedies to the extent they may impact the other jurisdiction's review. Where appropriate, and consistent with confidentiality and/or non-disclosure obligations, the agencies should share draft remedy proposals or settlement papers, on which they may provide comments to one another, and participate in joint conferences with the parties, buyers, and trustees.

AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF CANADA REGARDING THE APPLICATION OF THEIR COMPETITION LAWS¹²¹

THE EUROPEAN COMMUNITY AND THE EUROPEAN COAL AND STEEL COMMUNITY (the European Communities) of the one part and THE GOVERNMENT OF CANADA (Canada) of the other part (the Parties):

Considering the close economic relations between them;

Recognising that the world's economies, including those of the parties, are becoming increasingly interrelated;

Noting that the parties share the view that the sound and effective enforcement of competition law is a matter of importance to the efficient operation of their respective markets and to trade between them;

Acknowledging their commitment to enhancing the sound and effective enforcement of their competition laws through cooperation and, in appropriate cases, coordination between them in the application of those laws;

Noting that coordination of their enforcement activities may, in certain cases, result in a more effective resolution of the Parties' respective competition concerns than would be attained through independent enforcement action by the Parties;

Acknowledging the Parties' commitment to giving careful consideration to each other's important interests in the application of their competition laws and to using their best efforts to arrive at an accommodation of those interests;

Having regard to the Recommendation of the Organisation for Economic Cooperation and Development Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on 27 and 28 July 1995, and

Having regard to the Economic Cooperation Agreement between Canada and the European Communities adopted on 6 July 1976, to the Declaration on European Community-Canada Relations adopted on 22 November 1990 and to the Joint Political Declaration on Canada-EU Relations and its accompanying action plan adopted on December 17, 1996;

HAVE AGREED AS FOLLOWS:

1. Purpose and definitions

1. The purpose of this Agreement is to promote cooperation and coordination between the competition authorities of the Parties and to lessen the possibility or impact of differences between the Parties in the application of their competition laws.

121 Signed on 17 June 1999. OJ L 175, 10.7.1999, p 49—Council and Commission decision of 29 April 1999 (1999/445/EC, ECSC)

2. In this Agreement, “anti-competitive activities” shall mean any conduct or transaction that may be subject to penalties or other relief under the competition laws of a Party;

“competent authority of a Member State” shall mean that authority of a Member State set out in Annex A. Annex A may be added to or modified at any time by the European Communities. Canada will be notified in writing of such additions or modifications before any information is sent to a newly listed authority;

“competition authority” and “competition authorities” shall mean:

(i) for Canada, the Commissioner of Competition appointed under the Competition Act, and

(ii) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities; “competition law or laws” shall mean:

(i) for Canada, the Competition Act and regulations thereunder, and

(ii) for the European Communities, Articles 85, 86, and 89 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations pursuant to the said Treaties including High Authority Decision No 2454, as well as any amendments thereto and such other laws or regulations as the parties may jointly agree in writing to be a “competition law” for the purposes of this Agreement, and “enforcement activity” shall mean any application of competition law by way of investigation or proceeding conducted by the competition authority of a Party.

3. Any reference in this Agreement to a specific provision in either Party’s competition law shall be interpreted as referring to that provision as amended from time to time and to any successive provisions.

II. Notification

1. Each Party shall notify the other Party in the manner provided by this Article and Article IX with respect to its enforcement activities that may affect important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party and therefore ordinarily give rise to notifiable circumstances include those:

(i) that are relevant to enforcement activities of the other Party;

(ii) that involve anticompetitive activities, other than mergers or acquisitions, carried out wholly or in part in the territory of the other Party;

(iii) that involve conduct believed to have been required, encouraged or approved by the other Party or one of its provinces or Member States;

(iv) that involve a merger or acquisition in which:

- one or more of the parties to the transaction, or

- a company controlling one or more of the parties to the transaction,

is a company incorporated or organised under the laws of the other Party or one of its provinces or Member States,

(v) that involve the imposition of, or application for, remedies by a competition authority that would require or prohibit conduct in the territory of the other Party, or

(vi) that involve one of the Parties seeking information located in the territory of the other Party.

3. Notification pursuant to this Article shall ordinarily be given as soon as a competition authority becomes aware that notifiable circumstances are present, and in any event, in accordance with paragraphs 4 through 7 of this Article.

4. Where notifiable circumstances are present with respect to mergers or acquisitions, notification shall be given:

(a) in the case of the European Communities, when a notice is published in the Official Journal, pursuant to Article 4(3) of Council Regulation (EEC) No 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorisation from the Commission is required under that provision, and

(b) in the case of Canada, not later than when its competition authority issues a written request for information under oath or affirmation, or obtains an order under section 11 of the Competition Act, with respect to the transaction.

5. (a) When the competition authority of a Party requests that a person provide information, documents or other records located in the territory of the other Party, or requests oral testimony in a proceeding or participation in a personal interview by a person located in the territory of the other Party, notification shall be given at or before the time that the request is made.

(b) Notification pursuant to subparagraph (a) of this paragraph is required notwithstanding that the enforcement activity in relation to which the said information is sought has previously been notified pursuant to Article II, paragraphs 1 to 3. However, separate notification is not required for each subsequent request for information from the same person made in the course of such enforcement activity unless the notified Party indicates otherwise or unless the Party seeking information becomes aware of new issues bearing upon the important interests of the notified Party.

6. Where notifiable circumstances are present, notification shall also be given far enough in advance of each of the following events to enable the other Party's views to be considered:

(a) in the case of the European Communities,

(i) when its competition authority decides to initiate proceedings with respect to the concentration, pursuant to Article 6(1)(c) of Council Regulation (EEC) No 4064/89;

(ii) in cases other than mergers and acquisitions, the issue of a statement of objections;
or

(iii) the adoption of a decision or settlement,

(b) in the case of Canada,

(i) the filing of an application with the Competition Tribunal,

(ii) the initiation of criminal proceedings,

(iii) the settlement of a matter by way of undertaking or consent order.

7. (a) Each Party shall also notify the other whenever its competition authority intervenes or otherwise participates in a regulatory or judicial proceeding, if the issues addressed in the intervention or participation may affect the other Party's important interests. Notification under this paragraph shall apply only to:

(i) regulatory or judicial proceedings that are public, and

(ii) intervention or participation that is public and pursuant to formal procedures.

(b) Notification shall be made at the time of the intervention or participation or as soon thereafter as possible.

8. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effects of the enforcement activity on its own important interests. Notifications shall include the names and addresses of the natural and legal persons involved, the nature of the activities under investigation and the legal provisions concerned.

9. Notifications made pursuant to this Article shall be communicated in accordance with Article IX.

III. Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party undertakes to consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. During consultations under paragraph 1, the competition authority of each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the matter under discussion.

IV. Coordination of enforcement activities

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent compatible with the assisting Party's laws and important interests.

2. In cases where both Parties' competition authorities have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, either in whole or in part, each Party's competition authority shall take into account the following factors, among others:

- (i) the effect of such coordination on the ability of each Party's competition authority to achieve the objectives of its enforcement activities;
- (ii) the relative ability of each Party's competition authority to obtain information necessary to conduct the enforcement activities;
- (iii) the extent to which either Party's competition authority can secure effective preliminary or permanent relief against the anticompetitive activities involved;
- (iv) the opportunity to make more efficient use of resources, and
- (v) the possible reduction of cost to persons subject to enforcement activities.

3. (a) The Parties competition authorities may coordinate their enforcement activities by agreeing on the timing of those activities in a particular matter, while respecting fully their own laws and important interests. Such coordination may, as agreed by the Parties' competition authorities, result in enforcement action by one or both Parties' competition authorities, as is best suited to attain their objectives.

(b) When carrying out coordinated enforcement activity, each Party's competition authority shall seek to maximise the likelihood that the other Party's enforcement objectives will also be achieved.

(c) Either Party may at any time notify the other Party that it intends to limit or terminate the coordination and pursue its enforcement activities independently and subject to the other provisions of this Agreement.

V. Cooperation regarding anticompetitive activities in the territory of one Party that adversely affect the interests of the other Party

1. The Parties note that anticompetitive activities may occur within the territory of one Party that, in addition to violating that Party's competition laws, adversely affect important interests of the other Party. The Parties agree that it is in both their interests to address anticompetitive activities of this nature.

2. If a Party has reason to believe that anticompetitive activities carried out in the territory of the other Party are adversely affecting, or may adversely affect the first Party's important interests, the first Party may request that the other Party's competition authority initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effects on the interests of the requesting Party, and shall include an offer of such further information and other cooperation as the requesting Party's competition authority is able to provide.

3. The requested Party shall consult with the requesting Party and the requested Party's competition authority shall accord full and sympathetic consideration to the request in deciding whether or not to initiate, or expand, enforcement activities with respect to the anticompetitive activities identified in the request. The requested Party's competition authority shall promptly inform the other Party of its decision and the reasons for that decision. If enforcement activities are initiated, the requested Party's competition authority shall advise the requesting Party of significant developments and the outcome of the enforcement activities.

4. Nothing in this Article limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the anticompetitive activities identified in the request, or precludes the requesting Party's competition authority from undertaking enforcement activities with respect to such anticompetitive activities.

VI. Avoidance of conflict

1. Within the framework of its own laws and to the extent compatible with its important interests, each Party shall, having regard to the purpose of this Agreement as set out in Article I, give careful consideration to the other Party's important interests throughout all phases of competition enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding and the nature of the remedies or penalties sought in each case.

2. Where it appears that one Party's enforcement activities may adversely affect the important interests of the other Party, each Party shall, consistent with the general principles set out above, use its best efforts to arrive at an appropriate accommodation of the Parties competing interests and in doing so each Party shall consider all relevant factors, including:

(i) the relative significance to the anticompetitive activities involved of conduct occurring within one Party's territory as compared to conduct occurring within that of the other;

(ii) the relative significance and foreseeability of the effects of the anticompetitive activities on one Party's important interests as compared to the effects on the other Party's important interests;

(iii) the presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party's territory;

(iv) the degree of conflict or consistency between the enforcement activities and the other Party's laws or articulated economic policies including those expressed in the application of, or decisions under, their respective competition laws;

(v) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;

- (vi) the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- (vii) the location of relevant assets;
- (viii) the degree to which a remedy, in order to be effective, must be carried out within the other Party's territory;
- (ix) the need to minimise the negative effects on the other Party's important interests, in particular when implementing remedies to address anti-competitive effects within the Party's territory, and
- (x) the extent to which enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.

VII. Exchange of information

1. In furtherance of the principles set forth in this Agreement, the Parties agree that it is in their common interest to share information which will facilitate the effective application of their respective competition laws and promote better understanding of each others enforcement policies and activities.
2. Each Party agrees to provide to the other Party on request such information within its possession as the requesting Party may describe that is relevant to an enforcement activity that is being contemplated or conducted by the requesting Party's competition authority.
3. In the case of concurrent action by the competition authorities of both Parties with a view to the application of their competition law, the competition authority of each Party shall, on request by the competition authority of the other Party, ascertain whether the natural or legal persons concerned will consent to the sharing of confidential information related thereto between the Parties competition authorities.
4. During consultations pursuant to Article III, each Party shall provide the other with as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of a particular transaction.

VIII. Semiannual meetings

1. In furtherance of their common interest in cooperation and coordination in relation to their enforcement activities, appropriate officials of the Parties' competition authorities shall meet twice a year, or otherwise as agreed between the competition authorities of the Parties, to: (a) exchange information on their current enforcement activities and priorities, (b) exchange information on economic sectors of common interest, (c) discuss policy changes which they are considering, and (d) discuss other matters of mutual interest relating to the application of competition laws.

2. A report on these semiannual meetings shall be made available to the Joint Cooperation Committee under the Framework Agreement for Commercial and Economic Cooperation between the European Communities and Canada.

IX. Communications under this Agreement

Communications under this Agreement, including notifications under Article II and requests under Articles III and V, may be carried out by direct oral, telephonic or fax communication between the competition authorities of the Parties. Notifications under Article II and requests under Articles III and V, however, shall be confirmed promptly in writing through normal diplomatic channels.

X. Confidentiality and use of information

1. Notwithstanding any other provision of this Agreement, neither Party is required to disclose information to the other Party where such disclosure is prohibited by the laws of the Party possessing the information or would be incompatible with that Party's important interests.

2. Unless otherwise agreed by the Parties, each Party shall, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Party under this Agreement. Each Party shall oppose, to the fullest extent possible, any application by a third party for disclosure of such information.

3. (a) The competition authority of the European Communities, after notice to the Canadian competition authority, will inform the competent authorities of the Member State or Member States whose important interests are affected of the notifications sent to it by the Canadian competition authority.

(b) The competition authority of the European Communities, after consultation with the Canadian competition authority, will inform the competent authorities of such Member State or Member States of any cooperation and coordination of enforcement activities. However, as regards such activities, the competition authority of the European Communities will respect the Canadian competition authority's request not to disclose the information which it provides when necessary to ensure confidentiality.

4. Before taking any action which may result in a legal obligation to make available to a third party information provided in confidence under this Agreement, the Parties competition authorities shall consult one another and give due consideration to their respective important interests.

5. Information received by a Party under this Agreement, apart from information received under Article II, shall only be used for the purpose of enforcing that Party's competition laws. Information received under Article II shall only be used for the purpose of this Agreement.

6. A Party may require that information furnished pursuant to this Agreement be used subject to the terms and conditions it may specify. The receiving Party shall not use such

information in a manner contrary to such terms and conditions without the prior consent of the other Party.

XI. Existing law

Nothing in this Agreement shall require a Party to take any action that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or Member States.

XII. Entry into force and termination

1. This Agreement shall enter into force on signature.
2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing that it wishes to terminate the Agreement.
3. The Parties shall review the operation of this Agreement not more than 24 months from the date of its entry into force, with a view to assessing their cooperative activities, identifying additional areas in which they could usefully cooperate and identifying any other ways in which the Agreement could be improved. The Parties agree that this review will include, among other things, an analysis of actual or potential cases to determine whether their interests could be better served through closer cooperation. Attached to this Agreement are three letters exchanged between the Parties. These letters form an integral part of this Agreement.

STATEMENT BY THE COMMISSION

(regarding the information to be provided to the Member States)

In accordance with the principles which govern the relationship between the Commission and the Member States in the application of the Competition rules as enshrined, for example, in Council Regulation No 17, and in accordance with Article X(3) of the Agreement between the European Communities and Canada regarding the application of their competition laws,

- the Commission shall forward to the Member State or Member States whose important interests are affected the notification sent by the Commission or received from the Canadian competition authority. Member States shall be notified as soon as is reasonably possible and in the language of the exchange. Where the Commission sends information to the Canadian authorities, Member States shall be informed at the same time,
- the Commission shall also notify the Member State or Member States whose important interests are affected of any cooperation or coordination of enforcement activities, as soon as is reasonably possible.

For the purposes of this statement, it is considered that the important interests of a Member State are affected where the enforcement activities in question:

- (i) are relevant to enforcement activities of the Member State;

(ii) involve anticompetitive activities, other than mergers or acquisitions, carried out wholly or in part in the territory of the Member State;

(iii) involve conduct believed to have been required, encouraged or approved by the Member State;

(iv) involve a merger or acquisition in which:

- one or more of the parties to the transaction, or

- a company controlling one or more of the parties to the transaction,

is a company incorporated or organised under the laws of the Member State;

(v) involve the imposition of, or application for, remedies that would require or prohibit conduct in the territory of the Member State; or

(vi) involve the Canadian competition authority seeking information located in the territory of the Member State.

In addition, at least twice a year at meetings of government competition specialists, the Commission will inform all the Member States about the implementation of the Agreement, and particularly about the contacts which have taken place with the Canadian competition authority as regards the forwarding to the Member States of information received by the Commission under the Agreement.

EXCHANGE OF LETTERS

A. Letter to the Government of Canada

Dear...,

On..., the Council of the European Union and the Commission of the European Communities concluded the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws.

In order to ensure a clear understanding of the European Communities' interpretation of the Agreement, we set out below two interpretative statements.

1. In the light of Article XI of the Agreement, Article X(1) should be understood to mean that the information covered by the provisions of Article 20 of Council Regulation No 17 or by equivalent provisions in other regulations in the field of competition may not under any circumstances be communicated to the Canadian competition authority, save with the express agreement of the source concerned.

Similarly, the information referred to in Articles II(8) and VII of the Agreement may not include information covered by Article 20 of Regulation No 17 nor by equivalent provisions in other regulations in the field of competition, save with the express agreement of the source concerned.

2. In the light of Article X(2) of the Agreement, all information provided in confidence by either of the Parties in accordance with the Agreement will be considered as confidential by the receiving Party which should oppose any request for disclosure to a third

party unless such disclosure is (a) authorised by the Party supplying the information or (b) required under the law of the receiving Party.

This is understood to mean that:

- each Party assures the confidentiality of all information provided in confidence by the other Party in accordance with the receiving Party's applicable rules, including those rules intended to assure the confidentiality of information gathered during a Party's own enforcement activities,
- each Party shall use all the legal means at its disposal to oppose the disclosure of this information.

We also to confirm that, should a Party become aware that, notwithstanding its best efforts, information has accidentally been used or disclosed in a manner contrary to the provisions of Article X, that Party shall notify the other Party forthwith.

Would you kindly confirm by return letter whether this interpretation raises any difficulties with the Canadian Government.

Please accept, Sir, the assurance of our highest consideration.

For the European Community and for the European Coal and Steel Community

B. Reply from the Government of Canada

Dear Commissioner

Thank you for your letter dated (...). We are very pleased that the Agreement between the European Communities and the Government of Canada regarding the application of our respective competition laws has now been completed. The interpretative and other statements included in your letter are consistent with our understanding of the Agreement.

I would also like to confirm that, with respect to the application of Article XI, and for greater certainty, no information may be exchanged by Canada pursuant to this Agreement which could not have been exchanged in the absence of this Agreement. I would ask that you confirm your understanding to this effect by return letter.

We look forward to continuing and furthering our relationship of competition law cooperation as reflected in the Agreement and in our mutual conduct to date.

Please accept, Sir, the assurance of my highest consideration.

C. Reply to the Government of Canada

Dear...

Thank you very much for your letter dated... We confirm that your letter does not give rise to any difficulties for the European Communities.

We are extremely pleased that the Agreement between the European Communities and Canada has been completed and look forward to close cooperation in the future.

Please accept, Sir, the assurance of my highest consideration.

Provisions on international relations in EU competition policy

For the European Community and for the European Coal and Steel Community

OJ L 131, 15.6.1995, p. 38

OJ L 173, 18.6.1998, p. 26

OJ L 175, 10.7.1999, p. 49

AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE GOVERNMENT OF JAPAN CONCERNING COOPERATION ON ANTI-COMPETITIVE ACTIVITIES¹²²

THE EUROPEAN COMMUNITY, of the one part, and THE GOVERNMENT OF JAPAN, of the other part (hereinafter referred to as “the Parties”):

RECOGNISING that the world’s economies, including those of the European Community and Japan, are becoming increasingly interrelated;

NOTING that the sound and effective enforcement of competition laws of the European Community and Japan respectively is a matter of importance to the efficient functioning of their respective markets and to trade between them;

NOTING that the sound and effective enforcement of competition laws of the European Community and Japan respectively would be enhanced by cooperation and, where appropriate, coordination between the Parties in the application of those laws;

NOTING that from time to time differences may arise between the Parties concerning the application of the competition laws of the European Community and Japan respectively;

NOTING their commitment to give careful consideration to the important interests of each Party in the application of the competition laws of the European Community and Japan respectively (hereinafter referred to as the “competition laws of each Party”); and

HAVING REGARD to the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade, as revised July 27 and 28, 1995, and to the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Effective Action Against Hard Core Cartels adopted on March 25, 1998;

HAVE AGREED AS FOLLOWS:

Article 1

1. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through promoting cooperation and coordination between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters pertaining to the application of the competition laws of each Party.

2. For the purposes of this Agreement:

(a) the term “anti-competitive activities” means any conduct or transaction that may be subject to sanctions or other relief under the competition laws of the European Community or Japan;

122 OJ L 183, 22.07.2003 p.12.

- (b) the term “competent authority of a Member State” means one authority for each Member State mentioned in Article 299(1) of the Treaty establishing the European Community competent for the application of competition laws. Upon signature of this Agreement a list of such authorities will be notified by the Commission of the European Communities to the Government of Japan. The Commission will notify to the Government of Japan an updated list each time this becomes necessary. No information pursuant to paragraph 6 of Article 9 of this Agreement shall be sent to a competent authority of a Member State before this authority is included in the list notified by the Commission to the Government of Japan;
- (c) the terms “competition authority” and “competition authorities” mean:
 - (i) for the European Community, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Community; and
 - (ii) for Japan, the Fair Trade Commission;
- (d) the term “competition laws” means:
 - (i) for the European Community, Articles 81, 82, and 85 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, and their implementing Regulations pursuant to the said Treaty, as well as any amendments thereto; and
 - (ii) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No 54, 1947) (hereinafter referred to as “the Antimonopoly Law”) and its implementing regulations as well as any amendments thereto;
- (e) the term “enforcement activities” means any application of competition laws by way of investigation or proceeding conducted by the competition authority of a Party. However, research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries are not included. Such research, studies or surveys shall not be construed so as to include any investigation with regard to suspected violation of competition laws;
- (f) the term “the territory of a Party”, “the territory of the Party” and “the territory of the other Party” means the territory to which the Treaty establishing the European Community applies or the territory of Japan, as the context requires;
- (g) the term “the laws and regulations of a Party”, “the laws and regulations of the Party” and “the laws and regulations of the other Party” means the laws and regulations of the European Community or the laws and regulations of Japan, as the context requires.

Article 2

1. The competition authority of each Party shall notify the competition authority of the other Party with respect to the enforcement activities that the notifying competition authority considers may affect the important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party include those that:

- (a) are relevant to enforcement activities of the other Party;
- (b) are against a national or nationals of the other Party (in the case of the European Community a national or nationals of the Member States of the European Community), or against a company or companies incorporated or organised under the applicable laws and regulations within the territory of the other Party;
- (c) involve anti-competitive activities, other than mergers or acquisitions, carried out in any substantial part within the territory of the other Party;
- (d) involve a merger or acquisition in which:
 - (i) one or more of the parties to the transaction; or
 - (ii) a company controlling one or more of the parties to the transaction, is a company incorporated or organised under the applicable laws and regulations within the territory of the other Party;
- (e) involve conduct considered by the notifying competition authority to have been required, encouraged or approved by the other Party; or
- (f) involve the imposition of, or application for, sanctions or other relief by a competition authority that would require or prohibit conduct within the territory of the other Party.

3. Where notification is required pursuant to paragraph 1 of this Article with respect to mergers or acquisitions, such notification shall be given not later than:

- (a) in the case of the European Community,
 - (i) the Decision to initiate proceedings with respect to the concentration, pursuant to Article 6(1)(c) of Council Regulation (EEC) No 4064/89; and
 - (ii) the issuance of a Statement of Objections;
- (b) in the case of Japan,
 - (i) the issuance of request to submit documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law; and
 - (ii) the issuance of a Recommendation or the Decision to initiate a hearing.

4. Where notification is required pursuant to paragraph 1 of this Article with respect to matters other than mergers or acquisitions, notification shall be given as far in advance of the following actions as is practically possible:

- (a) in the case of the European Community,
 - (i) the issuance of a Statement of Objections; and
 - (ii) the adoption of a Decision or settlement;
- (b) in the case of Japan,

- (i) the filing of a criminal accusation;
- (ii) the filing of a complaint seeking an urgent injunction;
- (iii) the issuance of a Recommendation or the Decision to initiate a hearing; and
- (iv) the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued.

5. Notifications shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effects of the enforcement activities on its own important interests.

Article 3

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the Party rendering the assistance and the important interests of that Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of the Party, and the important interests of that Party:

- (a) inform the competition authority of the other Party with respect to its enforcement activities involving anti-competitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other Party;
- (b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anti-competitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and
- (c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

Article 4

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;

- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective relief against the anti-competitive activities involved;
- (d) the opportunity to make more efficient use of resources;
- (e) the possible reduction of cost to the persons subject to the enforcement activities; and
- (f) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activities, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

Article 5

1. If the competition authority of a Party believes that anti-competitive activities carried out in the territory of the other Party adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the competition authority of the other Party initiate appropriate enforcement activities.

2. The request shall be as specific as possible about the nature of the anti-competitive activities and their effect on the important interests of the Party of the requesting competition authority, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

3. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anti-competitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition

authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

4. Nothing in this Article limits the discretion of the requested Party's competition authority under its competition laws and enforcement policies as to whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request, or precludes the requesting Party's competition authority from withdrawing its request.

Article 6

1. The competition authority of each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of sanctions or other relief sought in each case.

2. When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall endeavour to provide timely notice of significant developments of such enforcement activities.

3. Where either Party considers that enforcement activities by a Party may adversely affect the important interests of the other Party, the Parties should consider the following factors, in addition to any other factor that may be relevant in the circumstances in seeking an appropriate accommodation of the competing interests:

- (a) the relative significance to the anti-competitive activities of conduct or transactions occurring within the territory of a Party as compared to conduct or transactions occurring within the territory of the other Party;
- (b) the relative impact of the anti-competitive activities on the important interests of the respective Parties;
- (c) the presence or absence of evidence of an intention on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors within the territory of the Party conducting the enforcement activities;
- (d) the extent to which the anti-competitive activities substantially lessen competition in the market of the European Community and Japan respectively;
- (e) the degree of conflict or consistency between the enforcement activities by a Party and the laws and regulations of the other Party, or the policies or important interests of that other Party;
- (f) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;
- (g) the location of relevant assets and parties to the transaction;
- (h) the degree to which effective sanctions or other relief can be secured by the enforcement activities of the Party against the anti-competitive activities; and
- (i) the extent to which enforcement activities by the other Party with respect to the same persons, either natural or legal, would be affected.

Article 7

1. The Parties may hold, as necessary, consultations through the diplomatic channel on any matter which may arise in connection with this Agreement.
2. A request for consultations under this Article shall be communicated through the diplomatic channel.

Article 8

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in the implementation of this Agreement.
2. The competition authorities of the Parties shall meet at least once a year to:
 - (a) exchange information on their current enforcement efforts and priorities in relation to the competition laws of each Party;
 - (b) exchange information on economic sectors of common interest;
 - (c) discuss policy changes that they are considering; and
 - (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

Article 9

1. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws and regulations of the Party possessing the information or such communication would be incompatible with its important interests.
2. (a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall only be used by the receiving Party for the purpose specified in paragraph 1 of Article 1 of this Agreement.
(b) When a Party communicates information in confidence under this Agreement, the receiving Party shall, consistent with the laws and regulations, maintain its confidentiality.
3. A Party may require that information communicated pursuant to this Agreement be used subject to the terms and conditions it may specify. The receiving Party shall not use such information in a manner contrary to such terms and conditions without the prior consent of the other Party.
4. Each Party may limit the information it communicates to the other Party when the latter Party is unable to give the assurance requested by it with respect to confidentiality, with respect to the terms and conditions it specifies, or with respect to the limitations of purposes for which the information will be used.

5. This Article shall not preclude the use or disclosure of information, other than publicly available information, by the receiving Party to the extent that:

- (a) the Party providing the information has given its prior consent to such use or disclosure, or
- (b) there is an obligation to do so under the laws and regulations of the Party receiving the information. In such case, the receiving Party:
 - (i) shall not take any action which may result in a legal obligation to make available to a third party or other authorities information provided in confidence pursuant to this Agreement without the prior consent of the Party providing the information;
 - (ii) shall, wherever possible, give advance notice of any such use or disclosure to the Party which provided the information and, upon request, consult with the other Party and give due consideration to its important interests; and
 - (iii) shall, unless otherwise agreed by the Party which provided the information, use all available measures under the applicable laws and regulations to maintain the confidentiality of information as regards applications by a third party or other authorities for disclosure of the information concerned.

6. The competition authority of the European Community,

- (a) after notice to the Japanese competition authority, will inform the competent authorities of the Member State or Member States whose important interests are affected of the notifications sent to it by the Japanese competition authority;
- (b) after consultation with the Japanese competition authority, will inform the competent authorities of such Member State or Member States of any cooperation and coordination of enforcement activities; and
- (c) shall ensure that information, other than publicly available information, communicated to the competent authorities of the Member State or Member States pursuant to subparagraphs (a) and (b) above shall not be used for any purpose other than the one specified in paragraph 1 of Article 1 of this Agreement, as well as that such information shall not be disclosed.

Article 10

1. This Agreement shall be implemented by the Parties in accordance with the laws and regulations in force in the European Community and Japan respectively and within the available resources of their respective competition authorities.

2. Detailed arrangements to implement this Agreement may be made between the competition authorities of the Parties.

3. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other bilateral or multilateral agreements or arrangements between the Parties.

4. Nothing in this Agreement shall be construed to prejudice the policy or legal position of either Party regarding any issue related to jurisdiction.

5. Nothing in this Agreement shall be construed to affect the rights and obligations of either Party under other international agreements or under the laws of the European Community or Japan.

Article 11

Unless otherwise provided in this Agreement, communications under this Agreement may be directly carried out between the competition authorities of the Parties. Notifications under paragraph 2(b) of Article 1, Article 2 and requests under paragraph 1 of Article 5 of this Agreement, however, shall be confirmed in writing through the diplomatic channel. The confirmation shall be made as promptly as practically possible after the communication concerned between the competition authorities of the Parties.

Article 12

1. This Agreement shall enter into force on the thirtieth day after the date of signature.

2. This Agreement shall remain in force until 60 days after the date on which either Party notifies the other Party in writing through the diplomatic channel that it wishes to terminate the Agreement.

3. The Parties shall review the operation of this Agreement not more than five years from the date of its entry into force.

IN WITNESS WHEREOF, the undersigned, being duly authorised, have signed this Agreement.

DONE at Brussels in duplicate, on this 10th day of July 2003, in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish and Japanese languages. In case of divergence the English and Japanese texts shall prevail over the other language texts.

FOR THE EUROPEAN COMMUNITY

FOR THE GOVERNMENT OF JAPAN

AGREED MINUTES

The undersigned wish to record the following understanding which they have reached during the negotiation of the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities (hereinafter referred to as the "Agreement") signed today:

Both Parties confirm their understanding that:

(1) the Government of Japan is not required to communicate to the European Community under the Agreement "trade secrets of entrepreneurs" covered by the provisions of Article 39 of the Law Concerning Prohibition of Private Monopoly and Mainte-

nance of Fair Trade (Law No 54, 1947), except for those communicated with the consent of the entrepreneurs concerned and in accordance with the provisions of paragraph 4 of Article 4 of the Agreement; and

- (2) the European Community is not required to communicate to the Government of Japan under the Agreement confidential information covered by Article 20 of Regulation 17/1962, except for the information communicated in accordance with the provisions of paragraph 4 of Article 4 of the Agreement.

FOR THE EUROPEAN COMMUNITY

FOR THE GOVERNMENT OF JAPAN

IV – Other bilateral agreements

THE COTONOU AGREEMENT¹²³

Article 45–Competition Policy

1. The Parties agree that the introduction and implementation of effective and sound competition policies and rules are of crucial importance in order to improve and secure an investment friendly climate, a sustainable industrialisation process and transparency in the access to markets.
2. To ensure the elimination of distortions to sound competition and with due consideration to the different levels of development and economic needs of each ACP country, they undertake to implement national or regional rules and policies including the control and under certain conditions the prohibition of agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition. The Parties further agree to prohibit the abuse by one or more undertakings of a dominant position in the common market of the Community or in the territory of ACP States.
3. The Parties also agree to reinforce cooperation in this area with a view to formulating and supporting effective competition policies with the appropriate national competition agencies that progressively ensure the efficient enforcement of the competition rules by both private and state enterprises. Cooperation in this area shall, in particular, include assistance in the drafting of an appropriate legal framework and its administrative enforcement with particular reference to the special situation of the least developed countries.

123 OJ L 317, 15.12.2000, p. 3. The Cotonou agreement between the EU and the African Caribbean and Pacific countries was signed on 23 June 2000 and entered into force on 1 April 2003 following its ratification.

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITY AND ITS MEMBER STATES, OF THE ONE PART, AND THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, OF THE OTHER PART¹²⁴

[...]

**CHAPTER II
COMPETITION AND OTHER ECONOMIC MATTERS**

Article 41

1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and Algeria:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(b) abuse by one or more undertakings of a dominant position in:
– the whole of the territory of the Community or in a substantial part thereof;
– the whole of the territory of Algeria or in a substantial part thereof.

2. The Parties shall ensure administrative cooperation in the implementation of their respective competition legislations and exchange information taking into account the limitations imposed by the requirements of professional and business secrecy in accordance with the procedures laid down in Annex 5 to this Agreement.

3. If the Community or Algeria considers that a particular practice is incompatible with the terms of paragraph 1, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party, it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral for such consultation.

Article 42

The Member States and Algeria shall progressively adjust, without prejudice to their commitments to the GATT, any State monopolies of a commercial character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Algeria. The Association Committee will be informed about the measures adopted to implement this objective.

124 OJ L 265, 10.10.2005, p. 2

Article 43

With regard to public enterprises and enterprises which have been granted special or exclusive rights, the Association Council shall ensure, from the fifth year following the entry into force of this Agreement, that no measure which disturbs trade between the Community and Algeria in a manner which runs counter to the interests of the Parties is adopted or maintained. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to these enterprises.

ANNEX 5 IMPLEMENTING RULES FOR ARTICLE 41

CHAPTER I GENERAL PROVISIONS

1. Objectives

Cases relating to practices contrary to Article 41(1)(a) or (b) of this Agreement shall be dealt with by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development and the possible negative impact that such practices may have on the other Party's important interests.

The competence of the Parties' competition authorities to deal with these cases shall flow from the existing rules of their respective competition laws, including where these rules are applied to undertakings located outside their territory, but whose activities affect that territory.

The purpose of these rules is to promote cooperation and coordination between the Parties in the application of their competition laws in order to ensure that restrictions on competition do not block or cancel out the benefits which should be ensured following the progressive liberalisation of trade between the European Community and Algeria.

2. Definitions

For the purposes of these rules:

- (a) "competition law" shall mean:
 - (i) for the European Community ("the Community"), Articles 81 and 82 of the EC Treaty, Council Regulation (EEC) No 4064/89 and related secondary legislation adopted by the Community;
 - (ii) For Algeria, Competition Decree No 95-06 of 23 Sha'ban 1415 corresponding to 25 January 1995, and its implementing provisions;
 - (iii) and any amendments to or repeal of those laws.
- (b) "competition authority" shall mean:
 - (i) for the Community: the Commission of the European Community as to its responsibilities pursuant to the competition law of the Community;
 - (ii) for Algeria: the *Conseil de la Concurrence* (Competition Board).
- (c) "enforcement activity" shall mean any application of competition law by way of investigation or proceeding conducted by the competition authority of a Party, which may result in penalties or remedies;
- (d) "anti-competitive activity" and "conduct and practices which restrict competition" shall mean any conduct or transaction that is impermissible under the competition laws of a Party and may be subject to penalties or remedies.

CHAPTER II COOPERATION AND COORDINATION

3. Notification

3.1. Each Party's competition authority shall notify the other of its enforcement activities where:

- (a) the notifying Party considers them relevant to enforcement activities of the other Party;
- (b) they may significantly affect important interests of the other Party;
- (c) they relate to restrictions on competition which may directly and substantially affect the territory of the other Party;
- (d) they involve anti-competitive activities carried out mainly in the territory of the other Party;

and

- (e) they condition or prohibit action in the territory of the other Party.

3.2. To the extent possible, and provided that this is not contrary to the Parties' competition laws and does not adversely affect any investigation being carried out, notification shall take place during the initial phase of the procedure, to enable the notified competition authority to express its opinion. The notified authority shall give due consideration to the opinions received when taking decisions.

3.3. The notifications provided for in Article 3.1 of this Chapter shall be detailed enough to permit an evaluation in the light of the interests of the other Party.

3.4. The Parties undertake to give the above notification wherever possible, depending on available administrative resources.

4. Exchange of information and confidentiality

4.1. The Parties shall exchange information which will facilitate the effective application of their respective competition laws and promote a better understanding of their respective legal frameworks.

4.2. The exchange of information shall be subject to the standards of confidentiality applicable under the law of each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the Parties, shall not be provided without the express consent of the source of the information. Each competition authority shall maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other competition authority under the rules and shall oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorised by the competition authority that supplied the information.

5. Coordination of enforcement activities

5.1. Each competition authority may notify the other of its willingness to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the competition authorities from taking autonomous decisions.

5.2. In determining the extent of coordination, the competition authorities shall consider:

- (a) the results which coordination could produce;
- (b) the additional information to be obtained;
- (c) the reduction in costs for the competition authorities and the economic agents involved, and
- (d) the applicable deadlines under their respective legislations.

6. Consultation when important interests of one Party are adversely affected in the territory of the other Party

6.1. A competition authority which considers that one or more undertakings situated in one Party's territory are or have been engaged in anti-competitive activities of whatever origin that are substantially and adversely affecting the interests of the Party it represents may request consultations with the other competition authority, recognising that entering into such consultations is without prejudice to any action under its competition laws and to the full freedom of ultimate decision of the competition authority concerned. The requested competition authority may take the appropriate remedial action, in the light of the legislation in force.

6.2. Each Party shall, wherever possible and in accordance with its own legislation, take into consideration the important interests of the other Party in the course of its enforcement activities. A competition authority which considers that an enforcement activity being conducted by the competition authority of the other Party under its competition law may affect the important interests of the Party it represents should transmit its views on the matter to or request consultations with the other competition authority. Without prejudice to the continuation of its action under its competition laws or to its full freedom of ultimate decision, the competition authority so addressed should give full and sympathetic consideration to the views expressed by the requesting competition authority, and in particular to any suggestions as to alternative means of fulfilling the needs and objectives of the enforcement activity.

7. Technical cooperation

7.1. The Parties shall be open to technical cooperation in order to enable them to take advantage of their respective experience and to strengthen the implementation of their competition law and policies.

7.2. Cooperation shall include the following activities:

- (a) training for officials, to enable them to gain practical experience;
- (b) seminars, in particular for civil servants; and
- (c) studies of competition law and policies, with a view to supporting their development.

8. *Modification and update of the rules*

The Association Committee may amend these rules.

Brazil

**ANNEX TO THE FRAMEWORK AGREEMENT FOR COOPERATION
BETWEEN THE EUROPEAN ECONOMIC COMMUNITY
AND THE FEDERATIVE REPUBLIC OF BRAZIL**¹²⁵

**EXCHANGE OF LETTERS BETWEEN THE EUROPEAN ECONOMIC COMMUNITY
AND THE FEDERATIVE REPUBLIC OF BRAZIL ON MARITIME TRANSPORT**

A. Letter from the Community

Sir,

We should be obliged if you would confirm that your Government is in agreement with the following:

When the Framework Agreement for cooperation between the European Economic Community and the Federative Republic of Brazil was signed, the Parties undertook to address in the appropriate manner issues relating to the operation of shipping, particularly where the development of trade might be hindered. Mutually satisfactory solutions on shipping will be sought, while the principle of free and fair competition on a commercial basis is observed.

It has likewise been agreed that such issues should also be discussed by the Joint Committee.

Please accept, Sir, the assurance of my highest consideration.

On behalf of the Council of the European Communities

B. Letter from the Federative Republic of Brazil

Sir,

I have the honour to acknowledge receipt of your letter of today's date and confirm the agreement of my Government with the following:

'When the Framework Agreement for cooperation between the European Economic Community and the Federative Republic of Brazil was signed, the Parties undertook to address in the appropriate manner issues relating to the operation of shipping, particularly where the development of trade might be hindered. Mutually satisfactory solutions on shipping will be sought, while the principle of free and fair competition on a commercial basis is observed.

It has likewise been agreed that such issues should also be discussed by the Joint Committee.'

Please accept, Sir, the assurance of my highest consideration.

For the Government of the Federative Republic of Brazil

125 OJ L 262 , 01.11.1995, p.65

AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITY AND ITS MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF CHILE, OF THE OTHER PART¹²⁶

[...]

TITLE VII—COMPETITION

Article 172—Objectives

1. The Parties undertake to apply their respective competition laws in a manner consistent with this Part of the Agreement so as to avoid the benefits of the liberalisation process in goods and services being diminished or cancelled out by anti-competitive business conduct. To this end, the Parties agree to cooperate and coordinate among their competition authorities under the provisions of this Title.
2. With a view to preventing distortions or restrictions of competition which may affect trade in goods or services between them, the Parties shall give particular attention to anti-competitive agreements, concerted practices and abusive behaviour resulting from single or joint dominant positions.
3. The Parties agree to cooperate and coordinate among themselves for the implementation of competition laws. This cooperation includes notification, consultation, exchange of non-confidential information and technical assistance. The Parties acknowledge the importance of embracing principles on competition that would be accepted by both Parties in multilateral fora, including the WTO.

Article 173—Definitions

For the purpose of this Title:

1. ‘competition laws’ includes:
 - (a) for the Community, Articles 81, 82 and 86 of the Treaty establishing the European Community, Regulation (EEC) No 4064/89 and their implementing regulations or amendments;
 - (b) for Chile, Decreto Ley No 211 of 1973 and Ley No 19.610 of 1999 and their implementing regulations or amendments; and
 - (c) any changes that the abovementioned legislation may undergo after the entry into force of this Agreement.
2. ‘competition authority’ means:
 - (a) for the Community, the Commission of the European Communities; and
 - (b) for Chile, the Fiscalía Nacional Económica and the Comisión Resolutiva.

126 OJ L 352, 30.12.2002, p.3

3. 'enforcement activity' means any application of competition laws by way of investigation or proceeding conducted by the competition authority of a Party, which may result in the imposition of penalties or remedies.

Article 174–Notifications

1. Each competition authority shall notify the competition authority of the other Party of an enforcement activity if it:

- (a) is liable to substantially affect the other Party's important interests;
- (b) relates to restrictions on competition which are liable to have a direct and substantial effect in the territory of the other Party; or
- (c) concerns anti-competitive acts taking place principally in the territory of the other Party.

2. Provided that this is not contrary to the Parties' competition laws and does not affect any investigation being carried out, notification shall take place at an early stage of the procedure. The opinions received may be taken into consideration by the other competition authority when taking decisions.

3. The notifications provided for in paragraph 1 should be detailed enough to permit an evaluation in the light of the interests of the other Party.

4. The Parties undertake to use their best efforts to ensure that notifications are made in the circumstances set out above, taking into account the administrative resources available to them.

Article 175–Coordination of enforcement activities

The competition authority of one Party may notify the other Party's competition authority of its willingness to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the Parties from taking autonomous decisions.

Article 176–Consultations when the important interests of one Party are adversely affected in the territory of the other Party

1. Each Party shall, in accordance with its laws, take into consideration, as necessary, the important interests of the other Party in the course of its enforcement activities. If the competition authority of a Party considers that an investigation or proceeding being conducted by the competition authority of the other Party may adversely affect such Party's important interests it may transmit its views on the matter to, or request consultation with, the other competition authority. Without prejudice to the continuation of any action under its competition laws and to its full freedom of ultimate decision, the competition authority so addressed should give full and sympathetic consideration to the views expressed by the requesting competition authority.

2. The competition authority of a Party which considers that the interests of that Party are being substantially and adversely affected by anti-competitive practices of whatever origin that are or have been engaged in by one or more enterprises situated in the other Party may request consultations with the competition authority of that Party. Such consultations shall be without prejudice to the full freedom of ultimate decision of the competition authority concerned. A competition authority so consulted may take whatever corrective measures under its competition laws it deems appropriate, consistent with its own domestic law, and without prejudice to its full enforcement discretion.

Article 177–Exchange of information and confidentiality

1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information.

2. For the purpose of improving transparency, and without prejudice to the rules and standards of confidentiality applicable in each Party, the Parties hereby undertake to exchange information regarding sanctions and remedies applied in the cases that, according to the competition authority concerned, are significantly affecting important interests of the other Party and to provide the grounds on which those actions were taken, when requested by the competition authority of the other Party.

3. Each Party shall provide the other Party with information on state aid on an annual basis, including the overall amount of aid and, if possible, the segregation by sector. Each Party may request information on individual cases affecting trade between the Parties. The requested Party will use its best efforts to provide non-confidential information.

4. All exchange of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the interest of the Parties, shall not be provided without the express consent of the source of the information.

5. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority, and oppose any application for disclosure of such information by a third party that is not authorised by the competition authority that supplied the information.

6. In particular, where the laws of a Party so provides, confidential information may be provided to their respective courts of justice, subject to maintaining its confidentiality by the respective courts.

Article 178–Technical assistance

The Parties may provide each other technical assistance in order to take advantage of their respective experience and to strengthen the implementation of their competition laws and policies.

Article 179–Public enterprises and enterprises entrusted with special or exclusive rights, including designated monopolies

1. Nothing in this Title prevents a Party from designating or maintaining public or private monopolies according to their respective laws.
2. With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Association Committee shall ensure that, following the date of entry into force of this Agreement, there is neither enacted nor maintained any measure distorting trade in goods or services between the Parties to an extent contrary to the Parties' interests and that such enterprises shall be subject to the rules of competition insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Article 180–Dispute settlement

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Title.

China

DECLARATION ON THE START OF A DIALOGUE ON COMPETITION BY THE EU AND CHINA

On 24 November 2003 both sides reached agreement on the creation of a EU-China Competition Policy Dialogue

The Dialogue comes within the framework of the Joint Statement adopted at the EU-China Summit of 5 September 2001, in which competition policy was earmarked as one of the areas where the EU-China dialogue should be intensified.

The increasingly significant role of multilateral forums where competition matters are discussed such as the International Competition Network (ICN) should be taken into account in the dialogue between the EU and China on competition policy.

The primary objective of the Competition Policy Dialogue is to establish a permanent mechanism of consultation and transparency between China and the EU in this area, and to enhance the EU's technical and capacity-building assistance to China in the area of competition policy.

Both parties understand that competition policy is an important factor in ensuring consumer welfare and it should provide for a level playing field and legal certainty to the business community in the market. The dialogue will promote mutual considerations.

The Dialogue shall also contribute to the establishment of smooth and sustainable trade relations between China and the EU.

The precise structure, content and other details will be finalised by both parties in the coming weeks.

Mario Monti, Commissioner
European Commission

Lu Fuyuan, Minister
(p.o. Yu Guangzhou, Vice Minister)
Ministry of Commerce

TERMS OF REFERENCE OF THE EU-CHINA COMPETITION POLICY DIALOGUE

**ON 6 MAY 2004 THE MINISTRY OF COMMERCE OF CHINA AND THE
DIRECTORATE-GENERAL FOR COMPETITION OF EUROPEAN COMMISSION
REACHED AGREEMENT ON A STRUCTURED DIALOGUE ON COMPETITION OF
WHICH THE TERMS OF REFERENCE ARE LAID DOWN HEREWITH:**

1. Objectives and scope

The Dialogue comes within the framework of the Joint Statement adopted at the EU-China Summit of 5 September 2001, in which competition policy was earmarked as one of the areas where the EU-China dialogue should be intensified.

China has formulated various competition-related policies, laws and regulations. On its side, the EU has a relatively complete set of competition legislation. This provides a basis for a dialogue between both parties on competition legislation and enforcement.

The increasingly significant role of multilateral forums where competition matters are discussed such as the International competition Network (ICN) should be taken into account in the dialogue between the EU and China on competition policy.

The primary objective of the Competition Policy Dialogue between the authorities in charge of competition policy in China and the services responsible in the European Commission is to establish a permanent forum of consultation and transparency between China and the EU in this area, and to enhance the EU's technical and capacity-building assistance to China in the area of competition policy.

Within this framework, the aim shall be to increase both sides' understanding and awareness of current and forthcoming policy approaches, legislation and related issues, in China and the EU, and to promote exchanges and cooperation between China and the EU in the area of competition policy and legislation.

Both parties understand that competition policy is an important factor in ensuring consumer welfare and it should provide for a level playing field and legal certainty to the business community in the market. The dialogue will promote mutual considerations.

The Dialogue shall also contribute to the establishment of smooth and sustainable trade relations between China and the EU.

2. Structure

Treaty and Law Department of MOFCOM and the Directorate for Policy Development and Coordination of Directorate-General for Competition are responsible for coordinating the dialogue. The Dialogue, which will be co-chaired by a senior official (in principle the head of a Department or Directorate) in charge of competition policy and enforcement nominated by each administration, will be comprised of appropriate officials of

each party, accompanied by officials from other relevant authorities, as may be appropriate.

The contact points will be the Treaty and Law Department of the Chinese Ministry of Commerce and the Directorate for Policy Development and Coordination of the European Commission Directorate-General for Competition. Any further activity or set up stemming from this dialogue shall be taken by consensus. Each party will also promptly notify the other of all changes of their responsible authorities for competition policy, both for legislation and for enforcement. In particular, parties will make sure that any modifications on the competence of EU or Chinese authorities in charge of competition policy and enforcement will be adequately reflected in the structure of the dialogue.

The Dialogue may establish ad-hoc working groups to facilitate discussions at expert level. The Dialogue should take place at least once a year. Meetings shall alternate between Beijing and Brussels unless otherwise decided. The parties will take advantage to the maximum of the opportunities to meet granted by forums of dialogue already in place between China and the European Commission such as the China-EU Joint Committee meetings or other present or future forums in which both parties participate.

The working languages will be Chinese and English.

3. Content

The Dialogue shall, in particular, deal with:

- Antitrust law and enforcement. Exchange of views on current situations, experience, and new developments on legislation and enforcement of antitrust policies;
- Merger control in a global economy. How can company mergers be regulated? Exchange of views on merger legislations and enforcement;
- Setting up of a competition authority exchange of experiences on the set up of competition authorities, as well as their competition advocacy role;
- Exchange of views with respect to multilateral competition initiatives, with a particular mention to the fight against international «hard-core» cartels;
- Exchange of views on liberalisation of public utility sectors and State interventions into the market process;
- Exchange of experiences on raising companies and public's awareness on competition and anti-monopoly laws;
- Engage in cooperation to enhance EU's technical and capacity-building assistance to China in the area of competition policy.

4. Technical assistance and capacity building

In the framework of the EU-China cooperation projects, both parties will endeavour to support the objectives of the Dialogue with appropriate competition-related technical assistance and capacity building activities such as the organisation of training, seminars, studies etc.

5. Costs

Each party will cover its own costs, including transportation costs for international travelling, travelling between cities and accommodation. Each party will provide active support and assistance to the other.

Mario Monti,
Commissioner
European Commissioner for Competition

Bo Xilai, Minister
Minister of Commerce

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART AND EGYPT, OF THE OTHER PART¹²⁷

**CHAPTER 2
COMPETITION AND OTHER ECONOMIC MATTERS**

Article 35

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Egypt:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Egypt as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods.

2. The Association Council shall, within five years of the entry into force of the Agreement, adopt by decision the necessary rules for the implementation of paragraph 1.

Until these rules are adopted, the provisions of Article 23 bis shall be applied as regards the implementation of paragraph 1(iii).

3. Each Party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

4. With regard to agricultural products referred to in Title II, Chapter 3, paragraph 1(iii) does not apply. The WTO Agreement on Agriculture and the relevant provisions on WTO Agreement on Subsidies and Countervailing duties shall apply with regard to these products.

5. If the Community or Egypt considers that a particular practice is incompatible with the terms of the first paragraph of this Article, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 2, or

- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after thirty working days following referral for such consultation.

With reference to practices incompatible with paragraph 1(iii) of the present Article, such appropriate measures, when the WTO rules are applicable to them, may only be adopted in accordance with the procedures and under the conditions laid down by the WTO or by any other relevant instrument negotiated under its auspices and applicable to the Parties.

6. Notwithstanding any provisions to the contrary adopted in conformity with paragraph 2, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 36

The Member States and Egypt shall progressively adjust, without prejudice to their commitments to the GATT, any State monopolies of a commercial character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Egypt. The Association Committee will be informed about the measures adopted to implement this objective.

Article 37

With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Association Council shall ensure that as from the fifth year following the date of entry into force of this Agreement there is neither enacted nor maintained any measure distorting trade between the Community and Egypt contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to these enterprises.

JOINT DECLARATION ON ARTICLE 35

The Parties recognize that Egypt is currently in the process of drafting its own competition law. This will provide the necessary conditions for agreeing on the implementation rules referred to in paragraph 2 of article 35. While drafting its law, Egypt will take into account the competition rules developed within the European Union.

Until the implementation rules referred to in Article 35 paragraph 2 are adopted, if serious problems arise, the Parties may raise the matter for consideration in the Association Council.

DECLARATION BY THE EUROPEAN COMMUNITY ON ARTICLE 35

The Community declares that, until the adoption by the Association Council of the implementing rules on fair competition referred to in Art. 35 paragraph 2, in the context of the interpretation of Article 35 paragraph 1, it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles 85, 86 and 92 of the Treaty establishing the European Community, and, for products covered by the Treaty establishing the European Coal and Steel Community, by those contained in Articles 65 and 66 of that Treaty and the Community rules on State aids, including secondary legislation.

The Community declares that, as regards the agricultural products referred to in Title II Chapter 3, the Community will assess any practice contrary to paragraph 1(i) of Article 35 according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community and in particular those established in Council Regulation No. 26/62, and any practice contrary to paragraph 1(iii) of Article 35 according to the criteria established by the European Community on the basis of Articles 42 and 92 of the Treaty establishing the European Community.

**AGREEMENT BETWEEN THE EUROPEAN COMMUNITY,
OF THE ONE PART, AND THE GOVERNMENT OF DENMARK AND
THE HOME GOVERNMENT OF THE FAROE ISLANDS,
OF THE OTHER PART¹²⁸**

Signed on the basis of the Council Decision of 6 December 1996¹²⁹

[...]

Article 1

The aim of this Agreement is:

- (a) to promote through the expansion of reciprocal trade the harmonious development of economic relations between the Community and the Faeroes and thus to foster in the Community and in the Faeroes the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability,
- (b) to provide fair conditions of competition for trade between the Contracting Parties,
- (c) to contribute in this way, by the removal of barriers to trade, to the harmonious development and expansion of world trade.

[...]

Article 25

1. The following are incompatible with the proper functioning of this Agreement in so far as they may affect trade between the Community and the Faeroes:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Should a Contracting Party consider that a given practice is incompatible with this Article, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 29.

[...]

128 OJ L 53, 22.2.1997, p. 2

129 97/126/EC

Article 29

[...]

2. In the cases specified in Articles 24 to 28, before taking the measures provided for therein or, in cases to which paragraph 3 (d) of this Article applies, as soon as possible, the Contracting Party in question shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Contracting Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement.

The safeguard measures shall be notified immediately to the Joint Committee and shall be the subject of periodical consultations within the Committee, particularly with a view to their abolition as soon as circumstances permit.

3. For the implementation of paragraph 2, the following provisions shall apply:

(a) as regards Article 25, either Contracting Party may refer the matter to the Joint Committee if it considers that a given practice is incompatible with the proper functioning of this Agreement within the meaning of Article 25 (1).

The Contracting Parties shall provide the Joint Committee with all relevant information and shall give it the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.

If the Contracting Party in question fails to put an end to the practice objected to within the period fixed by the Joint Committee, or in the absence of agreement in the Joint Committee within three months of the matter being referred to it, the Contracting Party concerned may adopt any safeguard measures it considers necessary to deal with the serious difficulties resulting from the practices in question; in particular it may withdraw tariff concessions;

[...]

Israel

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART AND THE STATE OF ISRAEL, OF THE OTHER PART¹³⁰

Signed on the basis of the Decision of the Council and the Commission of 19 April 2000¹³¹

[...]

TITLE IV

[...]

CHAPTER 3—COMPETITION

Article 36

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Israel:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Israel as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. The Association Council shall, within three years of the entry into force of the Agreement, adopt by decision the necessary rules for the implementation of paragraph 1. Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the GATT shall be applied as the rules for the implementation of paragraph 1(iii).

3. Each Party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

4. With regard to agricultural products referred to in Title II, Chapter 3, paragraph 1(iii) does not apply.

130 OJ L 147, 21.06.2000, p.3

131 2000/384/EC, ECSC.

5. If the Community or Israel considers that a particular practice is incompatible with the terms of paragraph 1 and:

- is not adequately dealt with under the implementing rules referred to in paragraph 2, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral for such consultation.

With reference to practices incompatible with paragraph 1(iii), such appropriate measures, when the GATT is applicable to them, may only be adopted in accordance with the procedures and under the conditions laid down by the GATT or by any other relevant instrument negotiated under its auspices and applicable to the Parties.

6. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 2, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 37

1. The Member States and Israel shall progressively adjust any State monopolies of a commercial character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Israel.

2. The Association Committee shall be informed about the measures adopted to implement this objective.

Article 38

With regard to public undertakings and undertakings to which special or exclusive rights have been granted, the Association Council shall ensure that as from the fifth year following the date of entry into force of this Agreement there is neither enacted nor maintained any measure distorting trade between the Community and Israel to an extent contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to those undertakings.

[...]

DECLARATIONS BY THE EUROPEAN COMMUNITY

In the framework of the ongoing process of harmonisation of rules of origin applicable between the Community and other third countries, the Community may in future submit to the Association Council the amendments to Protocol 4 that may be necessary.

DECLARATION BY THE EUROPEAN COMMUNITY RELATING TO ARTICLE 36

The Community declares that, until the adoption by the Association Council of the implementing rules on fair competition referred to in Article 36(2), in the context of the interpretation of Article 36(1), it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles 85, 86 and 92 of the Treaty establishing the European Community, from those contained in Articles 65 and 66 of that Treaty and the Community rules on State aids, including secondary legislation.

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE HASHEMITE KINGDOM OF JORDAN, OF THE OTHER PART¹³²

[...]

**CHAPTER 2
COMPETITION AND OTHER ECONOMIC MATTERS**

Article 53

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Jordan:

- (a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (b) abuse by one or more undertakings of a dominant position in the territories of the Community or Jordan as a whole or in a substantial part thereof;
- (c) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practice contrary to this Article shall be assessed on the basis of the criteria resulting from the application of the rules contained in Articles 85, 86 and 92 of the Treaty establishing the European Community, and, for products covered by the Treaty establishing the European Coal and Steel Community, by those contained in Articles 65 and 66 of that Treaty and the Community rules on State aids, including secondary legislation.

3. The Association Council shall, within five years of the entry into force of the Agreement, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2. Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the GATT shall be applied as the rules for the implementation of paragraph 1(c) and the relevant parts of paragraph 2.

4. (a) For the purposes of applying the provisions of paragraph 1(c), the Parties recognise that, during the first five years of the entry into force of the Agreement, any public aid granted by Jordan to undertakings shall be assessed taking into account the fact that Jordan shall be regarded as an area identical to those areas of the Community where the standard of living is abnormally low or where there is serious underemployment, as described in Article 92(3)(a) of the Treaty establishing the European Community.

132 OJ L 129, 15.5.2002, p. 3

The Association Council shall, taking into account the economic situation of Jordan, decide whether that period should be extended for further periods of five years.

(b) Each Party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

5. With regard to products referred to in Title II, Chapter 2:

- paragraph 1(c) does not apply,
- any practices contrary to paragraph 1(a) shall be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community and in particular those established in Council Regulation No 26/62.

6. If the Community or Jordan considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral for such consultation.

With reference to practices incompatible with paragraph 1(c) of this Article, such appropriate measures, when the GATT is applicable to them, may only be adopted in accordance with the procedures and under the conditions laid down by the GATT or by any other relevant instrument negotiated under its auspices and applicable to the Parties.

7. Notwithstanding any provisions to the contrary adopted in conformity with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 54

The Member States and Jordan shall progressively adjust, without prejudice to their commitments respectively taken or to be taken under the GATT, any State monopolies of a commercial character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and Jordan. The Association Committee will be informed about the measures adopted to implement this objective.

Article 55

With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Association Council shall ensure that as from the fifth year following the date of entry into force of this Agreement there is neither enacted nor maintained any measure distorting trade between the Community and Jordan to an extent contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to these enterprises.

Korea (Republic of)

**MEMORANDUM OF UNDERSTANDING
ON COOPERATION BETWEEN THE FAIR TRADE COMMISSION
OF THE REPUBLIC OF KOREA AND THE COMPETITION
DIRECTORATE-GENERAL OF THE EUROPEAN COMMISSION**

The Fair Trade Commission of the Republic of Korea and the Competition Directorate-General of the European Commission (hereinafter referred to as “the Sides”),

expressing the wish to promote cooperation in the field of competition law enforcement and policy,

aiming to create favourable conditions for the development of bilateral relations,

based on the principles of equality and mutual benefit,

have reached the following understanding:

1. Both Sides will promote and strengthen cooperation in the field of competition law enforcement and policy.

2. This cooperation will be in the mutual interest of both Sides and will be based on the following principles:

i) improvement of the legal framework on business behaviour which restricts competition including certain agreements and concerted practices between companies, abuses by monopolies and certain mergers and acquisitions of companies, and anti-competitive government regulation;

ii) exchange of experience in the field of case investigations concerning breaches of competition legislation; and

iii) exchange of experience and views on substantive competition policy issues

3. The main forms of the Sides’ interaction in the field of competition law enforcement and policy may be as follows:

i) Korea-EU Competition Policy Consultation Meeting. The meeting will be carried out as follows:

It is intended to hold an annual Consultation Meeting. The Sides will take maximum advantage of the opportunities to meet at forums in which both Sides participate. Both Sides will communicate to each other their contact points for organising the Consultation Meeting upon signature of this Memorandum of Understanding. The working languages will be Korean and English. Each Side will cover its own costs, including interpretation, travel and accommodation.

ii) information exchange on major concerns between the Sides

iii) exchange of expert studies and consultation

iv) notification of enforcement activities that may affect the important interests of the other agency

- v) exchange of materials on current situations, experiences, and new developments on legislation and enforcement of competition policy
 - vi) exchange of views with respect to multilateral competition initiatives, with particular attention to the fight against international hardcore cartels

4. Cooperation between the Sides under this Memorandum of Understanding is subject to the respective laws of each Side, in particular those protecting confidential information. Such cooperation should not significantly delay or place a disproportionate burden on the effective enforcement activities of either Side.

5. Wherever possible, the Sides will settle amicably any discrepancies and disputes arising from cooperation under this Memorandum of Understanding.

6. Both Sides will do their best to establish a bilateral agreement as soon as the Member States of the European Union will agree to initiate negotiations leading to the adoption of a formal bilateral agreement on competition.

7. The present Memorandum of Understanding will come into effect on the date of signature by both Sides and will be effective until 2 months after the date of the written notification by one Side to the other of its intention to terminate it.

8. Termination of the present Memorandum of Understanding will not affect any programmes and projects started on the basis of it.

Signed in Brussels, Belgium, this 28th day of October 2004 in the English language.

For the Fair Trade Commission
of the Republic of Korea:
Chul-kyu Kang
Chairman

For the Directorate-General for Competition
of the European Commission:
Mario Monti
Commissioner for Competition

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITY AND ITS MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF LEBANON, OF THE OTHER PART¹³³

**CHAPTER 2
COMPETITION AND OTHER ECONOMIC MATTERS**

Article 35

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Lebanon:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, as defined by their respective legislation;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Lebanon as a whole or in a substantial part thereof, as defined by their respective legislation.

2. The Parties will enforce their respective competition legislation and shall exchange information taking into account the limitations imposed by the requirements of confidentiality. The necessary rules for co-operation in order to implement paragraph 1 shall be adopted by the Association Committee within five years of entry into force of the Agreement.

3. If the Community or Lebanon considers that a particular practice is incompatible with the terms of the first paragraph of this Article, and if such practice causes or threatens to cause serious prejudice to the other Party, it may take appropriate measures after consultation within the Association Committee or after thirty working days following referral for such consultation.

Article 36

The Member States and Lebanon shall progressively adjust, without prejudice to their commitments respectively taken or to be taken under the GATT, any State monopolies of a commercial character, so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under

133 OJ L 143, 30.5.2006, p. 2. Approved by Council Decision of 14 February 2006 concerning the conclusion of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States of the one part, and the Republic of Lebanon, of the other part. (2006/356/EC)

which goods are procured and marketed exists between nationals of the Member States and of Lebanon. The Association Committee will be informed about the measures adopted to implement this objective.

Article 37

With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Association Council shall ensure that as from the fifth year following the date of entry into force of this Agreement there is neither enacted nor maintained any measure distorting trade between the Community and Lebanon to an extent contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to these enterprises.

JOINT DECLARATION RELATING TO ARTICLE 35

The implementation of co-operation mentioned in Article 35 paragraph 2 is conditional upon the entry into force of a Lebanese competition law and of the taking up of the duties of the authority responsible for its application.

DECLARATION BY THE EUROPEAN COMMUNITY RELATING TO ARTICLE 35

The European Community declares that, in the context of the interpretation of Article 35(1), it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles 81 and 82 of the Treaty establishing the European Community, including secondary legislation.

Mexico

ECONOMIC PARTNERSHIP, POLITICAL COORDINATION AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND ITS MEMBER STATES, OF THE ONE PART, AND THE UNITED MEXICAN STATES, OF THE OTHER PART

SIGNED ON THE BASIS OF THE COUNCIL DECISION OF 28 SEPTEMBER 2000 (2000/658/EC)¹³⁴

[...]

**TITLE V
PUBLIC PROCUREMENT, COMPETITION, INTELLECTUAL PROPERTY
AND OTHER TRADE-RELATED PROVISIONS**

[...]

Article 11–Competition

1. The Parties shall agree on the appropriate measures in order to prevent distortions or restrictions of competition that may significantly affect trade between Mexico and the Community. To this end, the Joint Council shall establish mechanisms of cooperation and coordination among their authorities with responsibility for the implementation of competition rules. Such cooperation shall include mutual legal assistance, notification, consultation and exchange of information in order to ensure transparency relating to the enforcement of competition laws and policies.

2. In order to achieve this objective, the Joint Council shall decide in particular, on the following matters:

- (a) agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings;
- (b) the abuse by one or more undertakings of a dominant position;
- (c) mergers between undertakings;
- (d) state monopolies of a commercial character;
- (e) public undertakings and undertakings to which special or exclusive rights have been granted.

[...]

134

OJ L 276, 28.10.2000, p. 45

DECISION NO 2/2000 OF THE EC-MEXICO JOINT COUNCIL OF 23 MARCH 2000 – JOINT DECLARATIONS (2000/415/EC)¹³⁵

[...]

TITLE IV COMPETITION

Article 39–Mechanism of cooperation

1. A mechanism of cooperation between the authorities of the Parties with responsibility for implementation of competition rules is established in Annex XV.
2. The competition authorities of both Parties shall present to the Joint Committee an annual report on the implementation of the mechanism referred to in paragraph 1.

[...]

ANNEXES TO DECISION NO 2/2000 OF THE EC-MEXICO JOINT COUNCIL OF 23 MARCH 2000

[...]

ANNEX XV (REFERRED TO IN ARTICLE 39)

CHAPTER I–GENERAL PROVISIONS

Article 1–Objectives

1. The Parties undertake to apply their respective competition laws so as to avoid that the benefits of this Decision may be diminished or cancelled out by anti-competitive activities.
2. The objectives of this mechanism are:
 - (a) to promote cooperation and coordination between the Parties regarding the application of their competition laws in their respective territories and to provide mutual assistance in any fields of competition they consider necessary;
 - (b) to eliminate anticompetitive activities by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development, as well as the possible negative impact that such activities may have on the other Party's interests; and
 - (c) to promote cooperation in order to clarify any differences in the application of their respective competition laws.

135 OJ L 157, 30.6.2000, p. 10.

3. The Parties shall give the following aspects particular attention in implementing the present mechanism, with a view to preventing distortions or restrictions on competition which may affect trade conducted between the Community and Mexico:

- (a) for the Community: the agreements between companies, decisions to form an association between companies and concerted practices between companies, the abuse of a dominant position and mergers; and
- (b) for Mexico the absolute or relative monopolistic practices and mergers.

Article 2—Definitions

For the purpose of this Annex:

- (a) “competition laws”; include:
 - (i) for the Community, Articles 81, 82, 85 and 86 of the Treaty establishing the European Community, Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing Regulations, including High Authority Decision No 24/54;
 - (ii) for Mexico, the Ley Federal de Competencia of December 24, 1992, Reglamento Interior de la Comisión Federal de Competencia of August 28, 1998 and the Reglamento de la Ley Federal de Competencia of March 4, 1998; and
 - (iii) any amendments that the above mentioned legislation may undergo; and
 - (iv) it may also include additional legislation to the extent it may have implications to competition in terms of this mechanism;
- (b) “competition authority” means:
 - (i) for the Community, the Commission of the European Communities, and
 - (ii) for Mexico, Comisión Federal de Competencia;
- (c) “enforcement activities” means any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party, which may result in penalties or remedies;
- (d) “anticompetitive activities” and “conduct and practices which restrict competition” mean any conduct, transaction or act as defined under the competition laws of a Party, which is subject to penalties or remedies.

CHAPTER II—COOPERATION AND COORDINATION

Article 3—Notification

1. Each competition authority shall notify the competition authority of the other Party an enforcement activity if:

- (a) it is relevant to enforcement activities of the other Party;

- (b) it may affect the other Party's important interests;
- (c) it relates to restrictions on competition which may affect the territory of the other Party; and
- (d) decisions may be adopted conditioning or prohibiting action in the territory of the other Party.

2. To the extent possible, and provided that this is not contrary to the Parties' competition laws and does not adversely affect any investigation being carried out, notification shall take place during the initial phase of the procedure, to enable the notified competition authority to express its opinion. The opinions received may be taken into consideration by the other competition authority when taking decisions.

3. The notifications provided for in paragraph 1 shall be detailed enough to permit an evaluation in the light of the interests of the other Party. Notifications shall include, inter alia the following information:

- (a) a description of the restrictive effects of the transaction on competition and the applicable legal basis;
- (b) the relevant market for the product or service and its geographical scope, the characteristics of the economic sector concerned and data on the economic agents involved in the transaction; and
- (c) the estimated deadlines for resolution, in cases in which the procedure has been initiated, and to the extent possible an indication of its probable outcome, and of the measures which may be taken or provided for.

4. Each competition authority shall notify the competition authority of the other Party as soon as possible of the existence of measures, other than enforcement activities, which could affect that other Party important interests, bearing in mind the provision laid down in paragraph 1. In particular they shall do so in the following cases:

- (a) administrative or judicial proceedings; and
- (b) measures taken by other governmental agencies, including current or future regulatory bodies, which may have an impact to enhance competition in specific-regulated sectors.

Article 4–Exchange of information

1. With a view to facilitating the effective application of their respective competition laws and promoting a better understanding of their respective legal frameworks, the competition authorities shall exchange the following types of information:

- (a) to the extent practicable, texts on legal theory, case-law or market studies in the public domain, or in the absence of such documents, non-confidential data or summaries;
- (b) information related to the application of competition legislation provided that it does not adversely affect the person providing such information, and for the sole purpose of helping to resolve the procedure; and

(c) information concerning any known anticompetitive activities and any innovations introduced into the respective legal systems in order to improve the application of their respective competition laws.

2. The competition authorities shall help each other to collect other types of information in their respective territories, if circumstances so require.

3. Representatives of each Party's competition authorities shall meet in order to promote knowledge on both sides of their respective competition laws and policies, and to evaluate the results of the cooperation mechanism. They may meet informally, as well as at institutional meetings in a multilateral context, when circumstances allow.

Article 5—Coordination of enforcement activities

1. A competition Authority may notify its willingness to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the Parties from taking autonomous decisions.

2. In determining the extent of coordination, the Parties shall consider:

(a) the effective results which coordination could produce;

(b) the additional information to be obtained;

(c) the reduction in costs for the competition authorities and the economic agents involved; and

(d) the applicable deadlines under their respective legislation.

Article 6—Consultations when important interests of one Party are adversely affected in the territory of the other Party

1. A competition authority which considers that an investigation or proceeding being conducted by the competition authority of the other Party may affect such Party's important interests should transmit its views on the matter to, or request consultation with, the other competition authority. Without prejudice to the continuation of any action under its competition law and to its full freedom of ultimate decision, the competition authority so addressed should give full and sympathetic consideration to the views expressed by the requesting competition authority, and in particular, to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

2. The competition authority of a Party, which considers that the interests of that Party are being substantially and adversely affected by anticompetitive practices of whatever origin that are or have been engaged in by one or more enterprises situated in the other Party may request consultation with the other competition authority, recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the competition authority concerned. A competition authority so addressed should give full and sympathetic consid-

eration to such views and factual materials as may be provided by the requesting competition authority and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting competition authority.

Article 7–Avoidance of conflicts

1. Each Party shall, wherever possible, and in accordance with its own legislation, take into consideration the important interests of the other Party in the course of its enforcement activities.
2. If adverse effects for one Party result, even if the above considerations are respected, the competition authorities shall seek a mutually acceptable solution. In this context, the following may be considered:
 - (a) the importance of the measure and the impact which it has on the interests of one Party, by comparing the benefits to be obtained by the other Party;
 - (b) the presence or absence, in the actions of the economic agents concerned, of the intention to affect consumers, suppliers or competitors;
 - (c) the degree of any inconsistencies between the legislation of one Party and the measures to be applied by the other Party;
 - (d) whether the economic agents involved will be subject to incompatible requests by both Parties;
 - (e) the initiation of the procedure or the imposition of penalties or remedies;
 - (f) the location of the assets of the economic agents involved; and
 - (g) the importance of the penalty to be imposed in the territory of the other Party.

Article 8–Confidentiality

The exchange of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the Parties, shall not be provided without the express consent of the source of the information. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority under this mechanism, and oppose any application for disclosure of such information by a third party that is not authorised by the competition authority that supplied the information.

Article 9–Technical cooperation

1. The Parties shall provide each other technical assistance in order to take advantage of their respective experience and to strengthen the implementation of their competition laws and policies.
2. The cooperation shall include the following activities:
 - (a) training of officials of both Parties' competition authorities, to enable them to gain practical experience; and
 - (b) seminars, in particular for civil servants.

3. The Parties may carry out joint studies of competition or competition laws and policies, with a view to supporting their development.
4. The Parties acknowledge that developments in communication and computer systems are relevant to the activities they wish to develop and that they should be used to promote communication and facilitate access to information on competition policies as far as possible. To this end they shall seek to:
 - (a) extend their respective home pages so as to provide information on developments in their activities;
 - (b) promote the dissemination of subjects relating to competition studies through publications such as the *Boletín Latinoamericano de Competencia*, the Competition Policy Newsletter of the Directorate General for Competition of the European Community, and the annual reports and the *Gaceta de Competencia Económica* published by the *Comisión Federal de Competencia* of Mexico; and
 - (c) develop an electronic archive of case-law pertaining to the cases investigated, which would enable the identification of individual cases, the nature of the practice or conduct analysed, its legal framework and the outcomes and dates of resolution.

Article 10–Amendments

The Joint Committee may amend this Annex.

Moldova

**PARTNERSHIP AND COOPERATION AGREEMENT
ESTABLISHING A PARTNERSHIP BETWEEN THE EUROPEAN
COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART,
AND THE REPUBLIC OF MOLDOVA, OF THE OTHER PART**

**SIGNED ON THE BASIS OF THE COUNCIL AND COMMISSION
DECISION OF 28 MAY 1998 (98/401/EC, ECSC, EURATOM)¹³⁶**

[...]

**TITLE VI
COMPETITION, INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY
PROTECTION AND LEGISLATIVE COOPERATION**

Article 48

1. The Parties agree to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention insofar as they may affect trade between the Community and the Republic of Moldova.

2. In order to attain the objectives mentioned in paragraph 1:

2.1. The Parties shall ensure that they have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction.

2.2. The Parties shall refrain from granting State aids favouring certain undertakings or the production of goods other than primary products as defined in the GATT, or the provision of services, which distort or threaten to distort competition insofar as they affect trade between the Community and the Republic of Moldova.

2.3. Upon request by one Party, the other Party shall provide information on its aid schemes or on particular individual cases of State aid. No information needs to be provided which is covered by legislative requirements of the Parties on professional or commercial secrets.

2.4. In the case of State monopolies of a commercial character, the Parties declare their readiness, as from the fourth year from the date of entry into force of their Agreement, to ensure that there is no discrimination between nationals of the Parties regarding the conditions under which goods are procured or marketed.

2.5. In the case of public undertakings or undertakings to which Member States or the Republic of Moldova grant exclusive rights, the Parties declare their readiness, as from the fourth year from the date of entry into force of this Agreement, to ensure that there

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OJ L 181, 24.6.1998, p. 1

is neither enacted nor maintained any measure distorting trade between the Community and the Republic of Moldova to an extent contrary to the Parties' respective interests. This provision shall not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings.

2.6. The period defined in paragraphs 2.4 and 2.5 may be extended by agreement of the Parties.

3. Consultations may take place within the Cooperation Committee at the request of the Community or the Republic of Moldova on the restrictions or distortions of competition referred to in paragraphs 1 and 2 and on the enforcement of their competition rules, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy. Consultations may also comprise questions on the interpretation of paragraphs 1 and 2.

4. The Parties with experience in applying competition rules shall give full consideration to providing other Parties, upon request and within available resources, technical assistance for the development and implementation of competition rules.

5. The above provisions in no way affect the Parties' rights to apply adequate measures, notably those referred to in Article 18, in order to address distortions of trade in goods or services.

[...]

Article 50

1. The Parties recognise that an important condition for strengthening the economic links between the Republic of Moldova and the Community is the approximation of the Republic of Moldova's existing and future legislation to that of the Community. The Republic of Moldova shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

2. The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.

3. The Community shall provide the Republic of Moldova with technical assistance as appropriate for the implementation of these measures, which may include, *inter alia*:

- the exchange of experts,
- the provision of early information especially on relevant legislation,
- organisation of seminars,
- training activities,
- aid for translation of Community legislation in the relevant sectors.

Morocco

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE KINGDOM OF MOROCCO, OF THE OTHER PART

SIGNED ON THE BASIS OF THE COUNCIL AND COMMISSION DECISION OF 24 JANUARY 2000 (2000/204/EC, ECSC)¹³⁷

[...]

**CHAPTER II
COMPETITION AND OTHER ECONOMIC PROVISIONS**

Article 36

1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Morocco:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(b) abuse by one or more undertakings of a dominant position in the territories of the Community or of Morocco as a whole or in a substantial part thereof;

(c) any official aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, with the exception of cases in which a derogation is allowed under the Treaty establishing the European Coal and Steel Community.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community (*) and, in the case of products falling within the scope of the European Coal and Steel Community, the rules of Articles 65 and 66 of the Treaty establishing that Community, and the rules relating to State aid, including secondary legislation.

3. The Association Council shall, within five years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.

Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and

137 OJ L 70, 18.3.2000, p. 1.

* Renumbered Articles 81, 82 and 87 in the consolidated version of the EC Treaty (following the entry into force of the Treaty of Amsterdam).

Trade shall be applied as the rules for the implementation of paragraph 1(c) and related parts of paragraph 2.

4. (a) For the purposes of applying the provisions of paragraph 1(c), the Parties recognise that during the first five years after the entry into force of this Agreement, any State aid granted by Morocco shall be assessed taking into account the fact that Morocco shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Community.

During the same period of time, Morocco may exceptionally, as regards ECSC steel products, grant State aid for restructuring purposes provided that:

- it leads to the viability of the recipient firms under normal market conditions at the end of the restructuring period,
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced,
- the restructuring programme is linked to a comprehensive plan for rationalising capacity in Morocco.

The Association Council shall, taking into account the economic situation of Morocco, decide whether the period should be extended every five years.

b) Each Party shall ensure transparency in the area of official aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of official aid.

5. With regard to products referred to in Chapter II of Title II:

- the provisions of paragraph 1(c) do not apply,
- any practices contrary to paragraph 1(a) shall be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community, and in particular those established in Council Regulation (EEC) No 26/62.

6. If the Community or Morocco considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee.

In the case of practices incompatible with paragraph 1(c) of this Article, such appropriate measures may, where the GATT applies thereto, only be adopted in accordance with

the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which is applicable between the Parties.

7. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 37

The Member States and Morocco shall progressively adjust, without affecting commitments made under the GATT, any State monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Morocco. The Association Committee will be informed about the measures adopted to implement this objective.

Article 38

With regard to public enterprises and enterprises which have been granted special or exclusive rights, the Association Council shall ensure, from the fifth year following the entry into force of this Agreement, that no measure which disturbs trade between the Community and Morocco in a manner which runs counter to the interests of the Parties is adopted or maintained. This provision shall not impede the performance in fact or in law of the specific functions assigned to those enterprises.

**COUNCIL DECISION NO 1/2004 OF THE EU-MOROCCO
ASSOCIATION COUNCIL OF 19 APRIL 2004
ADOPTING THE NECESSARY RULES FOR THE IMPLEMENTATION
OF THE COMPETITION RULES¹³⁸ (2005/466/EC)**

THE EU-MOROCCO ASSOCIATION COUNCIL,

Having regard to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part¹³⁹ (the Agreement),

Whereas:

(1) A free trade area is to be established between the EU and Morocco by 28 February 2012 at the latest.

(2) Article 36(3) of the Agreement provides for the existence of administrative cooperation arrangements between the Parties to facilitate the implementation of paragraphs 1 and 2 of the said Article, and for the possibility of adopting technical cooperation measures.

(3) Article 36(3) of the Agreement provides that the Association Council may adopt the necessary rules for the implementation of the competition rules within five years of the entry into force of the Agreement,

HAS DECIDED AS FOLLOWS:

Sole Article

1. A mechanism of cooperation between the Parties' authorities responsible for the implementation of competition rules is established in the Annex.
2. The Parties' competition authorities shall inform the Association Committee's Internal Market Subcommittee on the implementation of the cooperation established under the mechanism referred to above.
3. This Decision shall enter into force on the day of its adoption.

Done at Brussels, 19 April 2004.

For the Association Council

B. Cowen

138 OJ L 165, 25.6.2005, p. 10

139 OJ L 70, 18.3.2000, p. 2. Agreement as last amended by Exchange of Letters of 30 December 2003 (OJ L 345, 31.12.2003, p. 119).

ANNEX
EU-MOROCCO ASSOCIATION AGREEMENT
MECHANISM OF COOPERATION BETWEEN THE PARTIES' COMPETITION
AUTHORITIES RESPONSIBLE FOR THE IMPLEMENTATION OF COMPETITION
RULES

CHAPTER I
GENERAL PROVISIONS

1. Objectives

1.1. Cases relating to practices contrary to Article 36(1)(a) or (b) of the Agreement shall be dealt with by applying the appropriate legislation, in order to avoid adverse effects on trade and economic development and the possible negative impact that such practices may have on the other Party's important interests.

1.2. The competences of the Parties' competition authorities to deal with these cases shall flow from the existing rules of their respective competition laws, including where these rules are applied to undertakings located outside their respective territories.

1.3. The purpose of these rules is to promote cooperation and coordination between the Parties in the application of their competition laws in order to ensure that restrictions on competition do not block or cancel out the benefits which should be ensured following the progressive liberalisation of trade between the European Community and Morocco.

2. Definitions

For the purposes of these rules:

(a) "competition law" shall mean:

(i) for the European Community (the Community), Articles 81 and 82 of the EC Treaty, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings¹⁴⁰ and related secondary legislation adopted by the Community;

(ii) for Morocco, the Price Liberalisation and Free Competition Act (No 6/99) of 2 rabii I 1421 (5 June 2000), and related secondary legislation;

(b) "competition authority" shall mean:

(i) for the Community, the Commission of the European Community as to its responsibilities pursuant to the competition law of the Community;

(ii) for Morocco, the Deputy Ministry for Economic and General Affairs and the Upgrading of the Economy;

140 OJ L 395, 30.12.1989, p. 1. Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p. 1).

- (c) “enforcement activity” shall mean any application of competition law by way of investigation or proceeding conducted by the competition authority of a Party, which may result in penalties or remedies.
- (d) “anti-competitive activity” and “conduct and practices which restrict competition” shall mean any conduct or transaction that is impermissible under the competition laws of a Party and may be subject to penalties or remedies.

CHAPTER II COOPERATION AND COORDINATION

3. Notification

3.1. Each Party’s competition authority shall notify the other of its enforcement activities where:

- (a) the notifying Party considers them relevant to enforcement activities of the other Party;
- (b) they may significantly affect important interests of the other Party;
- (c) they relate to restrictions on competition which may directly and substantially affect the territory of the other Party;
- (d) they involve anti-competitive activities carried out mainly in the territory of the other Party;
- (e) they condition or prohibit action in the territory of the other Party.

3.2. As far as possible, and provided that this is not contrary to the Parties’ competition laws and does not adversely affect any investigation being carried out, notification shall take place during the initial phase of the procedure, to enable the notified competition authority to express its opinion. The notified authority shall give due consideration to the opinions received when taking decisions.

3.3. The notifications provided for in Article 3.1. shall be detailed enough to permit an evaluation in the light of the interests of the other Party.

3.4. The Parties undertake to give the above notification wherever possible, depending on available administrative resources.

4. Exchange of information and confidentiality

4.1. The Parties shall exchange information which will facilitate the effective application of their respective competition laws and promote a better understanding of their respective legal frameworks.

4.2. The exchange of information shall be subject to the standards of confidentiality applicable under the law of each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the Parties, shall not be provided without the express consent of the source of the information. Each

competition authority shall maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other competition authority under the rules and shall oppose, to the same extent, any application for disclosure of such information by a third party that is not authorised by the competition authority that supplied the information.

5. Coordination of enforcement activities

5.1. Each competition authority may notify the other of its willingness to coordinate enforcement activities with respect to a specific case. This coordination shall not prevent the Parties from taking autonomous decisions.

5.2. In determining the extent of coordination, the competition authorities shall consider:

- (a) the effective results which coordination could produce;
- (b) the additional information to be obtained;
- (c) the reduction in costs for the competition authorities and the economic agents involved; and
- (d) the applicable deadlines under their respective legislation.

6. Consultation when important interests of one Party are adversely affected in the territory of the other Party

6.1. Each Party shall, wherever possible and in accordance with its own legislation, take into consideration the important interests of the other Party in the course of its enforcement activities. A competition authority which considers that an enforcement activity being conducted by the competition authority of the other Party under its competition law may affect the important interests of the Party it represents should transmit its views on the matter to, or request consultations with, the other competition authority. Without prejudice to the continuation of its action under its competition laws or to its full freedom of ultimate decision, the competition authority so addressed should give full and sympathetic consideration to the views expressed by the requesting competition authority, and in particular to any suggestions as to alternative means of fulfilling the needs and objectives of the enforcement activity.

6.2. A competition authority which considers that one or more undertakings situated in one Party's territory are or have been engaged in anti-competitive activities of whatever origin that are substantially and adversely affecting the interests of the Party it represents may request consultations with the other competition authority, recognising that entering into such consultations is without prejudice to any action under its competition laws and to the full freedom of ultimate decision of the competition authority concerned. The requested competition authority may take the appropriate remedial action, in the light of the legislation in force.

7. Technical cooperation

7.1. The Parties shall be open to technical cooperation in order to enable them to take advantage of their respective experience and to strengthen the implementation of their competition law and policies, according to the resources available to them.

7.2. The following cooperation activities may be included in the programme to back up the implementation of the Agreement:

- (a) training for officials, to enable them to gain practical experience;
- (b) seminars, in particular for civil servants;
- (c) studies of competition law and policies, with a view to supporting their development.

8. Management of implementing rules

Cooperation will be monitored and evaluated by the Internal Market Subcommittee established in the Agreement by the Association Council Decision of 24 February 2003.

9. Amendment and update of the rules

The Association Council may amend these rules after consultation of the competition authorities.

**AGREEMENT ON PARTNERSHIP AND COOPERATION
ESTABLISHING A PARTNERSHIP BETWEEN THE EUROPEAN
COMMUNITIES AND THEIR MEMBER STATES, OF ONE PART, AND
THE RUSSIAN FEDERATION, OF THE OTHER PART**

**SIGNED ON THE BASIS OF THE COUNCIL AND COMMISSION
DECISION OF 30 OCTOBER 1997 (97/800/EC, ECSC, EURATOM¹⁴¹)**

[...]

**TITLE VI
COMPETITION; INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY
PROTECTION; LEGISLATIVE COOPERATION**

Article 53–Competition

1. The Parties agree to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention in so far as they may affect trade between the Community and Russia.

2. In order to attain the objectives mentioned in paragraph 1:

2.1. The Parties shall ensure that they have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction.

2.2. The Parties shall refrain from granting export aids favouring certain undertakings or the production of products other than primary products. The Parties also declare their readiness, as from the third year from the date of entry into force of this Agreement, to establish for other aids which distort or threaten to distort competition in so far as they affect trade between the Community and Russia, strict disciplines, including the outright prohibition of certain aids. These categories of aids and the disciplines applicable to each shall be defined jointly within a period of three years after entry into force of this Agreement.

Upon request by one Party, the other Party shall provide information on its aid schemes or in particular individual cases of State aid.

2.3. During a transitional period expiring five years after the entry into force of the Agreement, Russia may take measures inconsistent with paragraph 2.2, second sentence, provided that these measures are introduced and applied in the circumstances referred to in Annex 9.

2.4. In the case of State monopolies of a commercial character, the Parties declare their readiness, as from the third year from the date of entry into force of this Agreement, to

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OJ L 237, 28.11.1997, p. 1.

ensure that there is no discrimination between nationals and companies of the Parties regarding the conditions under which goods are procured or marketed.

In the case of public undertakings or undertakings to which Member States or Russia grant exclusive rights, the Parties declare their readiness, as from the third year from the date of entry into force of this Agreement, to ensure that there is neither enacted nor maintained any measure distorting trade between the Community and Russia to an extent contrary to the Parties' respective interests. This provision shall not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings.

2.5. The period defined in paragraphs 2.2 and 2.4 may be extended by agreement of the Parties.

3. Consultations may take place within the Cooperation Committee at the request of the Community or Russia on the restrictions or distortions of competition referred to in paragraphs 1 and 2 and on the enforcement of their competition rules, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy. Consultations may also comprise questions on the interpretation of paragraphs 1 and 2.

4. The Party with experience in applying competition rules shall give full consideration to providing the other Party, upon request and within available resources, technical assistance for the development and implementation of competition rules.

5. The above provisions in no way affect a Party's rights to apply adequate measures, notably those referred to in Article 18, in order to address distortions of trade.

[...]

Article 55—Legislative Cooperation

1. The Parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

2. The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulations, transport.

South Africa

**AGREEMENT ON TRADE, DEVELOPMENT AND COOPERATION
BETWEEN THE EUROPEAN COMMUNITY AND ITS MEMBER
STATES, OF THE ONE PART, AND THE REPUBLIC OF SOUTH
AFRICA, OF THE OTHER PART**

**SIGNED ON THE BASIS OF THE COUNCIL DECISION OF 29 JULY
1999 (99/753/EC)¹⁴²**

[...]

**TITLE III
TRADE RELATED ISSUES**

SECTION D—COMPETITION POLICY

Article 35—Definition

The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and South Africa:

- (a) agreements and concerted practices between firms in horizontal relationships, decisions by associations of firms, and agreements between firms in vertical relationships, which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones;
- (b) abuse by one or more firms of market power in the territory of the Community or of South Africa as a whole or in a substantial part thereof.

Article 36—Implementation

If, at the entry into force of this Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of Article 35, in their jurisdictions it shall do so within a period of three years.

Article 37—Appropriate measures

If the Community or South Africa considers that a particular practice in its domestic market is incompatible with the terms of Article 35, and:

- (a) is not adequately dealt with under the implementing rules referred to in Article 36,
or

142 OJ L 311, 4.12.1999, p. 1.

(b) in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, including its services industry,

the Party concerned may take appropriate measures consistent with its own laws, after consultation within the Cooperation Council, or after 30 working days following referral for such consultation. The appropriate measures to be taken shall respect the powers of the Competition Authority concerned.

Article 38–Comity

1. The Parties agree that, whenever the Commission or the South African Competition Authority has reason to believe that anti-competitive practices, defined under Article 35, are taking place within the territory of the other authority and are substantially affecting important interests of the Parties, it may request the other Party's competition authority to take appropriate remedial action in terms of that authority's rules governing competition.

2. Such a request shall not prejudice any action under the requesting authority's competition laws that may be deemed necessary and shall not in any way encumber the addressed authority's decision-making powers or its independence.

3. Without prejudice to its respective functions, rights, obligations or independence, the competition authority so addressed shall consider and give careful attention to the views expressed and documentation provided by the requesting authority and, in particular, pay heed to the nature of the anti-competitive activities in question, the firm or firms involved, and the alleged harmful effect on the important interests of the aggrieved Party.

4. When the Commission or the Competition Authority of South Africa decides to conduct an investigation or intends to take any action that may have important implications for the interests of the other Party, the Parties must consult, at the request of either Party and both shall endeavour to find a mutually acceptable solution in the light of their respective important interests, giving due regard to each other's laws, sovereignty, the independence of the respective competition authorities and to considerations of comity.

Article 39–Technical assistance

The Community shall provide South Africa with technical assistance in the restructuring of its competition law and policy, which may include among others:

- (a) the exchange of experts;
- (b) organisation of seminars;
- (c) training activities.

Article 40–Information

The Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

SECTION E–PUBLIC AID**Article 41–Public aid**

1. In so far as it may affect trade between the Community and South Africa, public aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the proper functioning of this Agreement.

2. The Parties agree that it is in their interests to ensure that public aid is granted in a fair, equitable and transparent manner.

Article 42–Remedial measures

1. If the Community or South Africa considers that a particular practice is incompatible with the terms of Article 41, and that such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, the Parties agree, where it is not adequately dealt with under existing rules and procedures, to enter into consultations with a view to finding a mutually satisfactory solution. Such consultations will be without prejudice to the Parties' rights and obligations in terms of their respective laws and international commitments.

2. Either Party may invite the Cooperation Council to examine, in the context of such consultation, the Parties' public policy objectives justifying the grant of public aid referred to in Article 41.

Article 43–Transparency

Each Party shall ensure transparency in the area of public aid. In particular, where a Party so requests, the other Party shall provide information on aid schemes, on particular individual cases of public aid, or on the total amount and the distribution of aid given. The exchange of information between the Parties shall take into account the limitations imposed by either Party's laws relating to the requirements of business and professional secrecy.

Article 44–Review

1. In the absence of any rules or procedures for the implementation of Article 41, the provisions of Article VI and XVI of the General Agreement on Tariffs and Trade 1994 as well as the WTO Agreement on Subsidies and Countervailing Measures shall apply to public aid or subsidies.

2. The Cooperation Council shall periodically review the progress made in these matters. In particular it shall continue to develop cooperation and understanding on the measures taken by each Party with regard to the operation of Article 41.

Switzerland

AGREEMENT BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE SWISS CONFEDERATION

AGREED BY COUNCIL REGULATION (EEC) NO 2840/72 OF 19 DECEMBER 1972¹⁴³

[...]

Article 1

The aim of this Agreement is:

- (a) to promote through the expansion of reciprocal trade the harmonious development of economic relations between the European Economic Community and the Swiss Confederation and thus to foster in the Community and in Switzerland the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability;
- (b) to provide fair conditions of competition for trade between the Contracting Parties;
- (c) to contribute in this way, by the removal of barriers to trade, to the harmonious development and expansion of world trade.

[...]

Article 23

1. The following are incompatible with the proper functioning of the Agreement in so far as they may affect trade between the Community and Switzerland:

- (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition as regards the production of or trade in goods;
- (ii) abuse by one or more undertakings of a dominant position in the territories of the Contracting Parties as a whole or in a substantial part thereof;
- (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Should a Contracting Party consider that a given practice is incompatible with this Article, it may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 27.

[...]

143 OJ L 300, 31.12.1972 (French version); OJ Special Edition, 31.12.1972 (English version).

Article 27

1. In the event of a Contracting Party subjecting imports of products liable to give rise to the difficulties referred to in Articles 24 and 26 to an administrative procedure, the purpose of which is to provide rapid information on the trend of trade flows, it shall inform the other Contracting Party.

2. In the cases specified in Articles 22 to 26, before taking the measures provided for therein or, in cases to which paragraph 3(d) applies, as soon as possible, the Contracting Party in question shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Contracting Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of the Agreement.

The safeguard measures shall be notified immediately to the Joint Committee and shall be the subject of periodical consultations within the Committee, particularly with a view to their abolition as soon as circumstances permit.

3. For the implementation of paragraph 2, the following provisions shall apply:

(a) As regards Article 23, either Contracting Party may refer the matter to the Joint Committee if it considers that a given practice is incompatible with the proper functioning of the Agreement within the meaning of Article 23(1).

The Contracting Parties shall provide the Joint Committee with all relevant information and shall give it the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.

If the Contracting Party in question fails to put an end to the practice objected to within the period fixed by the Joint Committee, or in the absence of agreement in the Joint Committee within three months of the matter being referred to it, the Contracting Party concerned may adopt any safeguard measures it considers necessary to deal with the serious difficulties resulting from the practices in question; in particular, it may withdraw tariff concessions.

(b) As regards Article 24, the difficulties arising from the situation referred to in that Article shall be referred for examination to the Joint Committee, which may take any decision needed to put an end to such difficulties.

If the Joint Committee or the exporting Contracting Party has not taken a decision putting an end to the difficulties within 30 days of the matter being referred, the importing Contracting Party is authorized to levy a compensatory charge on the product imported.

The compensatory charge shall be calculated according to the incidence on the value of the goods in question of the tariff disparities in respect of the raw materials or intermediate products incorporated therein.

- (c) As regards Article 25, consultation in the Joint Committee shall take place before the Contracting Party concerned takes the appropriate measures.
- (d) Where exceptional circumstances requiring immediate action make prior examination impossible, the Contracting Party concerned may, in the situations specified in Articles 24, 25 and 26 and also in the case of export aids having a direct and immediate incidence on trade, apply forthwith the precautionary measures strictly necessary to remedy the situation.

[...]

DECLARATION BY THE EUROPEAN ECONOMIC COMMUNITY CONCERNING THE REGIONAL APPLICATION OF CERTAIN PROVISIONS OF THE AGREEMENT

The European Economic Community declares that the application of any measures it may take under Article 23, 24, 25 or 26 of the Agreement, in accordance with the procedure and under the arrangement set out in Article 27, or under Article 28, may be limited to one of its regions by virtue of Community rules.

DECLARATION BY THE EUROPEAN ECONOMIC COMMUNITY CONCERNING ARTICLE 23(1) OF THE AGREEMENT

The European Economic Community declares that in the context of the autonomous implementation of Article 23(1) of the Agreement which is incumbent on the Contracting Parties, it will assess any practices contrary to that Article on the basis of criteria arising from the application of the rules of Articles 85, 86, 90 and 92 of the Treaty establishing the European Economic Community.

AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE SWISS CONFEDERATION ON AIR TRANSPORT¹⁴⁴

AGREED BY DECISION OF THE COUNCIL AND OF THE COMMISSION OF 4 APRIL 2002 (2002/309/EC, EURATOM)

THE SWISS CONFEDERATION hereinafter referred to as “Switzerland”, and THE EUROPEAN COMMUNITY, hereinafter referred to as “the Community”, hereinafter referred to as “the Contracting Parties”,

RECOGNISING the integrated character of international civil aviation and desiring that regulations for intra-European air transport be harmonised;

DESIRING to set out rules for civil aviation within the area covered by the Community and Switzerland, rules which are without prejudice to those contained in the Treaty establishing the European Community (hereinafter referred to as the “EC Treaty”) and in particular to existing Community competences under Articles 81 and 82 of the EC Treaty and the competition rules derived therefrom;

AGREEING that it is appropriate to base these rules on the legislation which is in force within the Community at the time of signature of this Agreement;

DESIRING to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at as uniform an interpretation as possible of the provisions of this Agreement and the corresponding provisions of Community law which are substantially reproduced in this Agreement,

HAVE AGREED AS FOLLOWS:

CHAPTER 1 OBJECTIVES

Article 1

1. This Agreement sets out rules for the Contracting Parties in the field of civil aviation. These provisions are without prejudice to those contained in the EC Treaty and in particular to existing Community competences under the competition rules and the regulations of application of such rules, as well as under all relevant Community legislation listed in the Annex to this Agreement.

2. For this purpose, the provisions laid down in this Agreement as well as in the regulations and directives specified in the Annex shall apply under the condition set out hereafter. Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their imple-

144 OJ L 114, 30.4.2002, p. 73

mentation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement. The rulings and decisions given after the date of signature of this Agreement shall be communicated to Switzerland. At the request of one of the Contracting Parties, the implications of such latter rulings and decisions shall be determined by the Joint Committee in view of ensuring the proper functioning of this Agreement.

Article 2

The provisions of this Agreement and its Annex shall apply to the extent that they concern air transport or matters directly related to air transport as mentioned in the Annex to this Agreement.

CHAPTER 2 GENERAL PROVISIONS

Article 3

Within the scope of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 4

Within the scope of this Agreement and without prejudice to the provisions of Council Regulation (EEC) No 2407/92, as included in the Annex to this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or Switzerland in the territory of any of these States. This shall also apply to the setting up of agencies, branches and subsidiaries by nationals of any EC Member State or Switzerland established in the territory of any of these States. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 5, paragraph 2, under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

Article 5

1. Within the scope of this Agreement, companies or firms formed in accordance with the law of an EC Member State or Switzerland and having their registered office, central administration or principal place of business within the Community or Switzerland shall be treated in the same way as natural persons who are nationals of EC Member States or Switzerland.
2. 'Companies or 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-profit-making.

Article 6

Articles 4 and 5 shall not apply, as far as a Contracting Party is concerned, to activities which in that Contracting Party are connected, even occasionally, with the exercise of official authority.

Article 7

Articles 4 and 5 and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

Article 8

1. The following shall be prohibited as incompatible with this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
 - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 9

Any abuse by one or more undertakings of a dominant position within the territory covered by this Agreement or in a substantial part of it shall be prohibited as incompatible with this Agreement insofar as it may affect trade between the Contracting Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 10

All agreements, decisions and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, as well as abuses of a dominant position, which may only affect trade within Switzerland, shall be subject to Swiss law and remain under the competence of the Swiss authorities.

Article 11

1. The provisions of Articles 8 and 9 shall be applied and concentrations between undertakings shall be controlled by the Community institutions in accordance with Community legislation as set out in the Annex to this Agreement, taking into account the need for close cooperation between the Community institutions and the Swiss authorities.

2. The Swiss authorities shall rule, in accordance with the provisions of Articles 8 and 9, on the admissibility of all agreements, decisions and concerted practices as well as abuses of a dominant position concerning routes between Switzerland and third countries.

Article 12

1. In the case of public undertakings and undertakings to which EC Member States or Switzerland grant special or exclusive rights, the Contracting Parties shall ensure that there is neither enacted nor maintained in force any measure contrary to the rules contained in this Agreement.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, shall be subject to the rules contained in this Agreement, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the

particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Contracting Parties.

Article 13

1. Save as otherwise provided in this Agreement, any aid granted by Switzerland or by an EC Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Contracting Parties, be incompatible with this Agreement.
2. The following shall be compatible with this Agreement:
 - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences
3. The following may be considered to be compatible with this Agreement:
 - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment;
 - (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Contracting Party;
 - (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

Article 14

The Commission and the Swiss authorities shall keep under constant review matters to which reference is made in Article 12 and all systems of aid existing respectively in the EC Member States and in Switzerland. Each Contracting Party shall ensure that the other Contracting Party is informed of any procedure initiated to guarantee respect of the rules of Articles 12 and 13 and, if necessary, may submit observations before any final decision is taken. Upon request by one Contracting Party, the Joint Committee shall discuss any appropriate measures required by the purpose and functioning of this Agreement.

CHAPTER 3 TRAFFIC RIGHTS

Article 15

1. Subject to the provisions of Council Regulation (EEC) No 2408/92, as included in the Annex to this Agreement:

- Community and Swiss air carriers shall be granted traffic rights between any point in Switzerland and any point in the Community;
- two years after the entry into force of this Agreement, Swiss air carriers shall be granted traffic rights between points in different EC Member States.

2. For the purpose of paragraph 1:

- Community air carrier shall mean an air carrier which has its principal place of business and, if any, its registered office in the Community and which is licensed according to the provisions of Council Regulation (EEC) No 2407/92, as included in the Annex to this Agreement;
- Swiss air carrier shall mean an air carrier which has its principal place of business and, if any, its registered office in Switzerland and which is licensed according to the provisions of Council Regulation (EEC) No 2407/92, as included in the Annex to this Agreement.

3. The Contracting Parties shall undertake negotiations on the possible extension of the scope of this Article to cover traffic rights between points within Switzerland and between points within the EC Member States five years after the entry into force of this Agreement.

Article 16

The provisions of this Chapter supersede the relevant provisions of existing bilateral arrangements between Switzerland and the EC Member States. However, existing traffic rights which originate from these bilateral arrangements and which are not covered under Article 15 can continue to be exercised, provided that there is no discrimination on the grounds of nationality and competition is not distorted.

CHAPTER 4 ENFORCEMENT OF THE AGREEMENT

Article 17

The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement and shall refrain from any measures which would jeopardise attainment of the objectives of this Agreement.

Article 18

1. Without prejudice to paragraph 2 and the provisions of Chapter 2, each Contracting Party shall be responsible in its own territory for the proper enforcement of this Agreement and, in particular, the regulations and directives listed in the Annex.

2. In cases which may affect air services to be authorised under Chapter 3, the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex. However, in cases where Switzerland has taken or envisages taking measures of an environmental nature under either Article 8(2) or 9 of Council Regulation (EEC) No 2408/92, the Joint Committee, upon request by one of the Contracting Parties, shall decide whether those measures are in conformity with this Agreement.

3. Any enforcement action under paragraphs 1 and 2 shall be carried out in accordance with Article 19.

Article 19

1. Each Contracting Party shall give the other Contracting Party all necessary information and assistance in the case of investigations on possible infringements which that other Contracting Party carries out under its respective competences as provided in this Agreement.

2. Whenever the Community institutions act under the powers granted to them by this Agreement on matters which are of interest to Switzerland and which concern the Swiss authorities or Swiss undertakings, the Swiss authorities shall probe fully informed and given the opportunity to comment before a final decision is taken.

Article 20

All questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement, shall be of the exclusive competence of the Court of Justice of the European Communities.

CHAPTER 5 JOINT COMMITTEE

Article 21

1. A committee composed of representatives of the Contracting Parties, to be known as the ‘Community/Switzerland Air Transport Committee’ (hereinafter referred to as the Joint Committee), is hereby established which shall be responsible for the administration of this Agreement and shall ensure

its proper implementation. For this purpose it shall make recommendations and take decisions in the cases provided for in this Agreement. The decisions of the Joint Committee shall be put into effect by the Contracting Parties in accordance with their own rules. The Joint Committee shall act by mutual agreement.

2. For the purpose of the proper implementation of this Agreement, the Contracting Parties shall exchange information and, at the request of either Contracting Party, shall hold consultations within the Joint Committee.

3. The Joint Committee shall adopt, by a decision, its rules of procedure which shall include, among other provisions, the procedures for convening meetings, appointing the Chairman and laying down the latter's terms of reference.
4. The Joint Committee shall meet as and when necessary, and at least once a year. Either Contracting Party may request the convening of a meeting.
5. The Joint Committee may decide to set up any working party that can assist it in carrying out its duties.

Article 22

1. A decision of the Joint Committee shall be binding upon the Contracting Parties.
2. If, in the view of one of the Contracting Parties, a decision of the Joint Committee is not properly implemented by the other Contracting Party, the former may request that the issue be discussed by the Joint Committee. If the Joint Committee cannot solve the issue within two months of its referral, that Contracting Party may take appropriate temporary safeguard measures under Article 31 for a period not exceeding 6 months.
3. The decisions of the Joint Committee shall be published in the *Official Journal of the European Communities* and the Official Compendium of Swiss Federal Law. Each decision shall state the date of its implementation in the Contracting Parties and any other information likely to concern economic operators. The decisions shall be submitted if necessary for ratification or approval by the Contracting Parties in accordance with their own procedures.
4. The Contracting Parties shall notify each other of the completion of this formality. If upon the expiry of a period of twelve months after adoption of a decision by the Joint Committee such notification has not taken place, paragraph 5 shall apply *mutatis mutandis*.
5. Without prejudice to paragraph 2, if the Joint Committee does not take a decision on an issue which has been referred to it within six months of the date of referral, the Contracting Parties may take appropriate temporary safeguard measures under Article 31 for a period not exceeding six months.
6. As regards legislation covered by Article 23 which has been adopted between the signature of this Agreement and its entry into force and of which the other Contracting Party has been informed, the date of referral in paragraph 5 shall be taken as the date on which the information was received. The date on which the Joint Committee shall reach a decision may not be earlier than two months after the date of entry into force of this Agreement.

CHAPTER 6 NEW LEGISLATION

Article 23

1. The Agreement shall be without prejudice to the right of each Contracting Party, subject to compliance with the principle of non-discrimination and the provisions of this Agreement, to amend unilaterally its legislation on a point regulated by this Agreement.
2. As soon as new legislation is being drawn up by one of the Contracting Parties, it shall informally seek advice from experts of the other Contracting Party. During the period preceding the formal adoption of new legislation, the Contracting Parties shall inform and consult each other as closely as possible. At the request of one of the Contracting Parties, a preliminary exchange of views may take place in the Joint Committee.
3. As soon as a Contracting Party has adopted an amendment of its legislation, it shall inform the other Contracting Party at the latest eight days after the publication in the *Official Journal of the European Communities* or the Official Compendium of Swiss Federal Law. Upon request of one Contracting Party, the Joint Committee shall hold an exchange of views on the implications of such an amendment for the proper functioning of this Agreement within six weeks after the request at the latest.
4. The Joint Committee shall:
 - either adopt a decision revising the Annex or, if necessary, propose a revision of the provisions of this Agreement, so as to integrate therein, if necessary on a basis of reciprocity, the amendments made to the legislation in question;
 - or adopt a decision to the effect that the amendments to the legislation in question shall be regarded as being in accordance with the proper functioning of this Agreement;
 - or decide any other measure to safeguard the proper functioning of this Agreement.

CHAPTER 7 THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS

Article 24

The Contracting Parties shall consult with each other in due time at the request of either Contracting Party, in accordance with the procedures laid down in Articles 25, 26 and 27:

- (a) on air transport questions dealt with in international organisations; and
- (b) on the various aspects of possible developments in relations between Contracting Parties and third countries in air transport, and on the functioning of the significant elements of bilateral or multilateral agreements concluded in this field.

The consultations shall be held within one month of the request or as soon as possible in urgent cases.

Article 25

1. The main aims of the consultations provided for in Article 24(a) shall be:
 - (a) to determine jointly whether the questions raise problems of common interest; and
 - (b) depending upon the nature of such problems:
 - to consider jointly whether Contracting Parties' action within the international organisations concerned should be coordinated, or
 - to consider jointly any other approach which might be appropriate.
2. The Contracting Parties shall as soon as possible exchange any information of relevance to the aims described in paragraph 1.

Article 26

1. The main aims of the consultations provided for in Article 24(b) shall be to examine the relevant issues and to consider any approach which might be appropriate.
2. For the purpose of the consultations referred to in paragraph 1, each Contracting Party shall inform the other Contracting Party of possible developments in the field of air transport and of the operation of bilateral or multilateral agreements concluded in that field.

Article 27

1. The consultations provided for in Articles 24, 25 and 26 shall take place within the framework of the Joint Committee.
2. If an agreement between one of the Contracting Parties and a third country or an international organisation were to affect negatively the interests of the other Contracting Party, the latter, notwithstanding the provisions of Council Regulation (EEC) No 2408/92, as included in the Annex to this Agreement, may take appropriate temporary safeguard measures in the field of market access in order to maintain the balance of this Agreement. Such measures may, however, be adopted only after consultations on this issue have taken place within the Joint Committee.

CHAPTER 8 FINAL PROVISIONS

Article 28

The representatives, experts and other servants of the Contracting Parties shall be required, even after their duties have ceased, not to disclose information, obtained in the framework of this Agreement, which is covered by the obligation of professional secrecy.

Article 29

Each Contracting Party may bring a matter under dispute which concerns the interpretation or application of this Agreement before the Joint Committee. The latter shall endeavour to settle the dispute. The Joint Committee shall be provided with all information which might be of use in making possible an in-depth examination of the situation, with a view to finding an acceptable solution. To this end, the Joint Committee shall examine all possibilities of maintaining the good functioning of this Agreement. The provisions of this Article shall not apply to questions which are within the exclusive competence of the Court of Justice of the European Communities under Article 20.

Article 30

1. If one of the Contracting Parties wishes to revise the provisions of this Agreement, it shall notify the Joint Committee accordingly. The amendment to this Agreement shall enter into force after completion of the respective internal procedures.
2. The Joint Committee may, upon the proposal of one Contracting Party and in accordance with Article 23, decide to modify the Annex.

Article 31

If one Contracting Party refuses to comply with any obligation under this Agreement, the other Contracting Party may, without prejudice to Article 22 and after having completed any other applicable procedure provided for in this Agreement, take appropriate temporary safeguard measures in order to maintain the balance of this Agreement.

Article 32

The Annex to this Agreement shall form an integral part thereof.

Article 33

Without prejudice to Article 16, this Agreement shall supersede the relevant provisions of bilateral arrangements in force between Switzerland on the one hand and EC Member States on the other hand concerning any matter covered by this Agreement and the Annex thereof.

Article 34

This Agreement shall apply, on the one hand to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty and, on the other, to the territory of Switzerland.

Article 35

1. In the event of termination of this Agreement, under the provisions of Article 36(4), air services operated at the date of conformist expiry under the provisions of Article 15

may continue until the end of the scheduling season into which that date of expiry falls.

2. The rights and obligations acquired by undertakings by virtue of Articles 4 and 5 of this Agreement and of the rules of Council Regulation (EEC) No 2407/92 as included in the Annex to this Agreement, shall not be affected by the termination of this Agreement under the provisions of Article 36(4).

Article 36

1. This Agreement shall be ratified or approved by the Contracting Parties in accordance with their own procedures. It shall enter into force on the first day of the second month following the final notification of the deposit of the instruments of ratification or approval of all the following seven agreements:

- agreement on air transport,
- agreement on the free movement of persons,
- agreement on the carriage of goods and passengers by rail and road,
- agreement on trade in agricultural products,
- agreement on certain aspects of government procurement,
- agreement on mutual recognition in relation to its assessment,
- agreement on scientific and technological cooperation.

2. This Agreement shall be concluded for an initial period of seven years. It shall be renewed indefinitely unless the Community or Switzerland notifies the other Contracting Party to the contrary before the initial period expires. Where such notification is given, paragraph 4 shall apply.

3. The Community or Switzerland may terminate this Agreement by notifying its decision to the other Contracting Party. Where such notification is given, paragraph 4 shall apply.

4. The seven agreements referred to in paragraph 1 shall cease to be applicable six months after receipt of the notification of non-renewal, as referred to in paragraph 2, or of termination, as referred to in paragraph 3.

ANNEX

For the purposes of this Agreement:

- wherever acts specified in this Annex contain references to Member States of the European Community, or a requirement for a link with the latter, the references shall, for the purpose of the Agreement, be understood to apply equally to Switzerland or to the requirement of a link with Switzerland;
- without prejudice to Article 15 of this Agreement, the term ‘Community air carrier’ referred to in the following Community directives and regulations shall include an

air carrier which is licensed and has its principal place of business and, if any, its registered office in Switzerland according to the provisions of Council Regulation (EEC) No 2407/92.

1. Third aviation package of liberalisation and other civil aviation rules

No 2407/92

Council Regulation of 23 July 1992 on licensing of air carriers.

(Articles 1-18)

(As regards the application of Article 13(3), the reference to Article 169 of the EC Treaty shall be understood to mean a reference to the applicable procedures of this Agreement)

No 2408/92

Council Regulation of 23 July 1992 on access for Community air carriers to intra-Community air routes.

(Articles 1-10, 12-15)

(The annexes shall be amended in order to include Swiss airports)

No 2409/92

Council Regulation of 23 July 1992 on fares and rates for air services.

(Articles 1-11)

No 295/91

Council Regulation of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport.

(Articles 1-9)

No 2299/89

Council Regulation of 24 July 1989 introducing a code of conduct for computer reservation systems, as amended by Council Regulation (EEC) No 3089/93.

(Articles 1-22)

L 114/82 EN 30.4.2002 Official Journal of the European Communities

No 3089/93

Council Regulation of 29 October 1993 amending Regulation (EEC) No 2299/89 on a code of conduct for computerised reservation systems.

(Article 1)

80/51

Council Directive of 20 December 1979 on the limitation of noise emissions from subsonic aircraft, as amended by Directive 83/206/EEC.

(Articles 1-9)

89/629

Council Directive of 4 December 1989 on the limitation of noise emissions from civil subsonic jet aeroplanes.

(Articles 1-8)

92/14

Council Directive of 2 March 1992 on the limitation of the operation of aeroplanes covered by Part III, Chapter 2, Volume I of Annex 16 to the Convention of International Civil Aviation, second edition (1988).

(Articles 1-11)

91/670

Council Directive of 16 December 1991 on mutual acceptance of personnel licences for the exercise of functions in civil aviation.

(Articles 1-8)

No 95/93

Council Regulation of 18 January 1993 on common rules for the allocation of slots at Community airports.

(Articles 1-12)

96/67

Council Directive of 15 October 1996 on access to the groundhandling market at Community airports.

(Articles 1-9, 11-23, 25)

No 2027/97

Council Regulation of 9 October 1997 on air carrier liability in the event of accidents.

(Articles 1-8)

No 323/1999

Council Regulation of 8 February 1999 amending Regulation (EEC) No 2229/89 on a code of conduct for computer reservation systems (CRSs).

(Articles 1 and 2)

2. Competition rules

Any reference in the following texts to Articles 81 and 82 of the Treaty shall be understood to mean Articles 8 and 9 of this Agreement.

No 17/62

Council Regulation of 6 February 1962 implementing Articles 81 and 82 of the Treaty, as amended by Regulation No 59, by Regulation No 118/63/EEC and by Regulation (EEC) No 2822/71.

(Articles 1-9, 10(1)-(2), 11-14, 15(1), 15(2), 15(4)-(6), 16(1)-(2), 17-24)

No 141/62

Council Regulation of 26 November 1962 exempting transport from the application of Regulation No 17, as amended by Regulations Nos 165/65/EEC and 1002/67/EEC.

(Articles 1-3)

No 3385/94

Commission Regulation of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17.

(Articles 1-5)

No 99/63

Commission Regulation of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17.

(Articles 1-11)

No 2988/74

Council Regulation of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the EEC relating to transport and competition.

(Articles 1-7)

No 3975/87

Council Regulation of 14 December 1987 laying down the procedures for the application of the rules on competition to undertakings in the air transport sector, as amended by Regulations (EEC) No 1284/91 and (EEC) No 2410/92 (see below).

(Articles 1-7, 8(1), 8(2), 9-11, 12(1), 12(2), 12(4), 12(5), 13(1), 13(2), 14-19)

No 1284/91

Council Regulation of 14 May 1991 amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector.

(Article 1)

No 2410/92

Council Regulation of 23 July 1992 amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector.

(Article 1)

No 3976/87

Council Regulation of 14 December 1987 on the application of Article 81(3) of the Treaty to certain categories of agreement and concerted practices in the air transport sector, as amended by Regulations (EEC) No 2344/90 and (EEC) No 2411/92 (see below).

(Articles 1-5, 7)

No 2344/90

Council Regulation of 24 July 1990 amending Regulation (EEC) No 3976/87 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

(Article 1)

No 2411/92

Council Regulation of 23 July 1992 amending Regulation (EEC) No 3976/87 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.

(Article 1)

No 3652/93(1)

Commission Regulation of 22 December 1993 on the application of Article 81(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services.

(Articles 1-15)

No 1617/93(2)

Commission Regulation of 25 June 1993 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports.

(Articles 1-7)

No 1523/96

Commission Regulation of 24 July 1996 amending Regulation (EEC) No 1617/93 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports.

(Articles 1, 2)

No 4261/88

Commission Regulation of 16 December 1988 on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87.

(Articles 1-14)

No 4064/89

Council Regulation of 21 December 1989 on the control of concentrations between undertakings.

(Articles 1-8, 9(1)-(8), 10-18, 19(1)-(2), 20-23)

No 1310/97

Council Regulation of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

(Articles 1, 2)

No 3384/94

Commission Regulation of 21 December 1994 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

(Articles 1-23)

80/723

Commission Directive of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, as amended by Directive 85/413/EEC of 24 July 1985.

(Articles 1-9)

85/413

Commission Directive of 24 July 1985 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.

(Articles 1-3)

3. Technical Harmonisation

No 3922/91

Council Regulation of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation.

(Articles 1-3, 4(2), 5-11, 13)

93/65

Council Directive on the definition and the use of compatible technical and operating specifications for the procurement of air traffic management equipment and systems.

(Articles 1-5, 7-10)

(The Annex should be adapted to include Swisscontrol and any other Swiss organisation covered by Article 5)

97/15

Commission Directive of 25 March 1997 adopting Eurocontrol standards and amending Council Directive 93/65/EEC on the definition and use of compatible technical specifications for the procurement of air-traffic management equipment and systems. (Articles 1-4, 6)

4. Air Safety

94/56

Council Directive of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents. (Articles 1-13)

5. Others

90/314

Council Directive of 13 June 1990 on package travel, package holidays and package tours.

(Articles 1-10)

93/13

Council Directive of 5 April 1993 on unfair terms in consumer contracts. (Articles 1-11)

JOINT DECLARATION ON FURTHER NEGOTIATIONS

The European Community and the Swiss Confederation declare their intention of undertaking negotiations to conclude agreements in areas of common interest such as the updating of Protocol 2 to the 1972 Free Trade Agreement and Swiss participation in certain Community training, youth, media, statistical and environmental programmes. Preparatory work for these negotiations should proceed rapidly once the current bilateral negotiations have been concluded.

DECLARATION ON SWISS ATTENDANCE OF COMMITTEES

The Council agrees that Switzerland's representatives may, insofar as the items concern them, attend meetings of the following committees and expert working parties as observers:

- Committees of research programmes, including the Scientific and Technical Research Committee (CREST)
- Administrative Commission on Social Security for Migrant Workers
- Coordinating Group on the mutual recognition of higher-education diplomas
- Advisory committees on air routes and the application of competition rules in the field of air transport.

Switzerland's representatives shall not be present when these committees vote.

In the case of other committees dealing with areas covered by these agreements in which Switzerland has adopted either the *acquis communautaire* or equivalent measures, the Commission will consult Swiss experts by the method specified in Article 100 of the EEA Agreement.

DECLARATION BY SWITZERLAND

on a Possible Amendment to the Statute of the Court of Justice of the European Communities

The Swiss Government indicates its expectation that, if the Statute and Rules of Procedure of the Court of Justice of the European Communities were to be amended in order to permit lawyers entitled to plead before the courts of States parties to a similar agreement as the present to plead before the Court of Justice of the European Communities, such amendment would also include the possibility for Swiss lawyers practising before the Swiss courts to plead before the Court of Justice of the European Communities in relation to the questions referred to that Court pursuant to this Agreement.

Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products.

The final notification of completion of the procedures necessary for the entry into force of the seven Agreements in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products between the European Community and its Member States, on the one hand, and the Swiss Confederation on the other hand, signed in Luxembourg on 21 June 1999, having taken place on 17 April 2002, these agreements will enter into force, simultaneously, on 1 June 2002.

Tunisia

EURO-MEDITERRANEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF TUNISIA, OF THE OTHER PART

SIGNED ON THE BASIS OF THE DECISION OF THE COUNCIL AND THE COMMISSION OF 26 JANUARY 1998 (98/238/EC, ECSC)¹⁴⁵

[...]

**CHAPTER II
COMPETITION AND OTHER ECONOMIC PROVISIONS**

Article 36

1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and Tunisia:

- (a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (b) abuse by one or more undertakings of a dominant position in the territories of the Community or of Tunisia as a whole or in a substantial part thereof;
- (c) any official aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, with the exception of cases in which a derogation is allowed under the Treaty establishing the European Coal and Steel Community.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and, in the case of products falling within the scope of the European Coal and Steel Community, the rules of Articles 65 and 66 of the Treaty establishing that Community, and the rules relating to state aid, including secondary legislation.

3. The Association Council shall, within five years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.

Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade shall be applied as the rules for the implementation of paragraph 1(c) and related parts of paragraph 2.

145 OJ L 97, 30.3.1998, p. 1.

4. (a) For the purposes of applying the provisions of paragraph 1(c), the Parties recognize that during the first five years after the entry into force of this Agreement, any State aid granted by Tunisia shall be assessed taking into account the fact that Tunisia shall be regarded as an area identical to those areas of the Community described in Article 92(3)(a) of the Treaty establishing the European Community.

During the same period of time, Tunisia may exceptionally, as regards ECSC steel products, grant State aid for restructuring purposes provided that:

- it leads to the viability of the recipient firms under normal market conditions at the end of the restructuring period,
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced,
- the restructuring programme is linked to a comprehensive plan for rationalising capacity in Tunisia.

The Association Council shall, taking into account the economic situation of Tunisia, decide whether the period should be extended every five years.

(b) Each Party shall ensure transparency in the area of official aid, *inter alia* by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of official aid.

5. With regard to products referred to in Chapter II of Title II:

- the provisions of paragraph 1(c) do not apply,
- any practices contrary to paragraph 1(a) shall be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community, and in particular those established in Council Regulation No 26/62.

6. If the Community or Tunisia considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee.

In the case of practices incompatible with paragraph 1(c) of this Article, such appropriate measures may, where the General Agreement on Tariffs and Trade applies thereto, only be adopted in accordance with the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which is applicable between the Parties.

7. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 37

The Member States and Tunisia shall progressively adjust, without affecting commitments made under the GATT, any state monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Tunisia. The Association Committee will be informed about the measures adopted to implement this objective.

Article 38

With regard to public enterprises and enterprises which have been granted special or exclusive rights, the Association Council shall ensure, from the fifth year following the entry into force of the Agreement, that no measures which disturbs trade between the Community and Tunisia in a manner which runs counter to the interests of the Parties is adopted or maintained. This provision shall not impede the performance in fact or in law of the specific functions assigned to those enterprises.

Ukraine

PARTNERSHIP AND COOPERATION AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND UKRAINE, OF THE OTHER PART

SIGNED ON THE BASIS OF THE COUNCIL AND COMMISSION DECISION OF 26 JANUARY 1998 (98/149/EC, ECSC, EURATOM)¹⁴⁶

[...]

**TITLE VI
COMPETITION, INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY PROTECTION AND LEGISLATIVE COOPERATION**

Article 49

1. The Parties agree to work to remedy or remove through the application of their competition laws or otherwise, restrictions on competition by enterprises or caused by State intervention in so far as they may affect trade between the Community and the Ukraine.

2. In order to attain the objectives mentioned in paragraph 1:

2.1. The Parties shall ensure that they have and enforce laws addressing restrictions on competition by enterprises within their jurisdiction.

2.2. The Parties shall refrain from granting State aid favouring certain undertakings or the production of goods other than primary products as defined in the GATT, or the provision of services, which distort or threaten to distort competition in so far as they affect trade between the Community and Ukraine.

2.3. Upon request by one Party, the other Party shall provide information on its aid schemes or on particular individual cases of State aid. No information needs to be provided which is covered by legislative requirements of the Parties on professional or commercial secrets.

2.4. In the case of State monopolies of a commercial character, the Parties declare their readiness, as from the fourth year from the date of entry into force of this Agreement, to ensure that there is no discrimination between nationals of the Parties regarding the conditions under which goods are procured or marketed.

2.5. In the case of public undertakings or undertakings to which Member States or Ukraine grant exclusive rights, the Parties declare their readiness, as from the fourth year from the date of entry into force of this Agreement, to ensure that there is neither enacted nor maintained any measure distorting trade between the Community and

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OJ L 49, 19.2.1998, p. 1.

Ukraine to an extent contrary to the Parties' respective interests. This provision shall not obstruct the performance, in law or fact, of the particular tasks assigned to such undertakings.

2.6. The period defined in paragraphs 2.4 and 2.5 may be extended by agreement of the Parties.

3. Consultations may take place within the Cooperation Committee at the request of the Community or Ukraine on the restrictions or distortions of competition referred to in paragraphs 1 and 2 and on the enforcement of their competition rules, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy. Consultations may also comprise questions on the interpretation of paragraphs 1 and 2.

4. The Parties with experience in applying competition rules shall give full consideration to providing other Parties, upon request and within available resources, technical assistance for the development and implementation of competition rules.

5. The above provisions in no way affect the Parties' rights to apply adequate measures, notably those referred to in Article 19, in order to address distortions of trade in goods or services.

[...]

Article 51

1. The Parties recognize that an important condition for strengthening the economic links between Ukraine and the Community is the approximation of Ukraine's existing and future legislation to that of the Community. Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

2. The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.

3. The Community shall provide Ukraine with technical assistance as appropriate for the implementation of these measures which may include in particular:

- the exchange of experts,
- the provision of early information especially on relevant legislation,
- organization of seminars,
- training activities,
- aid for translation of Community legislation in the relevant sectors.

**EURO-MEDITERRANEAN INTERIM ASSOCIATION AGREEMENT
ON TRADE AND COOPERATION BETWEEN THE EUROPEAN
COMMUNITY, OF THE ONE PART, AND THE PALESTINE
LIBERATION ORGANISATION (PLO) FOR THE BENEFIT OF THE
PALESTINIAN AUTHORITY OF THE WEST BANK AND THE GAZA
STRIP, OF THE OTHER PART**

**SIGNED ON THE BASIS OF THE COUNCIL DECISION OF
2 JUNE 1997 (97/430/EC)¹⁴⁷**

[...]

**TITLE II
PAYMENTS, CAPITAL, COMPETITION, INTELLECTUAL PROPERTY
AND PUBLIC PROCUREMENT**

[...]

**CHAPTER 2
COMPETITION, INTELLECTUAL PROPERTY AND PUBLIC PROCUREMENT**

Article 30

1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and the Palestinian Authority:
 - (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
 - (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or the West Bank and the Gaza Strip as a whole or in a substantial part thereof;
 - (iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.
2. The Parties shall, as appropriate, assess any practice contrary to this Article on the basis of the criteria resulting from the application of Community competition rules.
3. The Joint Committee shall, before 31 December 2001, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2.

147 OJ L 187, 16.7.1997, p. 1

Until these rules are adopted, the provisions of the Agreement on Subsidies and Countervailing Measures shall be applied as the rules for the implementation of paragraph 1 (iii) and the relevant parts of paragraph 2.

4. As regards the implementation of paragraph 1 (iii), the Parties recognize that the Palestinian Authority may wish to use, during the period until 31 December 2001, public aid to undertakings as an instrument to tackle its specific development problems.

5. Each Party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of public aid.

6. With regard to products referred to in Title I, Chapter 2:

- paragraph 1 (iii) does not apply,
- any practices contrary to paragraph 1 (i) shall be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community and in particular those established in Council Regulation No 26/62.

7. If the Community or the Palestinian Authority considers that a particular practice is incompatible with the terms of paragraph 1 of this Article, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Joint Committee or after 30 working days following referral for such consultation.

With reference to practices incompatible with paragraph 1 (iii) of this Article, such appropriate measures, when the GATT is applicable to them, may only be adopted in accordance with the procedures and under the conditions laid down by GATT or by any other relevant instrument negotiated under its auspices and applicable between the Parties.

8. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 31

The Member States and the Palestinian Authority shall progressively adjust, without prejudice to their commitments to the GATT where appropriate, any State monopolies of a commercial character, so as to ensure that, by 31 December 2001, no discrimination regarding the conditions under which goods are procured and marketed exists between

nationals of the Member States and the Palestinian people of the West Bank and Gaza Strip. The Joint Committee will be informed about the measures adopted to implement this objective.

Article 32

With regard to public enterprises and enterprises to which special or exclusive rights have been granted, the Joint Committee shall ensure that by 31 December 2001 there is neither enacted nor maintained any measure distorting trade between the Community and the Palestinian Authority contrary to the Parties' interests. This provision should not obstruct the performance in law or in fact of the particular tasks assigned to those undertakings.

V – Multilateral texts

**ORGANISATION FOR ECONOMIC COOPERATION
AND DEVELOPMENT (OECD)**

**RECOMMENDATION OF THE COUNCIL CONCERNING COOPERATION
BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES
AFFECTING INTERNATIONAL TRADE**

27 JULY 1995–C(95)130/FINAL

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the fact that international co-operation among OECD countries in the control of anticompetitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5th October 1967 [C(567)53(Final)], 3rd July 1973 [C(73)99(Final)], 25th September 1979 [C(79)154(Final)] and 21st May 1986 [C(86)44(Final)];

Having regard to the recommendations made in the study of transnational mergers and merger control procedures prepared for the Committee on Competition Law and Policy;

Recognising that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

Recognising that the continued growth in internationalisation of business activities correspondingly increases the likelihood that anticompetitive practices in one country or co-ordinated behaviour of firms located in different countries may adversely affect the interests of Member countries and also increases the number of transnational mergers that are subject to the merger control laws of more than one Member country;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices;

Recognising that anticompetitive practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anti-competitive practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with anticompetitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise;

Recognising the desirability of setting forth procedures by which the Competition Law and Policy Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to anticompetitive practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles:

I. RECOMMENDS to Governments of Member countries that insofar as their laws permit:

A. Notification, exchange of information and coordination of action

1. When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices;

2. Where two or more Member countries proceed against an anticompetitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

3. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anti-competitive practices in international trade. In this connection, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, in-

cluding those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

B. Consultation and conciliation

4. a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding;

5. a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned;

b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

c) The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests;

6. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 4 and 5 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

7. In the event of a satisfactory conclusion to the consultations under paragraphs 4 and 5 above, the requesting country, in agreement with, and in the form accepted by the Member country or countries addressed, should inform the Competition Law and Policy Committee of the nature of the anticompetitive practices in question and of the settlement reached;

8. In the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. INSTRUCTS the Competition Law and Policy Committee:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

2. To consider the reports submitted by Member countries in accordance with paragraph 7 of Section I above;

3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 8 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;

4. To report to the Council as appropriate on the application of the present Recommendation.

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 21st May 1986 [C(86)44(Final)].

APPENDIX

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, COOPERATION IN INVESTIGATIONS AND PROCEEDINGS, CONSULTATIONS AND CONCILIATION OF ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws. It is recognised that implementation of the Recommendation herein is fully subject to the national laws of Member countries, as well as in all cases to the judgement of national authorities that co-operation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.

Definitions

2. a) "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of a Member country pursuant to the competition laws of that country. Excluded, however, are (i) the review of business conduct or routine filings, in advance of a formal or informal determination that the matter may be anticompetitive, or (ii) research, studies or surveys the objective of which is to examine the general economic situation or general conditions in specific industries.

b) "Merger" means merger, acquisition, joint venture and any other form of business amalgamation that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

Notification

3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:

a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for notifying

4.a) Under the Recommendation notification ordinarily should be provided at the first stage in an investigation or proceeding when it becomes evident that notifiable circumstances described in paragraph 3 are present. However there may be cases where notification at that stage could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and

in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Competition Law and Policy Committee.

c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned, and, if applicable, the need to seek information from the territory of another Member country. In the case of an investigation or proceeding involving a merger, notification should also include:

- i) the fact of initiation of an investigation or proceeding;
- ii) the fact of termination of the investigation or proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties;
- iii) a description of the issues of interest to the notifying Member country, such as the relevant markets affected, jurisdictional issues or remedial concerns;
- iv) a statement of the time period within which the notifying Member country either must act or is planning to act.

Coordination of Investigations

5. The co-ordination of concurrent investigations, as recommended in paragraph I.A.2. of the Recommendation, should be undertaken on a case-by-case basis, where the relevant Member countries agree that it would be in their interests to do so. This co-ordination process shall not, however, affect each Member country's right to take a decision independently based on the investigation. Co-ordination might include any of the following steps, consistent with the national laws of the countries involved:

- a) providing notice of applicable time periods and schedules for decision-making;
- b) sharing factual and analytical information and material, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10;
- c) requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the co-operating countries to share some or all of the information in their possession, to the extent permitted by national laws;
- d) co-ordinating discussions or negotiations regarding remedial actions, particularly when such remedies could require conduct or behaviour in the territory of more than one Member country;

e) in those Member countries in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or to be made to other countries.

Assistance in an investigation or proceeding of a Member country

6. Cooperation among Member countries by means of supplying information on anti-competitive practices in response to a request from a Member country, as recommended in paragraph I.A.3. of the Recommendation, should be undertaken on a case-by-case basis, where it would be in the interests of the relevant Member countries to do so. Cooperation might include any of the following steps, consistent with the national laws of the countries involved:

- a) assisting in obtaining information on a voluntary basis from within the assisting Member's country;
- b) providing factual and analytical material from its files, subject to national laws governing confidentiality of information and the principles relating to confidential information set forth in paragraph 10;
- c) employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority;
- d) providing information in the public domain relating to the relevant conduct or practice. To facilitate the exchange of such information, Member countries should consider collecting and maintaining data about the nature and sources of such public information to which other Member countries could refer.

7. When a Member country learns of an anticompetitive practice occurring in the territory of another Member country that could violate the laws of the latter, the former should consider informing the latter and providing as much information as practicable, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10, consistent with other applicable national laws and its national interests.

8.a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

c) Any requests for information located abroad should be framed in terms that are as specific as possible.

9. The provision of assistance or co-operation between Member countries may be subject to consultations regarding the sharing of costs of these activities.

Confidentiality

10. The exchange of information under this Recommendation is subject to the laws of participating Member countries governing the confidentiality of information. A Member country may specify the protection that shall be accorded the information to be provided and any limitations that may apply to the use of such information. The requested Member country would be justified in declining to supply information if the requesting Member country is unable to observe those requests. A receiving Member country should take all reasonable steps to ensure observance of the confidentiality and use limitations specified by the sending Member country, and if a breach of confidentiality or use limitation occurs, should notify the sending Member country of the breach and take appropriate steps to remedy the effects of the breach.

Consultations between Member countries

11. a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

b) Requests for consultation under paragraphs I.B.4. and I.B.5. of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.

c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

12. a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph I.B.8. of the Recommendation, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.

b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)

RECOMMENDATION OF THE COUNCIL ON MERGER REVIEW 23 MARCH 2005–C(2005)34

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the Council's Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL], which recommended that, when permitted by their laws and interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other's requests to share information;

Having regard to the suggestions in the study of transnational mergers and merger procedures prepared for the Committee on Competition Law and Policy [Merger Cases in the Real World, A Study of Merger Control Cases (OECD 1994)] and to the Committee's work related to merger review procedures, including the Report on Notification of Transnational Mergers [DAFFE/CLP(99)2/FINAL];

Recognising that the continued growth in internationalisation of business activities, and the increasing number of jurisdictions which have adopted merger laws, correspondingly increase the number of mergers that are subject to review under merger laws in more than one jurisdiction; Recognising that reviews of transnational mergers can impose substantial cost on competition authorities and merging parties, and that it is important to address these costs without limiting the effectiveness of national merger laws;

Recognising that cooperation and coordination among competition authorities with respect to mergers of common concern can enhance the efficiency and effectiveness of the review process, help achieve consistent, or at least non-conflicting, outcomes, and reduce transaction costs;

Recognising the benefits that can result from the ability of competition authorities to share confidential information with foreign competition authorities with respect to mergers of common concern, and considering that most competition authorities may not be authorised by law or international agreement to share confidential information with foreign competition authorities in merger review proceedings, and therefore may do so only if the parties voluntarily waive their confidentiality rights;

Recognising that confidential information must be protected against improper disclosure or use if competition authorities share such information;

Recognising the important work by other entities in the area of merger notification and procedures, in particular that of the International Competition Network;

Recognising that Member countries are sovereign with respect to the application of their own laws to mergers;

I. RECOMMENDS as follows to Governments of Member countries:

A. Notification and Review Procedures

1. Merger review should be effective, efficient, and timely.

1). Member countries should ensure that the review process enables competition authorities to obtain sufficient information to assess the competitive effects of a merger.

2). Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties. In this respect, Member countries should in particular:

- assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;
- use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review;
- set reasonable information requirements consistent with effective merger review;
- provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance; and
- provide, without compromising effective and timely review, merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger.

3). The review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame.

2. Member countries should ensure that the rules, policies, practices and procedures involved in the merger review process are transparent and publicly available, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger.

3. Merger laws should ensure procedural fairness for merging parties, including the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such review of adverse enforcement decisions should be completed within reasonable time periods.

4. Merging parties should be given the opportunity to consult with competition authorities at key stages of the investigation with respect to any significant legal or practical issues that may arise during the course of the investigation.

5. Third parties with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to express their views during the merger review process.
6. Merger laws should treat foreign firms no less favourably than domestic firms in like circumstances.
7. The merger review process should provide for the protection of business secrets and other information treated as confidential under the laws of the reviewing jurisdiction that competition authorities obtain from any source and at any stage of the review process.

B. Coordination and Cooperation

1. Member countries should, without compromising effective enforcement of domestic laws, seek to cooperate and to coordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.
2. Member countries are encouraged to facilitate effective cooperation and coordination of merger reviews, and to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to cooperation and coordination.
3. Member countries should encourage merging parties to facilitate coordination among competition authorities, in particular with respect to the timing of notifications and provision of voluntary waivers of confidentiality rights, without drawing any negative inferences from a party's decision not to do so.
4. Member countries should establish safeguards concerning the treatment of confidential information obtained from another competition authority.

C. Resources and Powers of Competition Authorities

Member countries should ensure that competition authorities have sufficient powers to conduct efficient and effective merger review, and to effectively cooperate and coordinate with other competition authorities in the review of transnational mergers. They should be cognisant that competition authorities need sufficient resources to fulfil these tasks.

D. Periodic Review

Member countries should review their merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.

E. Definitions

For purposes of this Recommendation:

Competition authority means a government authority or agency charged in general with the review of mergers under the merger laws of a Member country. Competition authority does not include a government authority that is responsible for the review of mergers only in a specific industry sector.

Merger means a merger, acquisition, joint venture, or any other form of business amalgamation, combination or transaction that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

Merger laws means the competition laws of a Member country applied by competition authorities in the review of mergers, and the procedural rules governing such reviews.

Transnational merger means a merger that is subject to review under the merger laws of more than one jurisdiction.

II. INSTRUCTS the Competition Committee:

1. to explore further means to enhance the effectiveness of merger review, reduce the costs of reviewing transnational mergers, and strengthen coordination and cooperation among agencies, including by coordinating with other international organisations addressing these issues;
2. to periodically review the experiences under this Recommendation of Member countries and of non-member economies that have associated themselves with this Recommendation; and
3. to report to the Council as appropriate on any further action needed to improve merger laws, to achieve greater convergence towards recognised best practices, and to strengthen cooperation and coordination in the review of transnational mergers.

III. INVITES non-member economies to associate themselves with this Recommendation and to implement it.

BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS

October 2005

1. These Best Practices for the formal exchange of information¹⁴⁸ between competition authorities in hard core cartel investigations¹⁴⁹ (“Best Practices”) have been developed under the sole responsibility of the OECD’s Competition Committee.
2. The OECD gives high priority to effective competition law enforcement, particularly against hard core cartels¹⁵⁰. This has been recognised in recent acts by the OECD Council, which also encouraged member countries to cooperate in their law enforcement activities:
 - The Council’s Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL] recommended that, when permitted by their laws and consistent with their interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other’s requests to share information.
 - Furthermore the Council’s Recommendation Concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL] recognised that member countries’ mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.
 - The latter Recommendation also encouraged member countries to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

148 Throughout this document “exchanging information” and “providing information” are meant to refer to situations in which one competition authority shares information with, or otherwise makes information available to, another competition authority, including reciprocal exchanges of information between two competition authorities and the provision of information which one competition authority has obtained at the request of another competition authority.

149 Throughout this document “investigation of a hard core cartel” is meant to include all steps related to the enforcement of competition laws against hard core cartels.

150 Throughout this document “hard core cartel” is meant to refer to hard core cartels as defined in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

3. The Best Practices are based on these two Council Recommendations and draw from the Committee's previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations.¹⁵¹

4. Consistent with these Council Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Committee believes that member countries should generally support information exchanges and should, in accordance with their laws, seek to simplify and expedite the process for exchanging information in order to avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.

5. The Competition Committee also recognises that:

- a member country may decline to comply with a request for information, or limit or condition its co-operation;
- the exchanging of confidential information presupposes effective safeguards (i) to protect against improper disclosure or use of exchanged information; and (ii) for privileged information, in particular information subject to the legal profession privilege, as well as for other rights under the laws of member countries involved in the exchange of information, which may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions;
- information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programs, and that, to that end, most member countries have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission;
- member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases;
- regional organisations and regional agreements may imply a very close cooperation which requires less safeguards than set out in these Best Practices.

6. Based on the above, the Competition Committee believes that member countries should take note of the following Best Practices when they enter into international agreements, or adopt domestic legislation, authorising the exchange of confidential information in investigations of hard core cartels under their competition laws, and in their policies and practices applicable to such exchanges:

151 The Committee's previous work on the subject of information exchanges in hard core cartel investigations has been documented in reports by the Committee to the Council on the implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Committee also held roundtable discussions on various issues related to cooperation and information exchanges in hard core cartel investigations. Representatives of the business community contributed to the Committee's discussions, and their views have been taken into account in developing these Best Practices.

I. Information Exchanges Covered by These Best Practices

A. These Best Practices apply to situations where (i) for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides information obtained from private sources to a competition authority in another jurisdiction; (ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic law. International agreements and domestic laws authorising such disclosure, as well as policies and practices of competition authorities applicable to such exchanges, should provide for the safeguards identified in these Best Practices.

B. The Best Practices should apply to exchanges of information that has been obtained on behalf of a foreign competition authority following a request for assistance as well as information already in the possession of the requested jurisdiction.

C. These Best Practices do not apply to:

- (i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;
- (ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and
- (iii) Information exchanges in the context of private litigation.

II. Safeguards for Formal Exchanges of Information

A. Authority to Exchange Information

1. Before making a formal request for information, a requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request, in particular, whether it may have any disclosure requirements with respect to the information in the request and/or whether it would have to give notice to the source of the information. The requested jurisdiction should confirm that it will to the fullest extent possible consistent with its laws maintain the confidentiality of the information in the request.

2. The requesting jurisdiction should provide sufficient information as is necessary for the requested jurisdiction to act upon the request. The requesting jurisdiction should explain to the requested jurisdiction in detail how the request for information located in the territory of the requested jurisdiction concerns the requesting jurisdiction's investigation of a violation of the requesting jurisdiction's competition laws concerning hard core cartels.

3. The requested jurisdiction should have discretion to provide or not to provide the requested information. Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.

4. The requested jurisdiction may offer to provide the requested information only subject to conditions and/or limitations on use or disclosure. It should at least consider doing so if otherwise it would have to decline the request for information.

B. Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

1. The requesting jurisdiction should identify its domestic confidentiality laws and related practices so that the requested jurisdiction can consider the requesting jurisdiction's ability to maintain the confidentiality of the exchanged information.

2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements prior to the use of the information in such other matter in the requesting jurisdiction.

3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.

4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.

5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps

to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

C. Protection of Legal Profession Privilege

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.
2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections of the requesting jurisdiction.

D. Notice to Source of the Exchanged Information

1. If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.
2. If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.
3. Prior to giving notice to the source of the information in accordance with Sections D.1 or D.2, the requested jurisdiction should, where practicable, consult with the requesting jurisdiction.

III. Transparency

To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION

THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES¹⁵² **UNITED NATIONS GENEVA, 2000**

I. Preface

The United Nations Conference on Restrictive Business Practices was convened by the General Assembly in its resolution 33/153 of 20 December 1978 under the auspices of UNCTAD. Pursuant to resolution 103 (V) of 30 May 1979 of the United Nations Conference on Trade and Development, the Conference on Restrictive Business Practices met at the United Nations Office at Geneva from 19 November to 8 December 1979. At the conclusion of that period, the Conference requested a resumed session in order to complete its work. In accordance with General Assembly decision 34/447 of 19 December 1979, the Conference reconvened from 8 to 22 April 1980. In concluding its work, the United Nations Conference on Restrictive Business Practices adopted a resolution in which it approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and transmitted this Set of Principles and Rules to the General Assembly at its thirty-fifth Session for adoption as a resolution.

Accordingly, the General Assembly, at its thirty-fifth session in its resolution 35/63 of 5 December 1980, adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices approved by the United Nations Conference on Restrictive Business Practices.

Since the adoption of the Set in 1980, four United Nations Conferences to Review All Aspects of the Set have taken place under the auspices of UNCTAD, in 1985, 1990, 1995 and 2000 respectively. The Fourth Review Conference (25-29 September 2000) adopted a resolution (TD/RBP/CONF.5/15 of 4 October 2000) in which it, inter alia:

“Reaffirms the validity of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, recommends to the General Assembly to subtitle the Set for reference as “UN Set of Principles and Rules on Competition”, and calls upon all member States to implement the provisions of the Set”.

II. Resolution adopted by the United Nations Conference on Restrictive Business Practices, on 22 April 1980

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

The United Nations Conference on Restrictive Business Practices,

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United Nations document reference: TD/RBP/CONF/10/Rev.2

Recalling General Assembly resolution 33/153 of 20 December 1978, which required the Conference to negotiate, on the basis of the work of the Third Ad hoc Group of Experts on Restrictive Business Practices, and to take all decisions necessary for the adoption of a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices having adverse effects on international trade, particularly that of developing countries, and on the economic development of those countries, including a decision on the legal character of the principles and rules,

Having held its first session from 19 November to 8 December 1979 and its second session from 8 to 22 April 1980,

1. Approves the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices annexed hereto;¹⁵³
2. Transmits to the General Assembly at its thirty-fifth session this Set of Principles and Rules, having taken all decisions necessary for its adoption as a resolution;
3. Recommends also that the General Assembly, five years after the adoption of the Set of Principles and Rules, convene a United Nations Conference under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules.

7th plenary meeting 22 April 1980

III. Resolution 35/63 adopted by the General Assembly at its thirty-fifth Session, on 5 December 1980

Restrictive business practices

The General Assembly,

Recalling its resolution 3201 (S-VI) and 3202 (S-VI) of 1 May 1974, containing the Declaration and the Programme of Action on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States, and 3362 (S-VII) of 16 September 1975 on development and international economic co-operation,

Recalling that the United Nations Conference on Restrictive Business Practices, convened by the General Assembly in its resolution 33/153 of 20 December 1978, held its first session from 19 November to 8 December 1979 and, in accordance with Assembly decision 34/447 of 19 December 1979, held a second session from 8 to 22 April 1980,

Noting with satisfaction that the Conference approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices¹⁵⁴ and transmitted it to the General Assembly at its thirty-fifth session, having taken all the necessary decisions for its adoption as a resolution,

153 See section IV below.

154 See section IV below.

Noting that the United Nations Conference on Trade and Development, by its resolution 103 (V) of 30 May 1979,¹⁵⁵ requested the United Nations Conference on Restrictive Business Practices to make recommendations through the General Assembly to the Trade and Development Board with regard to the institutional aspects of future work on restrictive business practices within the framework of the United Nations Conference on Trade and Development, bearing in mind the work done in this field elsewhere in the United Nations,

1. Adopts the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the United Nations Conference on Restrictive Business Practices;
2. Decides to convene, in 1985, under the auspices of the United Nations Conference on Trade and Development, a United Nations conference to review all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;
3. Takes note of the recommendations of the United Nations Conference on Restrictive Business Practices regarding international institutional machinery, contained in section G of the Set of Principles and Rules, and requests the Trade and Development Board, at its twenty-second session, to establish an intergovernmental group of experts on restrictive business practices, operating within the framework of a committee of the United Nations Conference on Trade and Development, to perform the functions designated in that section;
4. Decides also that the necessary resources should be made available to the United Nations Conference on Trade and Development to carry out the tasks embodied in the Set of Principles and Rules.

83rd plenary meeting 5 December 1980

IV. The Set of Multilaterally Agreed Principles and Rules for the Equitable Control of Restrictive Business Practices¹⁵⁶

The United Nations Conference on Restrictive Business Practices,

Recognizing that restrictive business practices can adversely affect international trade, particularly that of developing countries, and the economic development of these countries,

Affirming that a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices can contribute to attaining the objective in the establish-

155 See Proceedings of the United Nations Conference on Trade and Development, Fifth Session, vol. I, Report and Annexes (United Nations publication, Sales No. E. 79.II.D.14), part one, sect. A.

156 The Set of Principles and Rules was adopted by the United Nations Conference on Restrictive Business Practices as an annex to its resolution of 22 April 1980 (see section II above).

ment of a new international economic order to eliminate restrictive business practices adversely affecting international trade and thereby contribute to development and improvement of international economic relations on a just and equitable basis,

Recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries,

Considering the possible adverse impact of restrictive business practices, including among others those resulting from the increased activities of transnational corporations, on the trade and development of developing countries,

Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries, and the economic development of these countries,

Convinced also of the benefits to be derived from a universally applicable set of multilaterally agreed equitable principles and rules for the control of restrictive business practices and that all countries should encourage their enterprises to follow in all respects the provisions of such a set of multilaterally agreed equitable principles and rules,

Convinced further that the adoption of such a set of multilaterally agreed equitable principles and rules for the control of restrictive business practices will thereby facilitate the adoption and strengthening of laws and policies in the area of restrictive business practices at the national and regional levels and thus lead to improved conditions and attain greater efficiency and participation in international trade and development, particularly that of developing countries, and to protect and promote social welfare in general, and in particular the interests of consumers in both developed and developing countries,

Affirming also the need to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries,

Affirming further the need that measures adopted by States for the control of restrictive business practices should be applied fairly, equitably, on the same basis to all enterprises and in accordance with established procedures of law; and for States to take into account the principles and objectives of the Set of Multilaterally Agreed Equitable Principles and Rules,

Hereby agrees on the following Set of Principles and Rules for the Control of Restrictive Business Practices, which take the form of recommendations:

A. Objectives

Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;
2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through:
 - (a) The creation, encouragement and protection of competition;
 - (b) Control of the concentration of capital and/or economic power;
 - (c) Encouragement of innovation;
3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;
5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

B. Definitions and scope of application

For the purpose of this Set of Multilaterally Agreed Equitable Principles and Rules:

(i) Definitions

1. “Restrictive business practices” means acts or behaviour of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, or which through formal, informal, written or unwritten agreements or arrangements among enterprises, have the same impact.
2. “Dominant position of market power” refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

3. “Enterprises” means firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, private or State, which are engaged in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.

(ii) Scope of application

4. The Set of Principles and Rules applies to restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries. It applies irrespective of whether such practices involve enterprises in one or more countries.

5. The “principles and rules for enterprises, including transnational corporations” apply to all transactions in goods and services.

6. The “principles and rules for enterprises, including transnational corporations” are addressed to all enterprises.

7. The provisions of the Set of Principles and Rules shall be universally applicable to all countries and enterprises regardless of the parties involved in the transactions, acts or behaviour.

8. Any reference to “States” or “Governments” shall be construed as including any regional groupings of States, to the extent that they have competence in the area of restrictive business practices.

9. The Set of Principles and Rules shall not apply to intergovernmental agreements, nor to restrictive business practices directly caused by such agreements.

***C. Multilaterally agreed equitable principles
for the control of restrictive business practices***

In line with the objectives set forth, the following principles are to apply:

(i) General principles

1. Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries.

2. Collaboration between Governments at bilateral and multilateral levels should be established and, where such collaboration has been established, it should be improved to facilitate the control of restrictive business practices.

3. Appropriate mechanisms should be devised at the international level and/or the use of existing international machinery improved to facilitate exchange and dis-

semination of information among Governments with respect to restrictive business practices.

4. Appropriate means should be devised to facilitate the holding of multilateral consultations with regard to policy issues relating to the control of restrictive business practices.

5. The provisions of the Set of Principles and Rules should not be construed as justifying conduct by enterprises which is unlawful under applicable national or regional legislation.

(ii) Relevant factors in the application of the Set of Principles and Rules

6. In order to ensure the fair and equitable application of the Set of Principles and Rules, States, while bearing in mind the need to ensure the comprehensive application of the Set of Principles and Rules, should take due account of the extent to which the conduct of enterprises, whether or not created or controlled by States, is accepted under applicable legislation or regulations, bearing in mind that such laws and regulations should be clearly defined and publicly and readily available, or is required by States.

(iii) Preferential or differential treatment for developing countries

7. In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and

(b) Encouraging their economic development through regional or global arrangements among developing countries.

D. Principles and Rules for enterprises, including transnational corporations

1. Enterprises should conform to the restrictive business practices laws, and the provisions concerning restrictive business practices in other laws, of the countries in which they operate, and, in the event of proceedings under these laws, should be subject to the competence of the courts and relevant administrative bodies therein.

2. Enterprises should consult and co-operate with competent authorities of countries directly affected in controlling restrictive business practices adversely affecting the interests of those countries. In this regard, enterprises should also provide information, in particular details of restrictive arrangements, required for this purpose, including that which may be located in foreign countries, to the extent that in the latter event such production or disclosure is not prevented by applicable law or established public policy. Whenever the provision of information is on a voluntary basis, its provisions should be in accordance with safeguards normally applicable in this field.

3. Enterprises, except when dealing with each other in the context of an economic entity wherein they are under common control, including through ownership, or otherwise not able to act independently of each other, engaged on the market in rival or potentially rival activities, should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) Agreements fixing prices, including as to exports and imports;
- (b) Collusive tendering;
- (c) Market or customer allocation arrangements;
- (d) Allocation by quota as to sales and production;
- (e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
- (f) Concerted refusal of supplies to potential importers;
- (g) Collective denial of access to an arrangement, or association, which is crucial to competition.

4. Enterprises should refrain from the following acts or behaviour in a relevant market when, through an abuse¹⁵⁷ or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- (a) Predatory behaviour towards competitors, such as using below-cost pricing to eliminate competitors;
- (b) Discriminatory (i.e. unjustifiably differentiated) pricing or terms or conditions in the supply or purchase of goods and services, including by means of the use of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;

157 Whether acts or behaviour are abusive or not should be examined in terms of their purpose and effects in the actual situation, in particular with reference to whether they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries, and to whether they are:

- (a) Appropriate in the light of the organisational, managerial and legal relationship among the enterprises concerned, such as in the context of relations within an economic entity and not having restrictive effects outside the related enterprises;
- (b) Appropriate in light of special conditions of economic circumstances in the relevant market such as exceptional conditions of supply and demand or the size of the market;
- (c) Of types which are usually treated as acceptable under pertinent national or regional laws and regulations for the control of restrictive business practices;
- (d) Consistent with the purposes and objectives of these principles and rules.

- (c) Mergers, takeovers, joint ventures or other acquisitions of control, whether of a horizontal, vertical or a conglomerate nature;
- (d) Fixing the prices at which goods exported can be resold in importing countries;
- (e) Restrictions on the importation of goods which have been legitimately marked abroad with a trademark identical with or similar to the trademark protected as to identical or similar goods in the importing country where the trademarks in question are of the same origin, i.e. belong to the same owner or are used by enterprises between which there is economic, organizational, managerial or legal interdependence and where the purpose of such restrictions is to maintain artificially high prices;
- (f) When not for ensuring the achievement of legitimate business purposes, such as quality, safety, adequate distribution or service:
 - (i) Partial or complete refusals to deal on the enterprise's customary commercial terms;
 - (ii) Making the supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods;
 - (iii) Imposing restrictions concerning where, or to whom, or in what form or quantities, goods supplied or other goods may be resold or exported;
 - (iv) Making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier or his designee

E. Principles and Rules for States at National, Regional and Subregional levels

1. States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations.
2. States should base their legislation primarily on the principle of eliminating or effectively dealing with acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on their trade or economic development, or which through formal, informal, written or unwritten agreements or arrangements among enterprises have the same impact.
3. States, in their control of restrictive business practices, should ensure treatment of enterprises which is fair, equitable, on the same basis to all enterprises, and in accordance with established procedures of law. The laws and regulations should be publicly and readily available.
4. States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to the attention of States that such practices adversely affect international trade, and particularly the trade and development of the developing countries.

5. Where, for the purposes of the control of restrictive business practices, a State obtains information from enterprises containing legitimate business secrets, it should accord such information reasonable safeguards normally applicable in this field, particularly to protect its confidentiality.
6. States should institute or improve procedures for obtaining information from enterprises including transnational corporations, necessary for their effective control or restrictive business practices, including in this respect details of restrictive agreements, understandings and other arrangements.
7. States should establish appropriate mechanisms at the regional and subregional levels to promote exchange of information on restrictive business practices and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of restrictive business practices at the regional and subregional levels.
8. States with greater expertise in the operation of systems for the control or restrictive business practices should, on request, share their experience with, or otherwise provide technical assistance to other States wishing to develop or improve such systems.
9. States should, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information, and, to the extent consistent with their laws and established public policy, other information necessary to the receiving interested State for its effective control of restrictive business practices.

F. International measures

Collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include:

1. Work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules.
2. Communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices.
3. Continued publication annually by UNCTAD of a report on developments in restrictive business practices legislation and on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, based upon publicly available information and as far as possible other infor-

mation, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the United Nations Center on Transnational Corporations and other competent international organizations.

4. Consultations:

(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;

(b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;

(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.

5. Continued work within UNCTAD on the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection.

6. Implementation within or facilitation by UNCTAD, and other relevant organizations of the United Nations system in conjunction with UNCTAD, of technical assistance, advisory and training programmes on restrictive business practices, particularly for developing countries:

(a) Experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business practices legislation and procedures;

(b) Seminars, training programmes or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business practices legislation and, in this connection, advantage should be taken, *inter alia*, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices;

(c) A handbook on restrictive business practices legislation should be compiled;

(d) Relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries;

(e) Exchange of personnel between restrictive business practices authorities should be arranged and facilitated;

- (f) International conferences on restrictive business practices legislation and policy should be arranged;
- (g) Seminars for an exchange of views on restrictive business practices among persons in the public and private sectors should be arranged.

7. International organizations and financing programmes, in particular the United Nations Development Programme, should be called upon to provide resources through appropriate channels and modalities for the financing of activities set out in paragraph 6 above. Furthermore, all countries are invited, in particular the developed countries, to make voluntary financial and other contributions for the above-mentioned activities.

G. International Institutional Machinery

(i) Institutional arrangements

1. An Intergovernmental Group of Experts on Restrictive Business Practices operating within the framework of a Committee of UNCTAD will provide the institutional machinery.
2. States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules.

(ii) Functions of the Intergovernmental Group

3. The Intergovernmental Group shall have the following functions:
 - (a) To provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom;
 - (b) To undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules;
 - (c) To invite and consider relevant studies, documentation and reports from relevant organizations of the United Nations system;
 - (d) To study matters relating to the Set of Principles and Rules and which might be characterized by data covering business transactions and other relevant information obtained upon request addressed to all States;
 - (e) To collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles;

(f) To make appropriate reports and recommendations to States on matters within its competence, including the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules;

(g) To submit reports at least once a year on its work.

4. In the performance of its functions, neither the Intergovernmental Group nor its subsidiary organs shall act like a tribunal or otherwise pass judgement on the activities or conduct of individual Governments or of individual enterprises in connection with a specific business transaction. The Intergovernmental Group or its subsidiary organs should avoid becoming involved when enterprises to a specific business transaction are in dispute.

5. The Intergovernmental Group shall establish such procedures as may be necessary to deal with issues related to confidentiality.

(iii) Review procedure

6. Subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules. Towards this end, the Intergovernmental Group shall make proposals to the Conference for the improvement and further development of the Set of Principles and Rules.

THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT 1947)

[...]

Article XVI

Subsidies

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 subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization 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 subsidization, 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 subsidization.

Section B—Additional Provisions on Export Subsidies

2. The contracting parties recognize 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.

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 subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

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 subsidization 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.

(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.

(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.

3. The contracting parties recognize 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.

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 authorizing 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.

(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 authorizing 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.

[...]

ANNEX I

NOTES AND SUPPLEMENTARY PROVISIONS

[...]

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 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.

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 stabilization 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.

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.

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”.

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.

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.

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.)

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.

WORLD TRADE ORGANISATION (WTO)

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES¹⁵⁸

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)¹⁵⁹;
 - (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.

158 This agreement is part of Annex 1A “Multilateral Agreements on Trade in Goods” of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

159 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.

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:

- (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 conditions¹⁶⁰ 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.¹⁶¹ 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.

160 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.

161 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 fact¹⁶², whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I¹⁶³;
- (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.

162 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.

163 Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

4.4 If no mutually agreed solution has been reached within 30 days¹⁶⁴ of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body (“DSB”) for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts¹⁶⁵ (referred to in this Agreement as the “PGE”) with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE’s conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel’s terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel’s report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.¹⁶⁶

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel’s report or the Appellate Body’s report, the DSB shall grant authorization to

164 Any time-periods mentioned in this Article may be extended by mutual agreement.

165 As established in Article 24.

166 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

the complaining Member to take appropriate¹⁶⁷ countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding (“DSU”), the arbitrator shall determine whether the countermeasures are appropriate.¹⁶⁸

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

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 Member¹⁶⁹;
- (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 1994¹⁷⁰;
- (c) serious prejudice to the interests of another Member.¹⁷¹

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

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:

167 This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

168 This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

169 The term “injury to the domestic industry” is used here in the same sense as it is used in Part V.

170 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.

171 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.

- (a) the total ad valorem subsidization¹⁷² of a product exceeding 5 per cent¹⁷³;
- (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;
- (d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.¹⁷⁴

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing 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 subsidizing 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 subsidized 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 subsidizing Member in a particular subsidized primary product or commodity¹⁷⁵ 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-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product

172 The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

173 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.

174 Members recognize 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.

175 Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

concerned, which, in normal circumstances, shall be at least one year). “Change in relative shares of the market” shall include any of the following situations: (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidized 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 subsidized product with prices of a non-subsidized 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, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, 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 exist¹⁷⁶ 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;
- (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);

176 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.

(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, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

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 prejudice¹⁷⁷ 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.

7.4 If consultations do not result in a mutually agreed solution within 60 days¹⁷⁸, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB¹⁷⁹ unless one of the parties to the dispute formally notifies

177 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.

178 Any time-periods mentioned in this Article may be extended by mutual agreement.

179 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.¹⁸⁰

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable¹⁸¹:

- (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:

180 If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

181 It is recognized 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.

- (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:¹⁸²,¹⁸³,¹⁸⁴ the assistance covers¹⁸⁵ not more than 75 per cent of the costs of industrial research¹⁸⁶ or 50 per cent of the costs of pre-competitive development activity¹⁸⁷,¹⁸⁸; 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.;

182 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.

183 Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

184 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.

185 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.

186 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.

187 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.

188 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.

- (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.
- (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development ¹⁸⁹ 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 criteria¹⁹⁰, 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 per cent of the average for the territory concerned;
 - unemployment rate, which must be at least 110 per cent 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.
- (c) assistance to promote adaptation of existing facilities¹⁹¹ 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 per cent of the cost of adaptation; and

189 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.

190 "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 subsidized 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.

191 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.

- (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 subsidization under a notified programme.¹⁹²

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 subsidizing 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 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.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

192 It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme 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 acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

PART V: COUNTERVAILING MEASURES

Article 10

*Application of Article VI of GATT 1994*¹⁹³

Members shall take all necessary steps to ensure that the imposition of a countervailing duty¹⁹⁴ on any product of the territory of any Member imported into the territory of

193 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.

194 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.

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 initiated¹⁹⁵ and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

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 subsidized 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 subsidized 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 subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized 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.

195 The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

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 expressed¹⁹⁶ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁹⁷ 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 per cent 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 per cent 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 publicizing 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 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 subsidization 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 subsidized imports, actual or potential, or the injury,

196 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.

197 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.

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 per cent 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.¹⁹⁸ 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 exporters¹⁹⁹ 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.

198 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 exporting territory.

199 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.

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 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.²⁰⁰

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 summarization 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 authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.²⁰¹

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 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

200 Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

201 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.

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 organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, 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.²⁰²

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.

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 guaran-

202 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.

tee 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*²⁰³

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 subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products²⁰⁴ and (b) the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized 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 subsidization 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

203 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.

204 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.

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.

15.4 The examination of the impact of the subsidized 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 utilization 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 subsidized imports are, through the effects²⁰⁵ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized 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 subsidized 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 subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized 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 subsidized 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 subsidized 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.

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;

205 As set forth in paragraphs 2 and 4.

- (ii) a significant rate of increase of subsidized 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 subsidized 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 subsidized 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 subsidized 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 related²⁰⁶ to the exporters or importers or are themselves importers of the allegedly subsidized 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 subsidized imports into

206 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.

such an isolated market and provided further that the subsidized 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 subsidized 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.

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 subsidized 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 subsidization.

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 may²⁰⁷ be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(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 subsidization and injury caused by such subsidization 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 subsidization 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 subsidization 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 subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

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 realized if the subsidized imports continue.

207 The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

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 subsidized 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 parties²⁰⁸ 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 subsidized 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.

208 For the purpose of this paragraph, the term “domestic interested parties” shall include consumers and industrial users of the imported product subject to investigation.

19.4 No countervailing duty shall be levied²⁰⁹ on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized 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 subsidized 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 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 subsidized 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.

209 As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.

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 subsidization 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 subsidization, 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 subsidization 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 subsidization and injury.²¹⁰ 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 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, 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.

210 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.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report²¹¹, 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) a description of the subsidy practice or practices to be investigated;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested Members and interested parties should be directed; and
- (vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 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 18, of the termination of such an undertaking, and of the termination of a definitive countervailing 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.

22.4 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 the existence of a subsidy 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 amount of subsidy established and the basis on which the existence of a subsidy has been determined;
- (iv) considerations relevant to the injury determination as set out in Article 15;
- (v) the main reasons leading to the determination.

22.5 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 an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which

211 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.

have led to the imposition of final measures or the acceptance of an 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 paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

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.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE

may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

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 subsidies²¹², 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.

212 The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized 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.

25.7 Members recognize 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.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies²¹³, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of

213 For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness, or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

- (a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or
- (b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

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. In such a case, Article 4 shall not apply. In addition during the same period:

- (a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;
- (b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

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 X: DISPUTE SETTLEMENT

Article 30

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 herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

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.²¹⁴

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

214 This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

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.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

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.
- (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 available²¹⁵ on world markets to their exporters.

215 The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

- (e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes²¹⁶ or social welfare charges paid or payable by industrial or commercial enterprises.²¹⁷
- (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 taxes²¹⁵ 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 taxes²¹⁵ 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

216 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.

217 The Members recognize 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. 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.

(making normal allowance for waste).²¹⁸ This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

- (i) The remission or drawback of import charges* 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 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

218 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).

* 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.

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 PROCESS²¹⁹

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 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:

219 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.

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 SUBSIDIZATION (PARAGRAPH 1(A) OF ARTICLE 6)²²⁰

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 subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's²²¹ sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.²²²

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 subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.²²³

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 subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

220 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.

221 The recipient firm is a firm in the territory of the subsidizing Member.

222 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.

223 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.

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 subsidization.
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 V PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.
2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.²²⁴ This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.²²⁵
3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm

224 In cases where the existence of serious prejudice has to be demonstrated.

225 The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

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.

ANNEX VII
DEVELOPING COUNTRY MEMBERS REFERRED TO
IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1,000 per annum²²⁶: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

226 The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

WORLD TRADE ORGANISATION (WTO)

GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)²²⁷

[...]

Article VIII—Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.
2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.
4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.
5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

Article IX—Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.
2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of

²²⁷ The GATS Agreement is Annex 1B of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

[...]

Article XV–Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects²²⁸. The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of members, particularly developing country members, for flexibility in this area. For the purpose of such negotiations, members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any member which considers that it is adversely affected by a subsidy of another member may request consultations with that member on such matters. Such requests shall be accorded sympathetic consideration.

[...].

REFERENCE PAPER ON REGULATORY PRINCIPLES IN THE TELECOMMUNICATIONS SECTOR

Article 1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

228 A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

WORLD TRADE ORGANISATION (WTO)

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)²²⁹

PART II

Standards Concerning the Availability, Scope and Use of Intellectual Property Rights

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.
3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

²²⁹ The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

WORLD TRADE ORGANISATION (WTO)

GATT AGREEMENT ON TRADE IN CIVIL AIRCRAFT OF 12 APRIL 1979

Article 1

Product coverage

- 1.1. This Agreement applies to the following products: (a) all civil aircraft; (b) all civil aircraft engines and their parts and components; (c) all other parts, components, and sub-assemblies of civil aircraft; (d) all ground flight simulators and their parts and components, whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification or conversion of civil aircraft.
- 1.2. For the purposes of this Agreement “civil aircraft” means (a) all aircraft other than military aircraft and (b) all other products set out in Article 1.1 above.

Article 6

Government support, export credits, and aircraft marketing

6.1. Signatories note that the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on tariffs and trade (Agreement on subsidies and countervailing measures) apply to trade in civil aircraft. They affirm that in their participation in, or support of, civil aircraft programmes they shall seek to avoid adverse effects on trade in civil aircraft in the sense of Articles 8.3 and 8.4 of the Agreement on subsidies and countervailing measures. They also shall take into account the special factors which apply in the aircraft sector, in particular the widespread governmental support in this area, their international economic interests, and the desire of producers of all signatories to participate in the expansion of the world civil aircraft market.

6.2. Signatories agree that pricing of civil aircraft should be based on a reasonable expectation of recoupment of all costs, including non-recurring programme costs, identifiable and pro-rated costs of military research and development on aircraft, components, and systems that are subsequently applied to the production of such civil aircraft, average production costs, and financial costs.

Article 8

Surveillance, review, consultation, and dispute settlement

8.1. There shall be established a Committee on Trade in Civil Aircraft (hereinafter referred to as “the Committee”) composed of representatives of all signatories. The Committee shall elect its own chairman. It shall meet as necessary, but not less than once a

year, for the purpose of affording signatories the opportunity to consult on any matters relating to the operation of this Agreement, including developments in the civil aircraft industry, to determine whether amendments are required to ensure continuance of free and undistorted trade, to examine any matter for which it has not been possible to find a satisfactory solution through bilateral consultations, and to carry out such responsibilities as are assigned to it under this Agreement, or by the signatories.

8.2. The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the Contracting Parties to the GATT of developments during the period covered by such review.

8.3. Not later than the end of the third year from the entry into force of this Agreement and periodically thereafter, signatories shall undertake further negotiations, with a view to broadening and improving this Agreement on the basis of mutual reciprocity.

8.4. The Committee may establish such subsidiary bodies as may be appropriate to keep under regular review the application of this Agreement to ensure a continuing balance of mutual advantages. In particular, it shall establish an appropriate subsidiary body in order to ensure a continuing balance of mutual advantages, reciprocity and equivalent results with regard to the implementation of the provisions of Article 2 above related to product coverage, the end-use systems, customs duties and other charges.

8.5. Each signatory shall afford sympathetic consideration to and adequate opportunity for prompt consultation regarding representations made by another signatory with respect to any matter affecting the operation of this Agreement.

8.6. Signatories recognize the desirability of consultations with other signatories in the Committee in order to seek a mutually acceptable solution prior to the initiation of an investigation to determine the existence, degree and effect of any alleged subsidy. In those exceptional circumstances in which no consultations occur before such domestic procedures are initiated, signatories shall notify the Committee immediately of initiation of such procedures and enter into simultaneous consultations to seek a mutually agreed solution that would obviate the need for countervailing measures.

8.7. Should a signatory consider that its trade interests in civil aircraft manufacture, repair, maintenance, rebuilding, modification or conversion have been or are likely to be adversely affected by any action by another signatory, it may request review of the matter by the Committee. Upon such a request, the Committee shall convene within 30 days and shall review the matter as quickly as possible with a view to resolving the issues involved as promptly as possible and in particular prior to final resolution of these issues elsewhere. In this connection the Committee may issue such rulings or recommendations as may be appropriate. Such review shall be without prejudice to the rights of signatories under the GATT or under instruments multilaterally negotiated under the auspices of the GATT, as they affect trade in civil aircraft. For the purposes of aiding consideration of the issues involved, under the GATT and such instruments, the Committee may provide such technical assistance as may be appropriate.

8.8. Signatories agree that, with respect to any dispute related to a matter covered by this Agreement, but not covered by other instruments multilaterally negotiated under the auspices of the GATT, the provisions of Articles XXII and XXIII of the General Agreement and the provisions of the understanding related to notification, consultation, dispute settlement and surveillance shall be applied, *mutatis mutandis*, by the signatories and the Committee for the purposes of seeking settlement of such dispute. These procedures shall also be applied for the settlement of any dispute related to a matter covered by this Agreement and by another instrument multilaterally negotiated under the auspices of the GATT, should the parties to the dispute so agree.

[...]

European Commission

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