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## ANNEX C

### LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (*b*) OF ARTICLE I AS RESPECTS THE CUSTOMS UNION OF BELGIUM, LUXEMBURG AND THE NETHERLANDS

The Economic Union of Belgium and Luxemburg

## II. INTERPRETATION AND APPLICATION OF ARTICLE I

### A. SCOPE AND APPLICATION OF ARTICLE I

#### 1. Interpretation and Application of Paragraph 1

***(1) "customs duties and charges of any kind imposed on or in connection with importation or exportation or the international transfer of payments for imports or exports"***

*(a) Unbound tariffs*

The Panel Report on "Spain - Tariff Treatment of Unroasted Coffee" includes the following Panel finding: "Having noted that Spain had not bound under the GATT its tariff rate on unroasted coffee, the Panel pointed out

Paragraph 2 of the 1979 Declaration on "Trade Measures Taken for Balance-of-Payments Purposes" provides that:

*(e) Trade conducted at most-favoured-nation duty rates*

A Note by the Director-General of 21 June 1972 on "Main Findings Concerning Trade at Most-favoured-nation and at Other Rates" presents data gathered by a working party, in response to a decision reached at the

In response to a request for an interpretation of paragraph 1 of Article I with respect to rebates of excise duties, the Chairman of the CONTRACTING PARTIES ruled on 24 August 1948 that "the most-favoured-nation treatment principle embodied in that paragraph would be applicable to any advantage, favour, privilege or immunity granted with respect to internal taxes".[21]

The 1952 Panel Report on "Belgian Family Allowances" discusses a Belgian system of tax exemptions for products imported from countries considered to have a system of family allowances similar to that of Belgium, in relation to Article I.[22] See below at page 33.

Under the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, which was agreed in the Review Session of 1954-55, the words "and with respect to the application of internal taxes to exported goods" would have been included in paragraph 1 to remove any uncertainty as to the application of Article I to discrimination in the exemption of exports from the levy of an excise tax.[23]

The Panel Report on "Japan - Trade in Semi-Conductors" examined, *inter alia*, measures by Japan to promote sales of foreign semi-conductors in Japan. The EEC claimed that Japan had thereby been granting preferential market access to US producers and exporters of semi-conductors and that, in the light of "the general tendency of the Agreement to address issues on a bilateral basis," this "could not but have discriminatory effects

measures to be inconsistent with Article XI:1 and "did not consider it necessary to make a finding on whether or not their administration was contrary to Article I:1 … the Panel considered that, once a measure had been found to be inconsistent with the General Agreement whether or not it was applied discriminatorily, the question of its non-discriminatory administration was no longer legally relevant. The Panel noted that another Panel had also refrained from examining the alleged discriminatory aspects of a restriction after having found it to be inconsistent with Article XI".[29]

*(c) Exemption from charges*

granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxembourg and the Netherlands, as well as in France, Italy, Sweden and the United Kingdom. … it is clear that that exemption would have to be granted unconditionally to all other contracting parties. The consistency or otherwise of the system of family allowances in force in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant in this respect, and the

*(f) Special treatment for diplomatic gifts, supplies and equipment accorded on the basis of reciprocity*

The Report of the Review Session Working Party on "Schedules and Customs Administration" records that:

> "Referring to the provisions for most-favoured-nation treatment, the representative of Germany informed the Working Party that German customs law requires that special treatment for gifts to heads of foreign states, equipment for diplomatic and consular offices and goods for the use of representatives of foreign governments may be granted only on a basis of reciprocity, thus not permitting observance of most-favoured-nation obligations for such imports. Many other countries follow the same practice. The Working Party took note of this situation and saw no reason why established practice in these cases should be disturbed".[43]

*(g) Application to individual cases and "balancing"*

The Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil" states with respect to Article I:1:

> "The Panel ... considered that Article I:1 does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others. If such a balancing were accepted, it would entitle a contracting party to derogate from the most-favoured-nation obligation in one case, in respect of one contracting party, on the ground that it accords more favourable treatment in some other case in respect of another contracting party. In the view of the Panel, such an interpretation of the most-favoured-nation obligation of Article I:1 would defeat the very purpose underlying the unconditionality of that obligation".[44]

***(8) "like product"***

*(a) General*

During discussions at the London session of the Preparatory Committee, it was stated that "the expression had different meanings in different contexts of the Draft Charter".[45] The Preparatory Committee did not think it necessary to define this phrase and recommended that such definition be studied by the ITO.[46] Both at that time and later at the Havana Conference, it was suggested that the method of tariff classification could be used for determining whether products were "like products" or not.[47]

See also the discussion of "like product" in the context of Article III:2 and III:4. The term "like product" or "like domestic product" is used in several other GATT provisions as well, including Articles II:2(a); VI:1(a); VI:1(b); IX:1; XI:2(c); XIII:1; and XVI:4. Other terms such as "like commodity" (Article VI:7), "like merchandise" (Article VII:2), and "like or competitive products" (Article XIX:1) also occur. See also the classification problems arising under Articles II and XXIV:5 ("corresponding duties").

The Panel Report on "United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil" notes with reference to this concept:

> "The Panel noted that Article I would in principle permit a contracting party to have different countervailing duty laws and procedures for different categories of products, or even to exempt one category of products from countervailing duties altogether. The mere fact that one category of products is treated one way by the United States and another category of products is treated another is therefore in principle not inconsistent with the most-favoured-nation obligation of Article I:1. However, this provision clearly prohibits a

[43]L/329, adopted 26 February 1955, 3S/205, 206 para. 3.
[44]DS18/R, adopted on 19 June 1992, 39S/128, 151, para. 6.10.
[45]EPCT/C.II/65, p. 2.
[46]EPCT/C.II/PV/12, pp. 6-7; London Report, p. 9, para. A.1(c).
[47]EPCT/C.II/PV/12, p. 7-8; E/CONF.2/C.3/SR.5, p. 4.

The 1981 Panel Report on "Spain - Tariff Treatment of Unroasted Coffee" examined a claim of Brazil under Article I:1 with respect to a Spanish Royal Decree which divided unroasted coffee into five tariff classifications: "Colombian mild," "other mild," "unwashed Arabica," "Robusta" and "other". The first two were duty-free and the latter three were subject to a duty of 7 per cent *ad valorem*; the tariff on raw coffee was unbound.

> "The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or sub-positions as appropriate.[53] The Panel considered, however, that whatever the classification adopted, Article I:1 required that the same tariff treatment be applied to 'like products'. The Panel therefore.. focused its examination on whether the various types of unroasted coffee listed in the Royal Decree 1764/79 should be regarded as 'like products' within the meaning of Article I:1. Having reviewed how the concept of 'like products' had been applied by the CONTRACTING PARTIES in previous cases involving, *inter alia*, a recourse to Article I:1,[54] the Panel noted that neither the General Agreement nor the settlement of previous cases gave any definition of such concept.
>
> "The Panel examined all arguments that had been advanced during the proceedings for the justification of a different tariff treatment for various groups and types of unroasted coffee. It noted that these arguments mainly related to organoleptic differences resulting from geographical factors, cultivation methods, the processing of the beans, and the genetic factor. The

interpretation of the "like product concept" to be the same in both Articles I and III, and that because these were trade-creating obligations a narrow definition of like products would not be appropriate; Japan argued that they were not the same.[59]

> "... In substance, Canada complains of the fact that Japan had arranged its tariff classification in such a way that a considerable part of Canadian exports of SPF dimension lumber to Japan was submitted to a customs duty of 8 per cent, whereas other comparable types of dimension lumber enjoy the advantage of a zero-tariff duty. The Panel considered it impossible to appreciate fully the Canadian complaint if it had not in a preliminary way clarified the bearing of some principles of the GATT-system in relation to tariff structure and tariff classification.
>
> "The Panel noted in this respect that the General Agreement left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure ... The adoption of the Harmonized System, to which both Canada and Japan have adhered, had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications.
>
> "The Panel was of the opinion that, under these conditions, a tariff classification going beyond the Harmonized System's structure is a legitimate means of adapting the tariff scheme to each contracting party's trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations. ...

regularly the case that an individual tariff line or description will cover a wide range of different products, particularly in the example of lines which read 'other' or 'not elsewhere specified'. Additionally, there are new

product" and stated that this action was aimed at low-cost suppliers in developing countries. The representative of Finland stated that the measure was fully in accordance with Article XIX.[66]

During discussion in the Committee on Trade and Development in March 1983 of a Canadian Article XIX action on leather footwear, which exempted footwear above a certain value, it was stated that "This price discrimination was not only contrary to the letter and sp

negotiations with respect to tariff preferences, it being understood that action resulting from such negotiations shall not require the modification of existing international obligations except by agreement between the contracting parties or, failing that, by termination of such obligations in accordance with their terms. All negotiated reductions in most-favoured-nation tariffs shall operate automatically to reduce or eliminate margins of preference". These rules further stated that "all margins of preference remaining after negotiations would be bound against increase".[72]

### 3. Paragraph 3

Paragraph 3 corresponds to Article 16, paragraph 3 of the Havana Charter; however, where the Charter paragraph referred to Charter Article 15 (for which no counterpart exists in the General Agreement), the General Agreement paragraph refers to the use of the waiver provisions of Article XXV in the light of Article XXIX.[87] This insertion was agreed by the Working Party on "Modifications to the General Agreement" which met during

### 3. Article IX

See under Article IX.

### 4. Article XIII

See under Article XIII.

## C. RELATIONSHIP OF ARTICLE I TO OTHER INTERNATIONAL AGREEMENTS

During the Third Session, held at Annecy in 1949, Cuba sought a ruling that the reduction of most-

See further at page 53 below concerning this Decision. See also a Secretariat Note of 1987 on "MTN Agreements and Arrangements: Special and Differential Treatment for Developing Countries", which lists provisions in the Tokyo Round agreements providing such special and differential treatment.[94]

**1. Agreement on Implementation of Article VI**

In November 1968, at the Twenty-fifth Session, the Director-General was asked for a ruling on whether parties to the Agreement on Implementation of Article VI

> "2. The provisions of paragraph 1 shall not apply to customs duties and charges of any kind imposed on or in connexion with importation, the method of levying such duties and charges, and other import regulations or formalities".

However, Article III:11 of the same Agreement provides:

> "... The Parties may also grant the benefits of this Agreement to suppliers in the least-developed countries which are not Parties, with respect to products originating in those countries".

## D. EXCEPTIONS AND DEROGATIONS

### 1. "imports of products for immediate or ultimate consumption in governmental use"

Article 8 of the US Draft Charter (the most-favoured-nation clause) included within its scope "all matters relating to internal taxation or regulation referred to in Article 9" (the national treatment clause of the US Draft Charter, which included in turn "laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment"). The last sentence of the proposed Article 8 provided: "The principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable

The Protocol relating to Trade Negotiations among Developing Countries entered into force 11 February 1973.[125] As of June 1993, the Protocol had been ratified by fifteen developing countries: Bangladesh, Brazil, Chile, Egypt, India, Israel, Mexico, Pakistan, Peru, Republic of Korea, Romania, Tunisia, Turkey, Uruguay and Yugoslavia; Paraguay had signed the Protocol *ad referendum* and the Philippines had signed but not ratified the Protocol.[126] India withdrew from the Protocol effective 29 March 1993.[127]

Referring to the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause") referred to below, the Committee of Participating Countries stated in its Seventh Annual Report to the CONTRACTING PARTIES: "There is thus a standing legal basis resulting from the Tokyo Round for the Protocol Relating to Trade Negotiations Among Developing Countries".[128] The annual reports of the Committee have stated: "The Protocol is applied under the provisions of the Enabling Clause, and in particular under the terms of its paragraph 2(c)".[129] See also the references to preferential arrangements under the Enabling Clause, below at page 57.

***(3) Waivers granted to individual contracting parties***

See the table of waivers under Article XXV:5.

**5. Preferential arrangements authorized by Decisions of the CONTRACTING PARTIES without reference to paragraph 5 of Article XXV**

***(1) First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)***

The Decision of 14 March 1978 on "First Agreement on Trade Negotiations Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific (Bangkok Agreement)"[130] was drafted by the Working Party which examined the provisions of this agreement, concluded between Bangladesh, India, Laos, Philippines, Republic of Korea, Sri Lanka and Thailand. The Report of the Working Party records that the spokesman for the parties to the Agreement stated

> "that Articles I, XXIV and XXXVII of the General Agreement all had equal force. In the Bangkok Agreement, the participating States were fulfilling the commitments and undertakings accepted by developing contracting parties in Part IV of the General Agreement in a manner which was consistent with their individual development, financial and trade needs .."..

In the view of the participating States, a waiver of GATT obligations under Article XXV of the General Agreement was not necessary for the implementation of the Bangkok Agreement.[131] In the view of the other members of the Working Party

> "the Bangkok Agreement which was not aimed at the establishment of a customs union or a free-trade area in accordance with Article XXIV of the General Agreement, introduced an element of discrimination against traditional suppliers in a way which could affect their trade. As, in their view, the Bangkok Agreement was not covered by Article I of the General Agreement and Part IV did not override other Parts of the General Agreement, a waiver or other appropriate decision by the CONTRACTING PARTIES seemed called for in this case".[132]

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[125]Status of Legal Instruments, p. 15-1.1.

[126]See also Decisions on Accession to the Protocol by Bangladesh, 23S/157 (entry into force: 29 March 1977); Paraguay, 23S/154 (not yet in force); Romania, 25S/174 (entry into force: 15 September 1978). See also annual reports of the Committee of Participating Countries at 21S/126, 22S/73, 23S/147, 24S/154, 25S/163, 26S/337, 27S/172, 28S/129, 29S/155, 30S/203, 31S/291, 32S/191, 33S/224, 34S/218, 35S/409, 36S/475, 37S/325, 38S/114.

[127]Let/1790, dated 15 October 1992.

[128]27S/172.

[129]See, *e.g.*, L/7106, CPC/W/161.

[130]25S/6.

[131]L/4635, adopted 14 March 1978, 25S/109, 111, para. 7.

[132]*Ibid.*, 25S/110-111, para. 5.

The US delegate "stated his delegation's understanding that the draft Decision was intended to meet the waiver requirements of Article XXV:5".[133]

The Report of the Working Party states: "It was understood that the Agreement would in no way be considered as affecting the legal rights of contracting parties under the General Agreement".[134]

The Standing Committee of the Bangkok Agreement has submitted biennial reports to the Committee on Trade and Development "having regard to paragraph 2(c) of the CONTRACTING PARTIES Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries".[135] See also the references to preferential arrangements under the Enabling Clause, below at page 57.

(2) ***Agreement on the Association of South-East Asian Nations (ASEAN) Preferential Trading Arrangements***

The Decision of 29 January 1979 on "Agreement on ASEAN Preferential Trading Arrangements"[136] was

"3. Any differential and more favourable treatment provided under this clause:

countries beneficiaries of the United States GSP programme in the backdating of the effect of the revocation of countervailing duty orders".[151]

### *(2) Preference schemes*

The 1980 Report of the Committee on Trade and Development refers to a statement from a representative of a developing country that the preferential treatment of certain textile imports under the European Communities' GSP scheme for 1980 had not been extended to all beneficiaries of the Communities' GSP scheme and amounted to discrimination inconsistent with the spirit of the GSP. The representative of the European Communities replied that in view of the increasingly serious difficulties in the textiles sector, the Communities had to limit their zero duty treatment for textile imports under the GSP to countries which were either a signatory of the MFA or had entered into a commitment to abide by obligations similar to those under that Arrangement.[152]

The July 1992 session of the Committee on Trade and Development discussed the issue of extension of GSP treatment to East European countries and republics of the former USSR; however, no consensus has yet been reached on this issue.[153]

See also the section on "graduation" below.

Concerning the Lomé Convention, see Article XXIV.

### *(3) Preferential arrangements notified under the Enabling Clause*

When an agreement is notified under the Enabling Clause, it is inscribed on the agenda of the Committee on Trade and Development (CTD). Subsequent actions of the CTD may include "noting" the agreement, requesting additional information, establishing a working party and adopting its reports, and reviewing reports made by members on developments under the agreement. The following trade arrangements had been notified under the Enabling Clause as of March 1994:

- 1971 Protocol relating to Trade Negotiations among Developing Countries[154]
- 1980 Montevideo Treaty establishing the Latin American Integration Association (ALADI)[155]
  - ALADI bilateral economic complementarity agreements[156]
  - Southern Common Market Agreement (MERCOSUR)[157]
- Association of South-East Asian Nations (ASEAN)
  - Asian Trade Expansion Programme (1975 Bangkok Agreement)[158]

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[151]DS18/R, adopted on 19 June 1992, 39S/128, 152-153, paras. 6.14-6.17.

[152]L/5074, adopted 26 November 1980, 27S/48, 51, paras. 10-11.

[153]COM.TD/132, L/7124.

[154]See Seventh Report of the Committee at 27S/172; activities in framework of Protocol are annually reviewed by CTD. See further at page 51 above.

[155]Successor to the 1960 Montevideo Treaty for the establishment of LAFTA. Members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Notification in 1982 (L/5342, C/M/144) reviewed by CTD (COM.TD/112); reports in 1984 (L/5859) reviewed by CTD (COM.TD/118); 1985 (COM.TD/W/423) reviewed by CTD (COM.TD/120); 1987 (L/6158+Add.1) supplemented in 1988 (L/6158/Add.1, COM.TD/W/469) reviewed by CTD in 1987, 1988, 1989 (COM.TD/126, L/6241, L/6418, COM.TD/129); 1989 (L/6531, reviewed by CTD (L/6605); 1991 (L/6946).

[156]L/5689, L/6158+Add.1, COM.TD/W/469, L/6531, L/6946, discussed at COM.TD/127, COM.TD/128, L/6418 (35S/31, 34).

[157]Members: Argentina, Brazil, Paraguay and Uruguay. Notified 1992, L/6985+Add.1, L/7044; see also COM.TD/W/496, COM.TD/W/497. Working party established on 28 May 1993 under the Committee on Trade and Development: terms of reference at L/7373, circulation of text in L/7370 and L/7370/Add.1, notification31hicatio/i8oi0(1)-s5i

  - – 1978 Agreement on ASEAN Preferential Trading Arrangements[159]
  - – Common Effective Preferential Tariff Scheme (CEPT) for the ASEAN Free Trade Area and Framework Agreement on Enhancing ASEAN Economic Cooperation[160]

- – 1980 South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)[161]
- – 1982 Unified Economic Agreement among member states of the Gulf Cooperation Council[162]
- – 1987 Cartagena Agreement (Andean Group) on sub-regional trade liberalization and adoption of a common external tariff[163]
- – 1989 Global System of Trade Preferences Among Developing Countries (GSTP)[164]
- – 1991 Trade Agreement between Thailand and the Lao People's Democratic Republic[165]
- – 1991 Additional Protocol on Preferential Tariffs negotiated among members of the Organization for Economic Cooperation[166]

In addition, as noted above, the Protocol relating to Trade Negotiations among Developing Countries and the 1967 Trade Expansion and Co-operation Agreement ("Tripartite Agreement") between Egypt, India and Yugoslavia, both of which predated the Enabling Clause, have since 1979 been treated as having a basis in the Enabling Clause.

The 1989 Report of the Committee on Trade and Development records that in response to a question in the Committee on Trade and Development regarding whether the CONTRACTING PARTIES were expected to approve the GSTP, which had been notified under the Enabling Clause,

> "a representative of the Secretariat said that the Committee has not established detailed procedures for the examination of arrangements which were notified under the Enabling Clause. The Committee was given from the CONTRACTING PARTIES in 1980 the responsibility for supervising the operation of the Enabling Clause. Under this mandate the Committee had so far received a limited number of notifications on arrangements concluded in accordance with paragraph 2(c) of the Enabling Clause. The practice of the Committee so far had been to take note of these arrangements after having duly examined them menemp-5.4(eleed nsu-5.4(eh )e40.53x)30.5(gmin)-5.84ation -5.84a.1.3(r)6(oOn h)-5.4(et)46 ba sie Committee

to such arrangements and any action taken in relation to them in its annual reports to the CONTRACTING PARTIES".[167]

During 1992, there were extensive discussions in the Council and the Committee on whether the MERCOSUR Agreement should be notified and examined under the Enabling Clause or under Article XXIV. This agreement was notified under the Enabling Clause and the Committee established a working party with the following terms of reference:

> "To examine the Southern Common Market Agreement (MERCOSUR) in the light of the relevant provisions of the Enabling Clause and of the General Agreement, including Article XXIV and to transmit a report and recommendations to the Committee for submission to the CONTRACTING PARTIES, with a copy of the report transmitted as well to the Council. The examination in the Working Party will be based on a complete notification and on written questions and answers."[168]

### *(4) "Graduation"*

The question of the compatibility of "graduation" with the Enabling Clause was discussed in 1981-82 in the Committee on Trade and Development and the Council.[169]

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At the Fifty-eighth Session of the Committee on Trade and Development, one representative stated that in the view of her authorities "the Enabling Clause had provided a useful mechanism for permitting temporary departures from the most-favoured-nation principle, and this had been achieved with a minimum of damage to the integrity of the General Agreement. However, this would continue to be the case only if the use of preferential treatment was gradually phased out. Contracting parties should give high priority to ensuring a timely transition to fuller participation in the framework of rights and obligations under the General Agreement. The Enabling Clause provided the legal basis for GSP programmes and the GSP had offered an opportunity for developing countries to expand and diversify their exports to the developed countries. ... She said that the guidelines provided in paragraph 3 of the Enabling Clause were important, and particularly paragraph 3(c), which indicated that special and differential treatment should be provided on a dynamic basis, taking into account changes in development levels and the development, financial and trade needs of developing countries. ... She noted that paragraph 7 required differentiation between developing countries beyond that envisaged for the least-developed countries. In the light of the economic progress made by some countat82vecomme8(odeg)4.sede(ght)412( 4.2(oped)4.8( y)]TJ( )]

## IV. RELEVANT