



Council of the
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ADD 1 DCL 1

WTO 55
SERVICES 11
FDI 11
COASI 73

DECLASSIFICATION

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Subject: Negotiating directives for a Free Trade Agreement with Australia

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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NOTE

From: Presidency
To: Council
Subject: Negotiating directives for a Free Trade Agreement with Australia

Following the Coreper discussion on 8 May 2018, delegations will find attached the negotiating directives for a Free Trade Agreement with Australia, for adoption at the Foreign Affairs Council (Trade) on 22 May 2018.

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NEGOTIATING DIRECTIVES FOR A FREE TRADE AGREEMENT WITH AUSTRALIA

A. NATURE AND SCOPE OF THE AGREEMENT

The Agreement should exclusively contain provisions on trade and foreign direct investment related areas applicable between the parties.

The Agreement should be ambitious, comprehensive and fully consistent with World Trade Organisation (WTO) rules and obligations. The negotiations should be conducted and concluded taking into account commitments under the WTO. The Agreement should have a high level of ambition going beyond existing WTO commitments.

The Agreement should provide for the progressive and reciprocal liberalisation of trade in goods, services and foreign direct investment. It will include detailed rules on other trade-related areas such as specified below in order to promote, facilitate or govern such trade and foreign direct investment. All commitments under the Agreement are undertaken with a view to have a direct and immediate effect on trade and, where relevant, within the scope of common EU rules. All elements will be negotiated in parallel and will form part of a single undertaking ensuring a balanced outcome between the elimination of duties, the elimination of unnecessary regulatory obstacles to trade and an improvement in rules, leading to a substantial result in each of these components and effective opening of each others' markets.

The Agreement should only include obligations in areas falling under the competence of all applicable authorities and entities of both parties to the Agreement.

The Agreement should ensure that all levels of government, including sub-central authorities and relevant entities, effectively comply with the provisions of the Agreement.

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The Agreement will recognise that sustainable development is an overarching objective of the parties and that they will aim at ensuring and facilitating respect of international environmental and labour agreements and standards. The Agreement should also contribute to the promotion of sustainable development and broader EU values, inter alia by including trade related provisions on labour and environment, including through corporate social responsibility, responsible governance of tenure of land, fisheries and forests, responsible agriculture investment and transparency. To address such measures, sustainable development should be taken into account throughout the Agreement, including in the form of a specific chapter on trade and sustainable development, covering both social and environmental issues.

The economic, environmental and social (including on women) impacts of the trade and investment provisions of the Agreement should be examined by means of an independent Sustainability Impact Assessment (SIA), which should be undertaken in parallel with the negotiations. The Commission should ensure that the SIA is conducted in regular dialogue with all relevant stakeholders from civil society. The SIA should be finalised ahead of the initialling of the Agreement and its findings should be taken into account in the negotiating process. It would aim to: (a) clarify the likely effects of the Agreement on sustainable development and climate, and the potential impact in other countries, in particular Least Developed Countries and, where relevant, overseas countries and territories and outermost regions; and (b) to propose measures to maximise the benefits of the Agreement and to prevent or minimise potential negative impacts.

B. PROPOSED CONTENT OF THE AGREEMENT

Preamble, General Principles

The preamble should recall that the partnership with Australia is based on common principles and values as reflected in the EU-Australia Framework Agreement. The Agreement should form part of the overarching political relationship and institutional framework set out in the Framework Agreement¹.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016JC0051>

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In view of liberalising bilateral trade and foreign direct investment, the Agreement should also refer, inter alia, to:

- The principles and objectives of the EU's external action;
- The commitment of the parties to sustainable development and the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all, the protection and preservation of the environment and natural resources;
- The commitment of the parties to fully comply with their rights and obligations arising from WTO membership;
- The commitment of the parties to enhance consumer welfare through policies ensuring a high level of consumer protection and economic well-being;
- The commitment of the parties to prevent and remove non-tariff-related obstacles to trade and foreign direct investment;
- The right to regulate economic activity in the public interest in accordance with international obligations, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity;
- The objective that the Agreement should create a new framework for economic relations between the parties and above all for the development of trade and foreign direct investment;
- The shared objective of the parties of taking into account the particular challenges faced by small and medium sized enterprises (SMEs) in contributing to the development of trade and foreign direct investment;

- The commitment of the parties to communicate with all relevant stakeholders from civil society, including the private sector, trade unions, and other non-governmental organisations.

Objectives

The Agreement should confirm the joint objective of progressively and reciprocally liberalising substantially all trade in goods and services and foreign direct investment, in full compliance with WTO rules, notably Article XXIV of the General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS).

The Agreement should ensure a high level of market access for public procurement, and trade-related intellectual property rights (IPR), including geographical indications and strengthen dialogue and cooperation on technical and regulatory frameworks.

The Agreement should recognise that sustainable development is an overarching objective of the parties and should ensure and facilitate respect of international environmental and social agreements and standards in order to promote trade. Sustainable development, meaning economic development in line with environmental and social issues, should be taken into account throughout the Agreement. The Agreement should ensure that the parties should not encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation, and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

Trade in Goods**Duties on imports and exports and non-tariff measures**

The aim of the Agreement is to ensure the highest possible degree of trade liberalisation. The Agreement should cover substantially all trade in goods between the parties. Tariffs on most lines should be eliminated on the entry into force of the Agreement. The aim of the Agreement should be to dismantle import duties and charges having an equivalent effect on both sides, as a general rule in not more than seven years. Exceptions should be kept to a minimum and specific provisions should cover the most sensitive products, which should be negotiated at the finest level of detail. For instance some agricultural products for which partial liberalisation such as tariff rate quotas or longer transitional periods or other arrangements should be considered, taking into account among others the specific concerns for the Union's outermost regions and outcomes in other trade agreements.

Negotiations on tariff reduction should take place on the basis of the duties applied by the EU *erga omnes* on the date of launch of the negotiations and of the duties applied by Australia *erga omnes* on the date of launch of the negotiations.

All customs duties or taxes on exports or any measures of equivalent effect should be prohibited and no new ones should be introduced.

The Agreement should prohibit any ban or restriction on trade between the Parties, including quantitative restrictions or authorisation requirements, which are not justified by the specific exceptions set out below, and should contain enhanced disciplines on import and export licensing, repaired goods, transshipment, remanufactured goods and origin marking.

Rules of origin

Rules of origin and provisions providing for administrative co-operation should be trade facilitating and simpler and should take into account the standard preferential rules of origin of the EU and the interests of EU.

Anti-fraud measures

A clause in the Agreement on enhanced administrative co-operation should set out the procedures and appropriate measures that the parties may take where a lack of administrative co-operation in customs matters, irregularities or fraud are established.

Management of administrative errors

Provisions should also be included to examine jointly the possibility of adopting appropriate measures in case of errors committed by the competent authorities in the application of the preferential rules of origin.

Customs and trade facilitation

The Agreement should include provisions to facilitate trade between the parties, while ensuring effective controls. To this end the Agreement should include commitments on rules, requirements, formalities and procedures of the parties related to import, export and transit, which are ambitious and go beyond WTO Trade Facilitation Agreement.

The Agreement should promote the effective implementation and application of international rules and standards in the field of customs and other trade-related procedures, including WTO provisions, WTO Trade Facilitation Agreement and World Customs Organisation instruments and the revised Kyoto Convention.

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The Agreement should include provisions to promote exchange of best practice and experience, relating to particular areas of mutual interest. These areas may include issues such as the modernisation and simplification of rules and procedures, standardised documentation, tariff classification, transparency, mutual recognition and inter-agency co-operation.

The Agreement should promote convergence in trade facilitation, building on the WTO Trade Facilitation Agreement and other relevant international standards and instruments as appropriate.

The Agreement should promote effective and efficient IPR enforcement by customs authorities on all goods under customs control.

The Agreement should take account, in the provisions on trade facilitation, of the challenges faced by SMEs while ensuring a level playing field for all economic operators.

The Agreement should aim to establish a Protocol on Mutual Administrative Assistance in Customs Matters, covering assistance with customs anti-fraud investigations (including assistance on request, spontaneous assistance and confidentiality).

Non-tariff barriers

The Agreement shall address trade related regulatory issues and non-tariff barriers (NTBs). Priority should be given to provisions and procedures that should be included to ensure the elimination of unjustified non-tariff obstacles to trade. The Agreement should also envisage appropriate procedures to prevent new NTBs and other unnecessary obstacles to trade from arising in the future, including through transparency in applicable laws and regulations. The Agreement should also address localisation requirements.

Product-specific NTBs should be solved on a request and offer basis, in parallel with exchanges on tariff concessions. Given the relevance of furthering the objectives of the Agreement and to improve market access at a level greater than that delivered through horizontal rules, the Agreement should include sector specific commitments on NTBs relating inter alia to goods contributing to fight against climate change and protection of the environment, and other areas of mutual interest.

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The Agreement should include provisions on state trading enterprises, assessing any possible distortion to competition and barriers to trade that this could create.

Technical regulations, standards and conformity assessment procedures

Apart from confirming the provisions of the WTO Agreement on Technical Barriers to Trade, the parties should also establish more ambitious provisions that build on and complement such provisions in order to facilitate access to each other's markets.

The Agreement should contain a number of general principles (such as proportionality, no undue restrictions, transparency, non-discrimination) and provisions that build on and complement WTO rules. Among other things, the aims should include increasing transparency, promoting good regulatory practice, adopting relevant international standards, seeking the compatibility and convergence of technical regulations on the basis of international standards, streamlining testing and certification requirements through, for example, the application of a risk-based approach to conformity assessment (including the application of self-certification in sectors where this is possible and appropriate) and provisions aiming at the compatibility of testing requirements in a number of priority sectors and promoting the use of accreditation.

The Agreement should contain provisions that aim at improving the dissemination of information to importers and exporters.

The negotiations should address the relationship between the Agreement and the existing Mutual Recognition Agreement with a view to improving its implementation and providing for more efficient cooperation.

Sanitary and phytosanitary (SPS) measures

The parties should build on and go beyond the WTO Agreement on SPS measures, with the objective of facilitating access to each Party's market while protecting human, animal or plant life and health. The SPS chapter should, taking into account the respective international regulations of the IPPC (International Plant Protection Convention), the OIE (World Organisation for Animal Health) and Codex Alimentarius, cover issues such as transparency and non-discrimination, avoidance of undue delays, harmonisation, the recognition of equivalence and alternative measures, the recognition of Parties' health and pest status, regionalisation, control, inspection and approval procedures, audits, certification, import checks, emergency measures, approval of establishments without prior inspection, pursuing the application of EU-wide export authorisation processes (single entity), regulatory cooperation, improved cooperation on antimicrobial resistance, and the creation of a mechanism to address expeditiously specific trade concerns related to SPS measures.

Products exported from a Party shall meet the applicable SPS standards of the importing Party.

Any unjustified SPS trade restriction to EU agricultural products should be discussed in parallel to FTA negotiations.

The negotiations should follow the provisions of the negotiating directives adopted by the Council on 20 February 1995 (Council document 4976/95).

The Agreement shall not impede in any way the application of the precautionary principle in the EU as set out in the Treaty on the Functioning of the European Union.

Animal welfare

The Agreement shall promote continued cooperation and exchanges on animal welfare, to discuss, inter alia, possible commitments on equivalence on animal welfare between the parties.

The EU standards on animal welfare should serve as a basis for negotiations.

Safeguards

The Agreement should include a clause on safeguard measures providing that either party may take appropriate measures in accordance with the WTO Agreement on Implementation of Article XIX GATT 1994 or the WTO Agreement on Safeguards and with article 5 of the Agreement on Agriculture. The Agreement should also provide for additional consultations and that such safeguard measures should have the least distorting effect on bilateral trade.

To maximise commitments towards liberalisation and in order to ensure any necessary protection, taking into account specificities of sensitive sectors, the Agreement should in principle contain a bilateral safeguard clause by which either party may remove, in part or in full, preferences where imports of a product from the other Party increase in such volumes and under such conditions that they are causing or threatening to cause serious injury to its domestic industry.

Anti-dumping and countervailing measures

The Agreement should include a clause on anti-dumping and countervailing measures providing that either party may take appropriate measures against dumping and/or countervailable subsidies in accordance with the WTO Agreement on Implementation of Article VI GATT 1994 or the WTO Agreement on Subsidies and Countervailing Measures. The Agreement should also integrate commitments that go beyond WTO rules in this area in line with EU rules and previous agreements, including transparency, public interest test and lesser-duty rule.

The Agreement should recognise that green box payments are not trade distortive and should therefore, in principle not be targeted by anti-dumping or anti-subsidy measures.

Trade in Services, Foreign Direct Investment and Digital Trade

In line with Article V GATS, the Agreement should have substantial sectorial coverage and should cover all modes of supply. The Agreement should have no *a priori* exclusion from its scope other than the exclusion of audio-visual services. Services supplied in the exercise of governmental authority as defined by Article I-3 of the GATS shall be excluded from these negotiations. The negotiations should aim at the progressive and mutual liberalisation of trade in services and foreign direct investment with regard to establishment by eliminating restrictions to market access and national treatment, beyond the Parties' WTO commitments and offers submitted in the context of the negotiations of the Trade in Services Agreement. The Agreement should include rules concerning performance requirements related to foreign direct investment.

Furthermore, the Agreement should contain regulatory disciplines. To that end, the negotiations should cover matters such as:

- Regulatory provisions on transparency;
- Framework for mutual recognition of qualifications, licenses or certifications granted in relation to the supply of services, including of professional qualifications;
- Horizontal provisions on domestic regulation, such as those ensuring impartiality and due process with regard to licensing and qualification requirements and procedures; and
- Regulatory provisions for specific sectors including notably telecommunication services, financial services, delivery services and international maritime transport services.

In the context of the increasing digitalisation of trade, the negotiations should result in rules covering digital trade and cross-border data flows, consumer protection in the online environment, electronic trust and authentication services, open internet access, unsolicited direct marketing communications, improvement of the conditions for international roaming and addressing unjustified data localisation requirements, while neither negotiating nor affecting the EU's personal data protection rules and without prejudice to the EU legislation.

The Agreement should not preclude the enforcement of exceptions on the supply of services justifiable under relevant WTO rules (Article XIV and XIVbis of the GATS).

The Agreement may include procedural commitments for the temporary entry and stay of natural persons for business purposes pursuant to the Parties' commitments in Mode 4. However, nothing in the Agreement should prevent the Parties from applying their national laws, regulations and requirements regarding entry and stay, provided that, in doing so, they do not nullify or impair the benefits accruing from the Agreement. The laws, regulations and requirements existing in the EU regarding working conditions and labour rights should continue to apply.

The Agreement should reaffirm that it does not prevent the EU, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity. The high quality of the EU's public services should be preserved in accordance with the Treaty on the Functioning of the European Union (TFEU) and in particular Protocol No 26 on Services of General Interest, and taking into account the EU's reservations in this area, including GATS.

Capital Movement and Payments

The Agreement should aim for the removal of restrictions to current payments and capital movements related to transactions liberalised under this Agreement, and include a standstill clause. It should include safeguard and carve-out provisions (e.g. concerning the Union's economic and monetary union and balance of payments), which should be in accordance with the provisions of the TFEU on the free movement of capital.

Intellectual Property Rights

The Agreement shall complement, build upon and go beyond current rules of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) aiming at ensuring a higher as well as adequate and effective level of protection and enforcement of all forms of intellectual property rights.

The IPR chapter should cover topics, such as copyright and related rights, trademarks, designs, patents, plant variety rights, undisclosed information including trade secrets, geographical indications (GIs) and enhanced enforcement. The Agreement should seek to improve the effectiveness of enforcement of IPR, including in the digital environment and at the border (including on exports).

The Agreement should set up appropriate cooperation mechanisms between the Parties to support the implementation of the IPR chapter, as well as a regular dialogue on intellectual property to promote exchange of information on respective legislative progress, exchange of experience on enforcement and consultation in relation to third countries.

Geographical Indications

The Agreement should provide direct protection and effective recognition through the agreement of a list of GIs (wines, spirits, agricultural products and foodstuffs), at a high level of protection building upon Article 23 TRIPs, including against evocation, enhanced enforcement (including administrative/ex-officio), co-existence with "bona fide" prior trademarks, protection against subsequent genericness, and provisions on adding new GIs. Issues concerning individual prior rights, for example related to plant varieties, trademarks, generic or other legitimate prior uses, should be addressed with the aim of solving existing conflicts in a satisfactory manner. In addition, the negotiations will include arrangements regarding protection of GIs in third country markets.

All GIs listed in the Agreement should be effectively protected as of the date of entry into force of the Agreement.

The negotiations should address the relationship between the Agreement and the existing EU-Australia Wine Agreement.

Public Procurement

The Agreement shall aim at comprehensive and improved mutual access to public procurement markets going beyond Australia's offers in its accession to the WTO Government Procurement Agreement (GPA). This should include comprehensive coverage of procurement at all levels of government (including national and sub-central), including in the utilities sector, state owned enterprises and undertakings with special or exclusive rights, and procurement of goods, services and public works. In doing so, the parties recognise the particularities and the sensitivities of their respective procurement environments. The Agreement should also consider covering commitments for public private partnerships / concessions in line with respective legislation in this area. National treatment should ensure treatment no less favourable than that accorded to locally-established suppliers or service providers.

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Procedural commitments should be based on the rules, procedures and requirements established under the WTO GPA. In particular, commitments should ensure due process (such as including effective review mechanism, transparency in covered procurement, use of electronic means, avoiding local content or local production requirements and allowing for the inclusion of non-discriminatory rules for environmental and social considerations in the procurement procedures. Specific language on transparency should be considered in order to ensure clarity on applicable procurement rules and on available procurement opportunities in order to provide businesses with easily available information.

Trade and Competition

The Agreement should include provisions on competition addressing competition rules and their enforcement and should contain disciplines on antitrust and mergers applicable to all enterprises. The Agreement should include general enforcement principles, including transparency, non-discrimination, procedural fairness and due process.

The Agreement should contain robust and binding provisions on subsidies, in line with the EU standards and principles on State aids. Furthermore, it should also include binding provisions on State-Owned Enterprises, designated monopolies and enterprises granted special rights or privileges to ensure that they do not distort competition or create barriers to trade and foreign direct investment.

Small and Medium-sized Enterprises

The Agreement should include a specific SME chapter. The Agreement should assist SMEs to take full advantage of the trade opportunities provided by the Agreement, inter alia through increasing the level of awareness among small and medium sized enterprises and enhancing their access to information about their trade and investment opportunities, as well as their access to useful information on rules, regulations and procedures related to doing business, including public procurement.

Trade and Sustainable Development

The Agreement shall include provisions on labour and environmental aspects of trade and sustainable development of relevance in a trade and foreign direct investment context. It should promote the implementation of the 2030 Agenda for sustainable development. It should include provisions that promote adherence to and effective implementation of relevant internationally agreed principles and rules, including the core labour standards and fundamental conventions of the International Labour Organisation (ILO) and multilateral environmental agreements including those related to climate change, in particular the Paris Agreement, and climate change mitigation-related multilateral initiatives, such as in the International Maritime Organization (IMO). The Agreement should include a commitment by each Party to make continued and sustained efforts towards ratifying one ILO fundamental convention: minimum age convention (C138).

The Agreement should reaffirm the right of the parties to regulate in the labour and environmental areas, consistent with their international commitments, and encouraging high levels of protection, including by taking into account the most environmentally advantageous options. It should reiterate the respect of the precautionary principle. It should include provisions for labour and environmental levels of protection not to be lowered in order to encourage trade and foreign direct investment. This should include a commitment not to derogate from or fail to enforce domestic labour or environmental laws.

The Agreement should promote a greater contribution of trade and foreign direct investment to sustainable development, including by addressing areas such as the facilitation of trade in environmental and climate-friendly goods and services and the promotion of voluntary sustainability assurance schemes and of corporate social responsibility, having regard to internationally recognised instruments and encouraging parties to use international practices, including OECD and sector specific guidelines.

The Agreement should also contain commitments promoting trade in legally obtained and sustainably managed natural resources, in particular in relation to biodiversity, fauna and flora, aquatic ecosystem, forestry products, fisheries and cover relevant international instruments and practices. It should also promote trade favouring low-emission, climate resilient development.

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The Agreement should foresee suitable provisions for the effective implementation and monitoring of these provisions, as well as a mechanism to address and working towards resolving any disputes arising between the Parties, and should provide for civil society participation, including regular consultations and communication action.

Energy and Raw Materials

The Agreement should include provisions addressing trade and foreign direct investment-related aspects of energy and raw materials. The Agreement should aim at ensuring an open, transparent, non-discriminatory and predictable business environment and at limiting anti-competitive practices in this area, exploration-production and access to infrastructure. It should aim at awarding specific rules of exploration, licenses for exploration and production, specific market access rules, non-discrimination rules for third-party access to transmission and distribution networks, and dispositions on renewable energies. The Agreement should also include rules that support and further promote trade and foreign direct investment in the renewable energy sector. The Agreement should also enhance cooperation in the abovementioned areas. The agreement should aim at promoting the development of a sustainable and safe low-carbon economy, such as investment in renewable energies and energy efficient solutions.

Transparency of Regulations

The Agreement should include provisions regarding:

- Publication, including making measures of general application publicly available, in a non-discriminatory manner and with reasonable time for comments on proposals for measures of general application.
- Enquiries and contact points, with mechanisms to respond to enquiries from interested parties regarding measures proposed or in force.

- Administrative proceedings based on and in accordance with law which ensure that information on the operation of measures of general application is available to interested persons and reasonable opportunity is afforded for those affected by a proceeding to present views prior to any final administrative action.
- Appropriate opportunities to review and appeal an administrative action in areas covered by the Agreement.
- Promotion of quality regulation and good administrative practice.

Regulatory cooperation

The Agreement should include cross-cutting disciplines on regulatory coherence and transparency for the development, adoption and implementation of efficient, cost-effective, and more compatible regulations so as to facilitate trade. The Agreement should include provisions on the promotion of information exchange, the enhanced use of good regulatory practices, and enhanced regulatory cooperation, taking into account the general principles and objectives of the Agreement, notably transparency and the right to regulate.

To this end, consideration should be given to the inclusion of provisions on voluntary regulatory cooperation between EU regulatory authorities and Australian relevant counterparts in certain specific areas not covered in the current framework, and to mechanisms for identifying potential obstacles to be addressed through regulatory cooperation.

Institutional and final provisions

A clear legal and institutional link should be established between the Agreement and the Framework Agreement. This should ensure external coherence in particular in respect of the existence, application, suspension and termination of the respective provisions.

The Agreement should set up a specific overarching body to monitor the implementation of the Agreement. Committees or working groups on specific areas may be established as appropriate and should operate under the framework of the overarching body.

The Commission may make recommendations to the Council on possible additional negotiating directives in accordance with Article 218(3) TFEU.

Dispute Settlement and Mediation

The Agreement should include an effective and binding dispute settlement mechanism with an expedited procedure, in particular for the panel composition and the conduct of panel proceedings. The dispute settlement mechanism should be transparent, open based on experience gained in the WTO and in other Free Trade Agreements. It should include provisions for consultations and a flexible and rapid mediation mechanism.

General exceptions

The Agreement should include general exceptions, applicable to the relevant parts of the Agreement, including regarding security, balance of payments, prudential supervision and taxation based on the relevant articles of WTO agreements.

Authentic languages

The Agreement, which should be equally authentic in all official EU languages, should include a language clause to that effect.

Other issues

The Agreement should recognise the importance of consumer protection issues and support effective consumer protection.

Following analysis by the Commission and prior consultation with the Trade Policy Committee and in accordance with EU Treaties, the Agreement may include additional provisions related to the trade and economic relationship where, in the course of negotiations, mutual interest was expressed in doing so.

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