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#### WTO ELECTRONIC COMMERCE NEGOTIATIONS

#### UPDATED CONSOLIDATED NEGOTIATING TEXT - NOVEMBER 2023

#### Revision

This Updated Consolidated Negotiating Text is a working document that captures progress so far in the WTO Joint Statement Initiative on Electronic Commerce. It has been prepared under the responsibility of the co-convenors. This text incorporates outcomes of small group discussions, consultations, and members' additional submissions.

For transparency, a box has been included under most provisions to indicate Members' positions or which Members' proposals the text is based on. For text on which discussion has been concluded in the small group, such a box has not been included.

For the purposes of this document, proposed definitions have generally been placed with the provisions to which they relate. Some proposed cross-cutting definitions have been included in "Scope and General Provisions".

Proposals (other than cross-cutting issues) that have not yet been the subject of small group negotiations have been included in a separate Annex.

The draft text reflected in this document is subject to the consideration of several cross-cutting issues that many Members have highlighted in the negotiations, including the following:

- Several Members have noted that they would expect security, general and prudential exceptions to apply.
- Several have expressed their intention that commitments would not apply to government procurement; a service supplied in the exercise of governmental authority; or, except as otherwise indicated, information held by or on behalf of a Party, or measures related to such information, including measures related to its collection.
- o Some Members have said they may require sectoral carve-outs.
- Several have noted the need to determine the relationship of provisions with Members' market access commitments, the legal architecture of the JSI outcome, and existing WTO agreements.

In preparing this document, the same drafting approach used for previous streamlined text compilations has been applied. This includes merging elements of text that have a similar effect and the use of square brackets and alternatives to reflect differences in proposals.

This document has been prepared on a without prejudice basis, and text that is not in square brackets does not indicate agreement to or conclusion of the text.

This working document does not prejudge the final legal framework which will give legal effect to each provision.

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## Section A: Enabling Electronic Commerce

## A.1. Facilitating Electronic Transactions

#### (1) Electronic transactions frameworks

Co-convenors' note: Small group discussion on this article were concluded in October 2022. Co-convenors and the facilitator remain available for discussions with any interested delegations.

- 1. Each [Party/Member] shall endeavour to adopt or maintain a legal framework governing electronic transactions that is consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996.
- [Alt: Each [Party/Member] shall adopt or maintain a legal framework governing electronic transactions that takes into account the principles of the UNCITRAL Model Law on Electronic Commerce 1996.]
- 2. Each [Party/Member] shall endeavour to:
  - (a) avoid undue\* regulatory burden on electronic transactions;
- [Alt: avoid undue regulatory burden on electronic transactions with respect to the administrative procedures for applications to competent authorities.]
  - (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

\*[Drafting note: [Several participants] mentioned [their] concern on future interpretation of "undue" in paragraph 2(a) as imposing a necessity test and accepted the term "undue" based on the shared understanding by small group Members that "undue" is not to be interpreted as imposing a necessity test.]

3. The [Parties/Members] recognise the importance of facilitating the use of electronic transferable records. To this end, each [Party/Member] shall endeavour to adopt or maintain a legal framework which takes into account the UNCITRAL Model Law on Electronic Transferable Records 2017.

## (2) Electronic authentication and electronic signatures

Co-convenors' note: This article was cleaned in informal discussions then endorsed at the 20 April 2021 plenary meeting.

- 1. "Electronic authentication" means the process or act of verifying the identity of a party to an electronic communication or transaction or\* ensuring the integrity of an electronic communication.
  - \*Negotiators' note: It is understood that 'or' includes 'and' and thus encompasses situations where both or either functions are performed.
- 2. "Electronic signature" means data in electronic form that is in, affixed to, or logically associated with an electronic data message that may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message.<sup>1</sup>
- 3. Except in circumstances otherwise provided for under its laws or regulations, a [Party/Member] shall not deny the legal effect, legal validity, or admissibility as evidence in legal proceedings of an electronic signature solely on the basis that the signature is in electronic form.
- 4. No [Party/Member] shall adopt or maintain measures that would:
  - (a) prohibit parties to an electronic transaction from mutually determining the appropriate electronic authentication methods, or electronic signature for that transaction; or
  - (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to electronic authentication or electronic signatures.
- 5. Notwithstanding paragraph 4, a [Party/Member] may require that, for a particular category of transactions, the method of authentication or the electronic signature meets certain performance standards or is certified by an accredited authority, in accordance with its laws or regulations.
- 6. To the extent provided for under its laws or regulations, a [Party/Member] shall apply paragraphs 3 to 5 to electronic seals, electronic time stamps and electronic registered delivery services.
- 7. [Parties/Members] shall encourage the use of interoperable electronic authentication.
- 8. [Parties/Members] may work together, on a voluntary basis, to encourage the mutual recognition of electronic signatures.

<sup>&</sup>lt;sup>1</sup> For greater certainty, nothing in this provision prevents a [Party/Member] from according greater legal effect to an electronic signature that satisfies certain requirements, such as indicating that the electronic data message has not been altered or verifying the identity of the signatory.

# (3) Electronic contracts

Co-convenors' note: This article was cleaned in informal discussions then endorsed at the 22 July 2021 plenary meeting.

1. Unless otherwise provided for under its laws or regulations, a [Party/Member] shall not deny the legal effect, legal validity, or enforceability of an electronic contract<sup>2</sup> solely on the basis that the contract has been made by electronic means.

 $<sup>^{2}</sup>$  For greater certainty, an electronic contract includes a contract made by interaction with an automated message system.

## (4) Electronic invoicing

Co-convenors' note: Small group discussion on this article were concluded in February 2023. Co-convenors and the facilitator remain available for discussions with any interested delegations.

#### Definition:

- (1) "electronic invoicing" means the processing and exchange of an invoice between a seller and a buyer using a structured digital format.
- (2) "electronic invoicing framework" means a system that facilitates the processing and exchange of an invoice between a seller and a buyer using a structured digital format [and that allows a buyer and a seller to each use a different access point service supplier to exchange an invoice].
- 1. Unless otherwise provided for under its laws or regulations, a [Party/Member] shall not deny the legal effect or admissibility as evidence in a legal proceeding of an invoice solely on the basis that the invoice is in electronic form.
- 2. [Parties/Members] recognise that electronic invoicing frameworks can help improve cost effectiveness, efficiency, accuracy, and reliability of electronic commerce transactions.
- 3. To the extent that a [Party/Member] develops a measure related to electronic invoicing frameworks, the [Party/Member] shall endeavour to design the measure to support cross-border interoperability, including by taking into account international standards, guidelines or recommendations, where they exist [and by promoting the adoption of electronic invoicing frameworks that are based on discovery, delivery and data components that utilize open standards].
- 4. Each [Party/Member] shall endeavour to share best practices pertaining to electronic invoicing, as appropriate.

## (5) Electronic Payments<sup>0</sup>

#### 1. Definition:

- (a) Electronic payments means the payer's transfer of a monetary claim on a person that is acceptable to the payee and made through electronic means; and
- (b) Self-regulatory organization means any non-governmental body that exercises regulatory or supervisory authority over [financial services suppliers/ electronic payment services suppliers] or financial institutions by statute or delegation from central or regional government.
- 2. Noting the rapid growth of electronic payments, in particular, those supplied by new electronic payment services suppliers, [Parties/Members] agree to support the development of efficient, safe and secure cross-border electronic payments by fostering the adoption and use of internationally accepted standards, promoting interoperability and the interlinking of payment infrastructures, and encouraging useful innovation and competition in the payments ecosystem.
- 3. To this end, and in accordance with their respective laws and regulations, [Parties/Members] recognise the following principles:
  - (a) [Parties/Members] shall endeavour to make their respective regulations on electronic payments, including those pertaining to regulatory approval, licensing requirements, procedures and technical standards, publicly available in a timely manner.
  - (b) [Parties/Members] shall endeavour to take into account, for relevant electronic payment systems, internationally accepted payment standards to enable greater interoperability between payment systems.
  - (c) [Parties/Members] shall endeavour to promote the use of Application Programming Interface (API) and to encourage financial institutions and electronic payment services suppliers to make available APIs of their financial products, services and transactions to third party players where possible to facilitate greater interoperability and innovation in the electronic-payments ecosystem.
  - (d) [Parties/Members] recognise the importance of upholding safety, efficiency, trust and security in electronic payment systems through regulation. The implementation of regulation should, where appropriate, be proportionate to and commensurate with the risks posed by the provision of electronic payment systems.
  - (e) [Parties/Members] agree that policies should promote innovation and competition in a level playing field and recognise the importance of enabling the introduction of new financial and electronic payment products and services by incumbents and new entrants in a timely manner.
- 4. Under terms and conditions that accord national treatment, each [Party/Member] shall grant electronic payment services suppliers of another [Party/Member] established within its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the [Party/Member]'s lender of last resort facilities.

<sup>&</sup>lt;sup>0</sup> For greater certainty, nothing in this Article shall be construed to impose an obligation on a [Party/Member] to modify its domestic rules on payments, including, *inter alia*, the need to obtain licences or permits or the approval of access applications.

<sup>&</sup>lt;sup>0</sup> For greater certainty, nothing under this Article shall be construed to require a [*Party*/Member] to allow foreign service suppliers to engage in the services on which it has not undertaken specific commitments.

- 5. Each [Party/Member] shall take such reasonable measures as may be available to it to ensure that the rules of general application adopted or maintained by self-regulatory organizations of the [Party/Member] are promptly published or otherwise made available.
- 6. This Article shall not apply to measures adopted or maintained by a [Party/Member] relating to:
  - (a) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
  - (b) activities forming part of a statutory system of social security or public retirement plans; and,
  - (c) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

## Paragraphs 1-6:

Based on text proposal by CN.

#### A.2. Digital trade facilitation and logistics

## (1) Paperless trading

Co-convenors' note: Small group discussion on this article were concluded in January 2022. Co-convenors and the facilitator remain available for discussions with any interested delegations.

- 1. 'Customs authority' means any authority that is responsible under the law of each Party/Member for the administration of its customs laws and regulations.
- 1bis. 'Supporting documentation' means any documentation that is required to support the information presented to a Party/Member for import, export, or transit of goods through its territory. Supporting documentation may include documents such as invoices, bills of lading, packing lists and money transfers.
- 1ter. With a view to creating a paperless border environment for trade of goods, each Party/Member recognises the importance of eliminating paper forms and documents required for import, export, or transit of goods. To this end, Parties/Members are encouraged to eliminate paper forms and documents, as appropriate, and transition toward using forms and documents in data-based formats.
  - For the purpose of paragraphs 2 and 3, 'electronic format' includes, inter alia, formats suitable for automated interpretation and electronic processing without human intervention, as well as digitized images and forms.
- 2. Each [Party/Member] shall make any form issued or controlled by its customs authority for import, export, or transit of goods through its territory available to the public in an electronic format.
- 2bis. Each [Party/Member] shall endeavour to make any form issued or controlled by any government agency other than its customs authority for import, export, or transit of goods through its territory available to the public in electronic format.
  - No Party/Member shall be required to apply paragraphs 2 and *2bis* if there is an international legal requirement to the contrary.
- 2*ter*. Each, [Party/Member] shall endeavour to make instructions for the submission in electronic format of the forms referred to in paragraph 2 and paragraph *2bis* available through the internet.
- 3. Each [Party/Member] shall accept any form issued or controlled by customs authorities and, as appropriate, supporting documentation, required by customs authorities for import, export, or transit of goods through its territory submitted in electronic format as the legal equivalent of the paper version of those documents.\_
- 3bis. Each [Party/Member] shall endeavour to accept any form issued or controlled by any government agency other than customs authorities and, as appropriate, supporting documentation, required by any government agency other than customs authorities for import, export, or transit of goods through its territory submitted in electronic format as the legal equivalent of the paper version of those forms.
- 3ter. No [Party/Member] shall be required to apply paragraphs 3 and 3bis if:
  - (a) there is a domestic or an international legal requirement to the contrary; or,
  - (b) doing so would reduce the effectiveness of the customs or other trade procedures required for import, export, or transit of goods through its territory.

3quater.

A [Party/Member] shall [endeavour to] [publish / notify the Committee [X] of] the list of paper forms required under paragraph 3ter (a) within [X] years of [the date of approval / date of entry into force of this initiative]. Each [Party/Member] shall [endeavour to] update the list, as appropriate.

Negotiators' note: This provision will be re-examined before the conclusion of the negotiations, in light of the chosen legal architecture and horizontal transparency provision.

- 4. [Parties/Members] shall endeavour to cooperate, where appropriate, in international fora to promote the use of electronic forms and documents required for import, export, or transit.
- 5. Recognizing that use of an international standard for utilization of electronic forms and documents required for import, export, or transit can facilitate trade, [Parties/Members] shall endeavour to take into account, as appropriate, standards of, or methods agreed by relevant international organizations.

# (2) Single windows data exchange and system interoperability / Unique Consignment Reference Numbers

Co-convenors' note: Small group discussion on this article were concluded in July 2023. Co-convenors and the facilitator remain available for discussions with any interested delegations.

- 1. In implementing its single window pursuant to TFA Article 10.4.1, each [Party/Member] shall endeavour to enable through a single entry point the electronic submission of the documentation [and/or] data the [Party/Member] requires for import, export, or transit of goods through its territory for all its participating authorities or agencies.
- 2. Whenever possible, the single window should allow the electronic submission of documentation [and/or] data in advance in order to begin processing information prior to the arrival of goods with a view to expediting the release of goods upon arrival.
- 3. In building and maintaining its single window, each [Party/Member]:
  - (a) shall endeavour to incorporate, as appropriate, the World Customs Organization Data Model or other international standards for data elements;
  - (b) shall ensure the protection and confidentiality of the data exchanged with other single window, whenever this exchange is permitted; and
  - (c) is encouraged to implement a reference number or other identity verification tool to uniquely identify data relating to an individual transaction.

Whenever a single window is not available or not integrated with customs authorities, this paragraph applies, as appropriate, to customs management systems used for processing data related to export, import and transit of goods through its territory.

- 4. In implementing paragraph 3, [Parties/Members] shall endeavour to:
  - (a) share with each other their respective experiences in developing and maintaining their single window; and
  - (b) work towards a harmonization, to the extent [practicable/possible], of data elements and customs processes.
- 5. Taking into consideration the interests of micro, small and medium enterprises, [a/each] [Party/Member] shall endeavour to allow traders and other stakeholders to use service providers to exchange data with a single window on their behalf or, where a single window is not available, with customs management systems [on their behalf] **FN**.

[FN - For greater certainty, this provision does not preclude a [Party/Member] from requiring service providers to meet certain procedural requirements in order to exchange data with the single window.]

# Section B: Openness and electronic commerce B.1. Customs duties on electronic transmissions

#### [Alt 1:

- 1. "Electronic transmission" means a transmission made using any electromagnetic means and includes the content of the transmission.
- 2. No [Party/Member] shall impose customs duties **FN** on electronic transmissions [between a person of one [Party/Member] and a person of another [Party/Member].\*

**FN**: For the purposes of this provision, customs duties include fees or other charges of any kind imposed on or in connection with importation or exportation.

\*Negotiators' note: The bracketed text 'between a person of one [Party/Member] and a person of another [Party/Member]' will be re-examined at a later stage in the negotiations, in light of the legal architecture of the negotiated outcome in the JSI.]

#### [Alt 2:

1. [Parties/Members] agree to maintain the current practice of not imposing customs duties on electronic transmissions, not including content transmitted electronically. [Parties/Members] may adjust their practice in light of any further WTO Ministerial Decisions or Agreements in relation to the Work Programme on Electronic Commerce. For greater certainty, the above shall not preclude a Member to apply custom procedures for public policy purposes.]

#### [Alt 3:

1. Each [Party/Member] shall maintain its practice of not imposing customs duties on electronic transmissions between itself and another Member, consistent with paragraph 3 of the WTO Ministerial Decision of 17 June 2022 (WT/MIN(22)/32) and any further WTO Ministerial Decisions in relation to the Work Programme on Electronic Commerce.]

#### Paragraph 3 (if attached to Alt 1) or Paragraph 2 (if attached to Alt 2)

For greater certainty, paragraph 2 shall not preclude a [Party/Member] from imposing internal taxes, fees or other charges on electronic transmissions in a manner consistent with the WTO Agreement.

## **Current State of Play - Members' Positions**

*Alt 1:* 

Support: AU, CA, CH, CL, CT, EU, GT, HKC, JP, KR, NO, NZ, SG, UA, UK, and US.

Alt 2:

Support: ID, AR.

Alt 3:

Support: CN, KSA, TR.

#### B.2. Access to internet and data

## (1) Open government data

Co-convenors' note: This article was cleaned in informal discussions and then endorsed at the 13 September 2021 plenary meeting.

- 1.
- (a) This Article applies to measures by a [Party/Member] with respect to data held by the central government, disclosure of which is not restricted under domestic law, and which a Party/Member makes digitally available for public access and use (hereafter referred to as "government data")<sup>0</sup>.
- (b) Parties/Members recognize the benefit of making data held by a regional or local government digitally available for public access and use in a manner consistent with paragraphs 2 to 4.

"Metadata" means structural or descriptive information about data, such as content, format, source, rights, accuracy, provenance, frequency, periodicity, granularity, publisher or responsible party, contact information, method of collection and context.

- 2. [Parties/Members] recognise that facilitating public access to and use of government data fosters economic and social development, competitiveness, and innovation. To this end, [Parties/Members] are encouraged to expand the coverage of such data, such as through engagement and consultation with interested stakeholders.
- 3. To the extent that a [Party/Member] chooses to make government data digitally available for public access and use, a [Party/Member] shall endeavour, to the extent practicable, to ensure that such data is:
  - (a) made available in a machine-readable and open format;
  - (b) searchable and retrievable;
  - (c) updated, as applicable, in a timely manner; and,
  - (d) accompanied by metadata that is, to the extent possible, based on commonly used formats that allow the user to understand and utilise the data.

A [Party/Member] shall further endeavour to make this data generally available at no or reasonable cost to the user.

- 4. To the extent that a [Party/Member] chooses to make government data digitally available for public access and use, it shall endeavour to avoid imposing conditions<sup>0</sup> that unduly prevent or restrict the user of such data from:
  - (a) reproducing, redistributing, or republishing the data;
  - (b) regrouping the data; or,
  - (c) using the data for commercial and non-commercial purposes, including in the process of production of a new product or service.

<sup>&</sup>lt;sup>0</sup> For greater certainty, this Article is without prejudice to a [Party's/Member's] laws pertaining to intellectual property and personal data protection.

 $<sup>^{\</sup>rm 0}$  For greater certainty, nothing in this paragraph prevents a [Party/Member] from requiring a user of such data to link to original sources.

5. [Parties/Members] shall endeavour to cooperate in matters that facilitate and expand public access to and use of government data, including exchanging information and experiences on practices and policies, with a view to encouraging the development of electronic commerce and creating business opportunities, especially for small and medium-sized enterprises.

[Drafting note: Turkey mentioned its concern on future interpretation of "unduly" in the chapeau of paragraph 4 as imposing a necessity test and accepted the term "unduly" based on the shared understanding by small group Members that "unduly" is not to be interpreted as imposing a necessity test.]

### (2) Access to and Use of the Internet for [electronic commerce/Digital Trade]

Co-convenors' note: Small group discussion on this article were concluded in September 2022. Co-Convenors and the facilitator remain available for discussions with any interested delegations.

Negotiators note: The delegations view this Article as being without prejudice to rights and obligations of Members arising from the GATS Annex on Telecommunications. The delegations also understand that the relationship between the disciplines foreseen under this Initiative, including this Article, and the GATS, including its Annex on Telecommunications, will be further discussed in the context of the Scope and General Provisions.

1. "End-user" means a natural or juridical person who purchases or subscribes to an Internet access service from an Internet access service provider.

Negotiators note: The choice of the final wording between 'juridical person' and 'enterprise' is pending the result of a discussion on these terms and their usage across the whole Consolidated text.

- 2. [Parties/Members] recognise the benefits of end-users in their territories having the ability to:
  - (a) access and use lawful services and applications of their choice available on the Internet, subject to reasonable network management [which does not block or slow down traffic for unfair commercial advantage;] [FN]

**FN**: For the purposes of paragraph 2(a), [Parties/Members] recognise that an Internet access service supplier that offers certain content only to its end-users would not be acting contrary to this principle.

- (b) connect the devices of their choice to the Internet, provided that such devices do not harm the network; and
- (c) access transparent and clear information on the network management practices of their internet access service supplier.

For greater certainty, nothing in this paragraph shall be construed to require a [Party/Member] to adopt, amend or maintain a particular measure to implement the principles set out in this paragraph.

# Section C: Trust and electronic commerce

#### C.1. Consumer Protection

#### (1) Online consumer protection

Co-convenors' note: This article was cleaned in informal discussions in August 2021 and then endorsed at the 13 September 2021 plenary meeting.

- 1. Misleading, fraudulent and deceptive commercial activities include:
  - (a) making material misrepresentations<sup>0</sup>, including implied factual misrepresentations, or false claims as to matters such as qualities, price, suitability for purpose, quantity or origin of goods or services.
  - (b) advertising goods or services for supply without intention or reasonable capability to supply;
  - (c) failing to deliver goods or provide services to a consumer after the consumer is charged unless justified on reasonable grounds; or
  - (d) charging a consumer for services or goods not requested.
- 2. The [Parties/Members] recognise the importance of transparent and effective measures that enhance consumer confidence and trust in electronic commerce. Each [Party/Member] shall adopt or maintain measures to proscribe misleading, fraudulent and deceptive commercial activities that cause harm, or potential harm, to consumers engaged in electronic commerce.
- 3. To protect consumers engaged in electronic commerce, each [Member/Party] shall endeavour to adopt or maintain measures that aim to ensure:
  - (a) that suppliers of goods and services deal fairly and honestly with consumers;
  - (b) that suppliers provide complete, accurate, and transparent information on goods and services including any terms and conditions of purchase; and
  - (c) the safety of goods and, where applicable, services during normal or reasonably foreseeable use.
- 4. The [Parties/Members] recognise the importance of affording to consumers who are engaged in electronic commerce consumer protection at a level not less than that afforded to consumers who are engaged in other forms of commerce.
- 5. The [Parties/Members] recognise the importance of cooperation between their respective consumer protection agencies or other relevant bodies including the exchange of information and experience, as well as cooperation in appropriate cases of mutual concern regarding the violation of consumer rights in relation to electronic commerce in order to enhance online consumer protection, where mutually agreed.
- 6. [Parties/Members] shall promote access to, and awareness of, consumer redress or recourse mechanisms, including for consumers transacting cross-border.

[Drafting note: Guatemala and Ecuador can support this text as long as they are allowed an implementation period of X years]

<sup>&</sup>lt;sup>0</sup> For the purposes of this article, material misrepresentations refer to misrepresentations that are likely to affect a consumer's conduct or decision to use or purchase a good or service.

 $<sup>^{\</sup>rm 0}$  For the purposes of this article, the term 'engaged' includes the pre-transaction phase of electronic commerce.

#### (2) Unsolicited commercial electronic messages

Co-convenors' note: This article was cleaned in informal discussions then endorsed at the 5 February 2021 plenary meeting.

- 1. "Commercial electronic message" means an electronic message which is sent for commercial purposes to an electronic address of a person<sup>0</sup> through telecommunication services, comprising at least electronic mail and to the extent provided for under domestic laws and regulations, other types of messages. "Unsolicited commercial electronic message" means a commercial electronic message that is sent without the consent of the recipient or despite the explicit rejection of the recipient.
- 2. [Parties/Members] recognize the importance of promoting confidence and trust in electronic commerce, including through transparent and effective measures that limit unsolicited commercial electronic messages. Each [Party/Member] shall adopt or maintain measures that:
  - (a) require suppliers of commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages; or,
  - (b) require the consent, as specified in the laws or regulations of each [Party/Member], of recipients to receive commercial electronic messages; or,
  - (c) otherwise provide for the minimisation of unsolicited commercial electronic messages.
- 3. Each [Party/Member] shall endeavour to ensure that commercial electronic messages are clearly identifiable as such, clearly disclose on whose behalf they are sent, and contain the necessary information to enable recipients to request cessation free of charge and at any time.
- 4. Each [Party/Member] shall provide access to either redress or recourse against suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained pursuant to paragraph 2.
- 5. [Parties/Members] shall endeavour to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.

[Drafting note: Guatemala and Ecuador can support this text as long as they are allowed an implementation period of X years.]

<sup>&</sup>lt;sup>0</sup> For greater certainty, the "electronic address of a person" does not cover IP addresses.

#### C.2. Privacy

#### (1) Personal data protection

1. "Personal data" means any information relating to an identified or identifiable natural person.

Paragraph 1 is stabilized.

2. [Drafter's note: Given the absence of consensus, this provision will be reexamined intersessionally through a silent procedure and consultations.]

#### Alt 1 (EU)

[Parties/Members] recognise that individuals have a right to privacy and the protection of personal data and that [high/enforceable] standards in this regard contribute to trust in the digital economy and to the development of trade.]

#### Alt 2 (CA)

The [Parties/Members] recognise the importance of protecting the personal data of users of [electronic commerce/digital trade] and that high [and enforceable] standards in this regard contribute to enhancing consumer confidence and trust in the digital economy and [electronic commerce/digital trade].

#### Alt 3 (EU)

The [Parties/Members] recognise the importance of protecting the rights of individuals in the context of [electronic commerce/digital trade]. In that regard, high standards of protection of personal data contribute to enhancing consumer confidence and trust in the digital economy and [electronic commerce/digital trade].

#### Alt 4 [EU Redraft 27 October]

The [Parties/Members] recognise that high standards of protection of personal data and related individual rights contribute to enhancing consumer confidence and trust in the digital economy and [electronic commerce/digital trade].

## Alt 5 [Merged TR/CA Alt 2 - 27 October]

The [Parties/Members] recognise the importance of protecting the [personal data of users of [electronic commerce/digital trade]/ TR: the right of individuals with respect to protection of their personal data] and that high [and enforceable] standards in this regard contribute to enhancing consumer confidence and trust in the [digital economy.][and electronic commerce/digital trade].

3. Each [Party/Member] shall adopt or maintain a legal framework that provides for the protection of the personal data of [individuals/the users of electronic commerce/the users of digital trade].

Paragraph 3 is stabilized.

**FN**: For greater certainty, a [Party/Member] may comply with the obligation in paragraph 3 by adopting or maintaining [measures or a combination of] measures such as a comprehensive privacy, personal data protection laws, sector-specific laws covering privacy[, or consumer protection laws that address privacy violations].

Pending issue: brackets (US proposal).

#### 3*bis* Alt 1:

[Parties may adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the [Parties'/Members'] respective safeguards.]

#### 3bis Alt 2: Proposal of alternative language by AU 26.10

[Nothing in this Agreement shall prevent a Party from adopting or maintaining measures on the protection of personal data and privacy, including with respect to cross-border data transfers, provided that the law of the Party provides for instruments enabling transfers under conditions of general application<sup>[FN]</sup> for the protection of the data transferred.

**[FN]** For greater certainty, "conditions of general application" refer to conditions formulated in objective terms that apply horizontally to an unidentified number of economic operators and thus cover a range of situations and cases.]

#### **ONGOING CONSULTATIONS.**

Negotiator's note: This provision (3bis) will be re-examined before the conclusion of the negotiations, in light of the scope of the finalised provisions and horizontal issues.

- 4. In the development of its legal framework for the protection of personal data, each [Party/Member] should take into account principles and guidelines developed by relevant international bodies or organisations.

  Paragraph 4 is stabilized.
- 5. (Previous paragraph 6, numbering changed for following paragraphs)

## [Alt 1:

Each [Party/Member] [shall endeavour to/shall] adopt or maintain measures that protect natural persons without discrimination, on such bases as nationality or residence, [among others,] from personal data protection violations occurring within its jurisdiction.]

#### [Alt 2:

When adopting or maintaining measures to protect natural persons from personal data protection violations occurring within its jurisdiction, each [Party/Member] [shall/shall endeavour to] ensure such measures [are not discriminatory / do not discriminate [against natural persons]], including on such bases as nationality or residence[, among others].]

#### [Alt 3 (redraft):

Each [Party/Member] [shall endeavour to/shall] ensure its measures concerning the protection of personal data do not discriminate against natural persons, including on the bases of nationality or residence.]

- 6. Each [Party/Member] shall publish information on the personal data protections it provides to [users of digital trade/users of electronic commerce], including guidance on how:
  - (a) [individuals/a natural person] can pursue remedies; and,
  - (b) enterprises can comply with legal requirements.

## Paragraph 6 is stabilized.

- 7. Recognising that [Parties/Members] may take different legal approaches to protecting personal data, each Party should encourage the development of mechanisms to promote compatibility between these different regimes.
  - Paragraph 7 is stabilized.
- 8. The mechanisms referred to in paragraph 7 may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks.
  - Paragraph 8 is clean.
- [Parties/Members] shall endeavour to exchange information on mechanisms referred to in paragraph 7 that are applied in their jurisdictions.
   Paragraph 9 is stabilized.
- 10. Each [Party/Member] shall endeavour to avoid using personal data obtained from an enterprise in a manner that discriminates against the natural person whose personal data was obtained.

11. Each [Party/Member] shall endeavour to protect personal data disclosed to a government authority by an enterprise such that the access, disclosure, use, retention, or modification of that personal data does not cause unnecessary damage to the interests of the natural person whose personal data was obtained. [FN]

**[FN:** For greater certainty, the public disclosure of personal data that can reasonably be expected to cause unnecessary damage to an individual does not constitute a violation of this obligation provided that it is not inconsistent with paragraph (x) of this article and that it is done for the purposes of legitimate law enforcement activities, judicial proceedings, compliance with regulatory requirements, or national security.]

Drafting note: El Salvador can support this text as long as the development provision, including implementation periods and technical assistance, is agreed.

- 12. "Personal data" means any direct or indirect information that relates to an identified or identifiable natural person.
- 13. The Members recognise the economic and social benefits of protecting the personal data of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.
- 14. To this end, the Members shall adopt or maintain measures that ensure the protection of personal data, including the cross-border transfer and processing of personal data and the conditions and requirements relating to it to promote the fundamental values of respect for privacy and protection of personal data.
- 15. The Members shall ensure obtaining the directly expressed individual's consent for cross-border transfer and processing of his personal data.

#### Paragraph 1:

Based on text proposals by EU and BR.

## Paragraph 2:

- Alt 1 based on text proposal by EU.
- Alt 2 based on text proposal by CA.
- Alt 3 based on text proposal by EU.
- Alt 4 based on text proposal by EU.
- Alt 5 based on text proposals by TR and CA.

#### Paragraph 3:

- Based on text proposals by JP, US, SG, HK, BR, UA, KR, CN, CA and UK.
- FN based on text proposal by US.

#### Paragraph 3bis:

- Alt 1 based on text proposal by EU.
- Alt 2 based on text proposal by AU.

### Paragraph 4:

Based on text proposals by JP, HK, BR, KR, CN, CA, UK and SG.

#### Paragraph 5:

- Alt 1 based on text proposals by EU, UK and SG.
- Alt 2 based on text proposals by AU.
- Alt 3 based on text proposals by CA.

## Paragraph 6:

Based on text proposals by JP, US, SG, HK, BR, KR, CN, CA and UK.

## Paragraph 7:

Based on text proposals by JP, US, SG, BR, UA, CN, CA and UK.

#### Paragraph 8:

Based on text proposals by JP, SG and UK.

## Paragraph 9:

Based on text proposals by JP, SG, UA, CN, CA and UK.

# Paragraph 10-11:

Based on text proposals by CA.

## Paragraphs 12-15:

Based on text proposal by RU.

#### C.3. Business trust

## (1) Source code

- 1. ["Algorithm" means a defined sequence of steps taken to solve a problem or obtain a result.]
- 2. No [Party/Member] [shall] [to the extent practicable] require the transfer of, or access to, source code of software owned by a person of another [Party/Member], [or the transfer of, or access to, an algorithm expressed in that source code,] as a condition for the import, distribution, sale, or use of that software, or of products containing that software, in its territory.
- 3. [For greater certainty, paragraph 2 does not apply to the voluntary transfer of [source code,] or granting of access to source code on a commercial basis, by a natural or juridical person, for instance in the context of a public procurement transaction or a freely negotiated contract.]
- 4. This Article/Paragraph 2 [does/shall] not preclude a competent authority of a [Party/Member] from requiring a person of another [Party/Member] [:]

## [Alt 1

- (a) to preserve and make available [1] the source code of software [, or an algorithm expressed in that source code,] for [an / a specific] investigation, inspection, examination, enforcement action, or judicial proceeding, [including those relating to non-discrimination and the prevention of bias,] subject to safeguards against unauthorised disclosure. [; and
- (b) to transfer or provide access to the source code of software [, or an algorithm expressed in that source code,] for the purpose of the imposition or enforcement of a remedy granted in accordance with that [Party's/Member's] law following an investigation, inspection, examination, enforcement action, or a judicial proceeding].]

#### [Alt 2

to preserve and make available<sup>[0]</sup> the source code of software [, or an algorithm expressed in that source code,] for [an / a specific] investigation, inspection, examination, or judicial proceeding, [to determine compliance with its laws and regulations, including those relating to non-discrimination and the prevention of bias;] or to preserve, make available, or transfer the source code of software [, or an algorithm expressed in that source code,] for an enforcement action.]

5. When source code of software has been [preserved,] made available [, or transferred] [to a competent authority of a Party/Member] for the purposes referred to in paragraph 4, that [Party/Member] shall adopt or maintain measures to prevent the unauthorised disclosure of that source code.

<sup>&</sup>lt;sup>0</sup> [This making available shall not be construed to negatively affect the status of source code of software [or algorithm expressed in that source code] as a trade secret [, if such status is claimed by the trade secret owner/if it has such a status under the laws and regulations of a [Member/Party].]

## Paragraph 1:

Based on text proposals by CA, CT, JP, KR, MX, PE, UA, SG and UK.

## Paragraph 2:

Based on text proposals by CA, CT, JP, KR, MX, PE, UA, SG, UK, EU and KSA.

## Paragraph 3:

Based on text proposal by EU and CN.

#### Paragraph 4:

- Alt 1 based on text proposals by CA, CT, JP, KR, MX, PE, UA, SG, UK, EU and NZ.
- Alt 2 based on text proposals by small group facilitator and NZ.

## Paragraph 5:

Based on text proposal by CA and JP.

#### (2) ICT products that use cryptography

- 1. For the purposes of this Article:
  - (a) "Cipher" or "cryptographic algorithm" means a [defined method of transforming data using cryptography]/ [mathematical procedure or formula for combining a key with plaintext to create a ciphertext];
  - (b) "Ciphertext" means data in a form that cannot be easily understood without subsequent decryption.
  - (c) "Cryptography" means the principles, means or methods for the transformation of data in order to conceal or disguise its content, prevent its undetected modification, or prevent its unauthorised use; and is limited to [principles, means or methods where]/[the transformation of information using,] one or more secret parameters, for example, crypto variables, or associated key management [is required in order to transform the data or to perform a corresponding reverse transformation];
  - (d) "Encryption" means the conversion of data (plaintext) through the use of a cryptographic algorithm into a ciphertext using the appropriate key;
  - (e) "Information and communication technology product (ICT product)" means a product whose intended function is information processing and communication by electronic means, including transmission and display, or electronic processing applied to determine or record physical phenomena, or to control physical processes.

**FN**: For greater certainty, an ICT product does not include a financial instrument.

- (f) "Key" means a parameter used in conjunction with a cryptographic algorithm that determines its operation in such a way that a person with knowledge of the key can reproduce or reverse the operation, while a person without knowledge of the key cannot.
- 2. With respect to an ICT product that uses cryptography and is [designed or] [used] for commercial applications, [to the extent practicable and in accordance with domestic laws and regulations,] no [Party/ Member] shall require a manufacturer or supplier [or developer] of the ICT product, as a condition of the manufacture, sale, distribution, import or use of the ICT product, to:
  - (a) transfer or provide access to any proprietary information relating to cryptography, including by disclosing a particular technology, production process, or other information, for example, a private key or other secret parameter, algorithm specification or other design detail, to that [Member/Party] or a person in the territory of that [Member/Party];
  - (b) partner or otherwise cooperate with a person in the territory of that [Member/Party] in the development, manufacture, sale, distribution, import or use of the ICT product; or
  - (c) use or integrate a particular cipher or cryptographic algorithm.
- [3. Paragraph 2 shall not apply to:
  - (a) a requirement or decision by a regulatory, judicial, law enforcement or national security authority of a [Member/Party] to preserve and make available [**FN1**] any information to which subparagraph 2(a) applies for a specific investigation, inspection, examination, judicial proceeding or enforcement action.

**FN1**: [Parties/M embers] understand that this making available shall not be construed to negatively affect the status of any proprietary information relating to cryptography as a trade secret.]

- a measure adopted or maintained by a [Member/Party] relating to the regulation or supervision of financial instruments, [institutions/services suppliers], or markets;
- (c) a requirement that a [Member/ Party] adopts or maintains relating to access to networks, including user devices, that are owned or controlled by [the government of] that [Member/ Party] and are exclusively for use in the exercise of government functions, including those of [critical national public infrastructures] and central banks.
- (d) the manufacture, sale, distribution, import, or use of an ICT product by or for [the government of] a [Member/Party].]

Facilitator's note: The Small Group agreed to work on the basis of this Facilitator redraft for paragraph 3 on 25 October. This text is subject to further discussion and amendments.

- [4. Where proprietary information relating to cryptography of an ICT product that uses cryptography and that is [designed or] used for commercial applications has been revealed to a [Member/Party] upon its request, that [Member/Party] shall adopt or maintain measures to prevent the unauthorised disclosure of proprietary information contained in or related to the ICT product that uses cryptography. To this end, each [Member/Party] shall provide for appropriate preventative measures against that disclosure, including by limiting the access to and use of that information to those who are essential to the performance of those activities only.]
- [5. Nothing in this Article shall be construed to:
  - (a) affect the rights and obligations of a [Member/Party] under Article [X.X] (Source Code); and]
  - [(b) preclude a [Member's/Party's] law enforcement authorities from requiring a service supplier using encryption to provide, access to encrypted and unencrypted communications, pursuant to that [Member's/Party's] legal procedures.]

## Paragraphs 1-5:

Based on text proposals by JP, UK and CL.

#### C.4. Cybersecurity

Co-convenors' note: Small group discussion on this article were concluded in October 2022. Co-convenors and the facilitator remain available for discussions with any interested delegations.

- 1. The [Parties/Members] recognise that threats to [cybersecurity/information security] undermine confidence in [digital trade/electronic commerce].
- 2. [Parties/Members] recognize the evolving nature of cyber threats. In order to identify and mitigate those threats and thereby facilitate [digital trade/electronic commerce] the [Parties/Members] shall endeavour to:
  - (a) build the capabilities of their respective national entities responsible for cybersecurity incident response;
  - (b) collaborate to identify and mitigate malicious intrusions or dissemination of malicious code that affect electronic networks of [Parties/Members] and to address cybersecurity incidents in a timely manner, [combat cybercrime], as well as to share information for awareness and best practices.
- 3. Given the evolving nature of cyber threats and their negative impact on [electronic commerce/digital trade], the [Parties/Members] recognise the importance of risk [-based/management] approaches in addressing those threats while minimising trade barriers. Accordingly, [where appropriate] each [Party/Member] shall endeavour to employ, and to encourage enterprises within its jurisdiction to use, risk [-based/management] approaches that rely on risk management best practices and on standards developed in a consensus-based, transparent, and open manner, to identify and protect against cybersecurity risks, to detect [cybersecurity events], and to respond to and recover from cybersecurity incidents.

Drafting note: The delegations' understanding of standards developed in a consensus-based manner draws on the TBT Committee Principles for the Development of International Standards, Guides and Recommendations. In this context, consensus need not imply unanimity.

# Section D: Cross-cutting issues D.1. Flow of information

### (1) Flow of Information and Location of Computing Facilities

This proposal is circulated by the Facilitators for discussion purposes with the aim of finding a landing zone that bridges the different approaches reflected in existing proposals. The Facilitators express special appreciation to the UK for its Communication (INF/ECOM/79) of July 2023, and to Members for their active contributions and input in the discussions hitherto October 2023.

This text is under the sole responsibility of the Facilitators of the Small Group on Data flows and localisation of computing facilities. It is circulated to capture, on a best-effort basis, the comments and suggestions made by Members. This is not intended to prejudge any outcome of the final text nor intended to preclude any Member from raising comments and drafting suggestions in the future. Members can also refer to the existing proposals on the data discipline to complement ongoing and future discussions.

The text takes INF/ECOM/79 as a basis. It integrates within brackets elements contained in section "D.1 Flow of information" of the Consolidated text INF/ECOM/62/Rev.4 or brought forward by participants during the meetings of September and October 2023 of the Small Group on Data flow and localization.

This text is without prejudice to Facilitators' national positions with respect to the final negotiated outcome of the Joint Statement Initiative and to the Facilitators' national positions reflected in the consolidated text.

The Facilitators reserve the right to modify this text proposal.

1. ["Covered person" means a national of a [Party/Member] or an enterprise of a [Party/Member].]

2. [Computing facility" means a computer server or storage device for processing or storing [information/data] for commercial use.]

- 3. ["Personal data" means any information relating to an identified or identifiable natural person.]
- 4. The [Parties/Members] recognise that each [Party/Member] may have its own regulatory requirements concerning the transfer of [information/data] by electronic means[, including regarding the protection of personal data] [including requirements that seek to ensure the security and confidentiality of communications].
- 5. The [Parties/Members] [recognize the importance of removing / are committed to removing / shall remove] prohibitions and restrictions on the cross-border transfer of [information/data] to facilitate trade in the digital economy. To that end, [unless otherwise provided for under their laws or regulations,] [no [Party/Member] shall restrict cross-border transfer of [information/data] [if this activity is for the conduct of the business of a covered person] [including] /cross-border transfer of information shall not be restricted] by [a [Party/Member]]:
  - (a) requiring the use of computing facilities or network elements in the [Party's/Member's] territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the [Party's/Member's] territory;
  - (b) requiring the localisation of [information/data] in the [Party's/Member's] territory for storage or processing;

- (c) prohibiting the storage or processing in the territory of another [Party/Member]; or,
- (d) making the cross-border transfer of [information/<u>data</u>] contingent upon use of computing facilities or network elements in the [Party's/Member's] territory or upon localisation requirements in the [Party's/Member's] territory.
- 6. Nothing in this Article shall prevent a [Party/Member] from adopting or maintaining a measure which is inconsistent with, or contains elements which are inconsistent with, paragraph 5, provided that:
  - (a) the measure has, or the relevant elements of the measure have, the [primary] purpose of achieving the protection of personal information data;
  - (b) the [Party's/Member's] [law/measures] [comprehensively] provide(s) how personal information data can lawfully flow across borders;
  - (C) the [Party's/Member's] [law/measures] provides for an instrument or a set of instruments enabling cross-border transfer of [information/data], formulated in [clear / transparent] and objective terms; and
  - (d) [such an instrument, or such a set of instruments in its totality, is not applied in an arbitrary or [unjustifiably] discriminatory manner [where like conditions prevail], or in such a manner as to nullify the benefits accruing to any [Party/Member] under any of subparagraphs (a) to (d) of paragraph 5.]
- 7. Without prejudice to paragraph 6, nothing in this Article shall prevent a [Party/Member] from adopting or maintaining a measure inconsistent with paragraph 5 to achieve a legitimate public policy objective [FN], provided that the measure:
  - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and,
  - (b) does not impose restrictions on transfers of information greater than are [required/necessary] to achieve the objective.
- 8. [Paragraph 5 shall not prevent a developing or least-developed [Party/Member] from adopting or maintaining any measure that it considers appropriate to regulate the cross-border transfer of [information/data], including personal data, by electronic means, or the use or location of computing facilities in its territory. For greater certainty, if a [Party/Member] invokes this paragraph in a dispute, the body or mechanism hearing the matter shall find that it applies.]

[FN For greater certainty, legitimate public policy objectives include the protection or promotion of the rights, interests, duties and responsibilities of indigenous peoples.]

### (2) [Cross-border transfer of information by electronic means / Cross-border data flows]

- 1. "Covered person" means a national of a [Party/Member] or an enterprise of a [Party/Member].
- 2. "Enterprise" means [an/any] entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including [any branch, / a / any] corporation, trust, partnership, sole proprietorship, joint venture, [or other association/ association or similar organisation].

## 3. [Alt 1:

"Personal information" means any information, including data, about an identified or identifiable natural person.]

#### Alt 2:

"Personal data" means any information relating to an identified or identifiable natural person.

4. [Parties/Members] recognise that each [Party/Member] may have its own regulatory requirements concerning the transfer of information by electronic means [compatible and interoperable with the requirements and limitations established in this Section].

## 5. **[Alt 1**:

No [Party/Member] shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means, if this activity is for the conduct of the business of a covered person.]

#### [Alt 2:

[Unless otherwise provided for under its laws or regulations,] [each\Each] [Party/Member] shall allow the cross-border transfer of information by electronic means when this activity is for the conduct of the business activity of a covered person.]

#### [Alt 3:

The [Parties/Members] are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted by:

- (a) requiring the use of computing facilities or network elements in the [Party's/Member's] territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of the Party;
- (b) requiring the localisation of data in the [Party's/Member's] territory for storage or processing;
- (c) prohibiting storage or processing in the territory of other [Parties/Members];
- (d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the [Party's/Member's] territory or upon localisation requirements in the [Party's/Member's] territory.]

## 6. [**Alt 1:**

Nothing in this Article shall prevent a [Party/Member] from adopting or maintaining [a measure/measures] inconsistent with paragraph 5 [that is necessary] to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade [; and
- (b) does not impose restrictions on transfers of information greater than are [necessary/required] to achieve the objective.]]

#### [Alt 2:

[Parties/Members] may adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the [Parties'/Members'] respective safeguards.]

- 6bis. For greater certainty, legitimate public policy objectives include the protection or promotion of the rights, interests, duties and responsibilities of indigenous peoples.
- 7. This article does not apply with respect to financial service suppliers, which are addressed by Article [X] (Financial Information)
- 8. Paragraphs 5 and 7 shall not prevent a developing or least-developed [Party/Member] from adopting or maintaining any measure regulating the cross-border transfer of information, including personal information, by electronic means, that it considers appropriate. For greater certainty, if a [Party/Member] invokes this paragraph in a dispute, the body or mechanism hearing the matter shall find that it applies.
- 9. Parties/Members ]further agree that, in view of the challenges brought by the global nature of the internet, this Agreement shall not prevent Members from adopting or maintaining any measures for the purposes of guaranteeing cybersecurity, safeguarding cyberspace sovereignty, protecting the lawful rights and interests of its citizens, juridical persons and other organizations and achieving other legitimate public policy objectives, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and are no more than necessary to achieve the objectives.]

Drafter's note on Paragraph 9: The CN text proposal on General exceptions (previously paragraph 2 of Alt 2) has been moved to D.1 Flow of information, and its final placement will be subject to the discussions under D.1 Flow of information.

#### Paragraph 1:

Based on text proposals by AU, CA, CL, CN, CT, JP, KR, SG and UK.

#### Paragraph 2.

Based on text proposals by AU, CA, CL, CN, CT, JP, KR, SG and UK.

## Paragraph 3:

- Alt 1 based on text proposals by AU, CA, CL, CT, JP, KR, SG and UK.
- Alt 2 based on text proposals by BR and EU.

## Paragraph 4:

Based on text proposals by BR and CN.

#### Paragraph 5:

- Alt 1 based on text proposals by AU, CA, CL, CT, JP, KR, SG and UK.
- Alt 2 based on text proposal by BR and CN.
- Alt 3 based on text proposal by EU.

#### Paragraph 6:

- Alt 1 based on text proposals by AU, BR, CA, CL, CN, CT, JP, KR, SG and UK.
- Alt 2 based on text proposal by EU.

## Paragraph 6bis:

Based on text proposal by NZ.

## Paragraph 7:

Based on text proposal by UK.

#### Paragraph 8:

Based on text proposal by NG.

## Paragraph 9:

Based on text proposal by CN.

#### (3) Location of computing facilities

- 1. "Computing facility" means a [computer servers/computer server] [and/or] storage device for processing or storing information for commercial use.
- 2. "Covered person" means a national of a [Party/Member] or an enterprise of a [Party/Member].
- 3. "Enterprise" means [an/any] entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including [any branch/ a / any] corporation, trust, partnership, sole proprietorship, joint venture, or [other association/ association or similar organisation].
- 4. [Parties\Members] recognise that each [Party\Member] may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
- 5. [Unless otherwise provided for under its laws or regulations], [no\No] [Party/Member] shall require a covered person to use or locate computing facilities in that [Party's/Member's] territory as a condition for conducting business in that territory.
- 6. Nothing in this Article shall prevent a [Party/Member] from adopting or maintaining measures inconsistent with paragraph 5 to achieve a legitimate public policy objective, provided that the measure:
  - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disquised restriction on trade; and
  - (b) does not impose restrictions on the use or location of computing facilities greater than are [necessary/required] to achieve the objective.
- 6bis. For greater certainty, legitimate public policy objectives include the protection or promotion of the rights, interests, duties and responsibilities of indigenous peoples.
- 7. This article does not apply with respect to [covered] financial service suppliers, which are addressed by Article [X] ([Financial Information/Location of financial computing facilities]).
- 8. Paragraph 5 shall not prevent a developing or least developed [Party/Member] from adopting or maintaining any measure regulating the use or location of computing facilities in its territory, that it considers appropriate. For greater certainty, if a [Party/Member] invokes this paragraph in a dispute, the body or mechanism hearing the matter shall find that it applies.

# Paragraph 1:

Based on text proposals by AU, SG, JP, KR, CA and UK.

## Paragraph 2:

Based on text proposals by AU, SG, JP, CA, UK, and KR.

## Paragraph 3:

Based on text proposals by AU, JP, SG, UK, CA and KR.

## Paragraph 4:

Based on text proposals by CN.

## Paragraph 5:

Based on text proposals by AU, JP, SG, UA, KR, CA and UK.

## Paragraph 6:

Based on text proposals by AU, CN, JP, SG, UA, KR, CA, and UK.

## Paragraph 6 bis:

Based on text proposal by NZ.

# Paragraph 7:

Based on text proposal by UK.

#### Paragraph 8:

Based on text proposal by NG.

## D.2. Transparency, domestic regulation and cooperation

## (1) Transparency

Co-convenors' note: Small group discussion on this article were concluded in July 2021. Co-convenors and the facilitator remain available for discussions with any interested delegations.

1. [Further to Article III of the GATS and Article X of the GATT], each [Party/Member] shall promptly publish or otherwise make publicly available and, except in emergency situations, at the latest by the time of their entry into force, all measures\* of general application pertaining to or affecting [digital trade / electronic commerce / the operation of this Agreement].\*\*

\*Negotiators' note: the definition of "measures", including the need for such a definition, is subject to negotiations and cross-cutting considerations to ensure consistency across the provisions finalized under this Initiative.

\*\*Negotiators' note: This provision will be re-examined before the conclusion of the negotiations, in light of the scope of the finalized provisions and of the chosen legal architecture.

## (2) Cooperation

## 1. [Alt 1:

Recognising the global nature of electronic commerce, [Parties/Members] [shall endeavour to/affirm the importance of]:

- (a) work together to [facilitate the use of electronic commerce by micro, small and medium-sized enterprises][promote access to E-commerce and] [assist [micro,] small and medium-sized enterprises [, indigenous peoples, rural populations, low socio-economic groups, women, and persons with disabilities,] to overcome obstacles to its use];
- (b) exchange information and share experiences on [laws,] regulations, policies, [enforcement and compliance] regarding electronic commerce, including:
  - (i) personal information protection;
  - (ii) [online] consumer protection, [including means for consumer redress and building consumer confidence];
  - (iii) [unsolicited commercial electronic messages];
  - (iv) security in electronic communications;
  - (v) [intellectual property rights];
  - (vi) authentication;
  - (vii) e-government; and,
- [(c) working together to maintain cross-border information flows as an essential element in the promotion of a dynamic environment for electronic commerce;]
- (d) participate actively in regional and multilateral forums to promote the development of electronic commerce; and
- (e) [encourage development by the private sector of methods of self-regulation that foster electronic commerce including/encouraging electronic commerce by promoting the development of], codes of conduct, model contracts, [seals of approval] guidelines and [enforcement] mechanisms [used by the private sector].
- [(f) Recognise the importance of digital inclusion and that all people and businesses can participate in, contribute to, and benefit from electronic commerce. To promote digital inclusion, the Parties/Members shall endeavour to cooperate on matters relating to digital inclusion. This may include:
  - i. identifying and addressing barriers to accessing e-commerce opportunities;
  - ii. developing programmes to promote participation of all groups in the digital economy, including for example improving digital skills and access to online business tools;
  - iii. sharing methods and procedures for the responsible collection of disaggregated data, the use of indicators, and the analysis of statistics related to participation in the digital economy;

- iv. sharing experiences and best practices, including exchange of experts, with respect to digital inclusion; and,
- v. other areas as jointly agreed by the Parties/Members.]

[Cooperation activities relating to digital inclusion may be carried out through the coordination, as appropriate, of the Parties'/Members' respective indigenous peoples, agencies, companies, labour unions, civil society, academic institutions, and non-governmental organizations, among others.]

#### [Alt 2:

[Parties/Members] shall maintain cooperation and dialogue on the regulatory issues raised by digital trade on the basis of mutually agreed terms and conditions, which shall address, *inter alia*, the following issues:

- (a) the recognition and facilitation of interoperable cross-border electronic signature and authentication services;
- (b) cross-border transfer of information by electronic means;
- (c) the liability of intermediary service providers with respect to the transmission or storage of information;
- (d) the treatment of direct marketing communications;
- (e) the protection of consumers in the ambit of digital trade;
- (f) data privacy;
- (g) cybersecurity;
- (h) methodologies to measure digital trade flows, including cross-border;
- (i) the promotion of paperless trading;
- (j) the promotion of digital trade by micro, small and medium-sized enterprises;
- (k) electronic government; and,
- (I) any other issue relevant to the development of digital trade.

Such cooperation shall focus on exchange of information on the [Parties'/Members'] respective legislation on these issues as well as on the implementation of such legislation.]

- 2. Each [Party/Member] shall, within its available resources, establish or maintain one or more enquiry points to:
  - (a) Be responsible for notification and consultation procedure related to the implementation of this Agreement.
  - (b) Answer reasonable enquiries of other [Parties/Members] on matters covered by this Agreement.
  - (c) Facilitate communications between the [Parties/Members] on any matter covered by this Agreement.
- 3. The enquiry points shall answer enquiries within a reasonable time period, which may vary depending on the nature or complexity of the request.

- 4. Each [Party/Member] shall notify the [Secretariat/Committee on e-commerce] of the contact information of the enquiry points referred to in paragraph 1.
- 5. When the notification or consultation may have a significant effect on trade, each [Party/Member] shall notify or request to consult other [Parties/Members] and shall provide the information in the paragraph 1(b) through the [Secretariat/Committee on ecommerce].
- 6. For greater certainty, the consultation procedure in accordance with the paragraph 1(a) is separate from the consultation of the Dispute Settlement Understanding.

# Paragraph 1:

- Alt 1 based on text proposals by JP, CL, CO, MX, NZ and PE.
- Alt 2 based on text proposal by BR.

#### Paragraphs 2-6:

Based on text proposal by KR.

# D.3. Capacity building

#### (1) Development

Note: This proposal is circulated for discussion purposes, with the aim of finding a landing zone that bridges the different approaches reflected in existing proposals.

- 1. [The provisions contained in Articles 1 to X of this Agreement shall be implemented by developing and least-developed country Members in accordance with this Section].
- 2. [Parties/Members] recognize international efforts to bridge the digital divide and enable an inclusive digital economy and the contribution that [electronic commerce/digital trade] disciplines have to overcoming digital trade-related challenges and promoting an inclusive growth of [electronic commerce/digital trade].

Furthermore, [Parties/Members] acknowledge their role in supporting developing and least developing members to effectively participate and tap growth opportunities in the digital economy, including enabling access to [digital ecosystems and infrastructure] and supporting their micro, small, and medium-sized enterprises and its people. In this context, [Parties/Members] recognize the importance of effectively implementing the [electronic commerce/digital trade] disciplines, including through technical assistance and capacity building to developing and least developed countries.

[In this regard, developed countries, and developing countries in position to do so shall provide technical and financial support and assistance to developing and least developed countries in addition the developed countries shall define and report on their contribution to technical and financial assistance as well as capacity building.].

#### **Needs Assessment**

**Alt1:** [Developing or Least-developed country Members/Parties may also work with relevant international organisations<sup>o</sup> to conduct or update need assessment to identify gaps in implementation, which developed and developing [Parties/Members] with the capacity to do so agree to facilitate the provision of assistance and support for capacity building on mutually agreed terms either bilaterally or through the appropriate international organisations. The needs assessment or [its] update should be concluded [no later than one year after [the]/at the point of entry into force of this Agreement to allow expeditious implementation of the Agreement.]

**Alt.2:** [Relevant International organisations and developed Members shall provide developing and least-developed country Members with support to conduct or update need assessment to identify gaps in implementation. The needs assessment or update should be concluded no later than one year after the entry into force of this Agreement to *allos expeditious* implementation of the Agreement.]

# Implementation Periods for developing and least developed country (LDC) Members

1. Developing or Least-developed country Members/Parties may designate specific (articles/issues) requiring public policy, institutional or legislative changes for implementation on a date following an implementation period not exceeding [three (3)]/[five (5)] years from the entry into force of this Agreement. For obligations which do not require public policy, institutional or legislative changes, developing and Least-developed country Members/Parties shall maintain practices to ensure that it meets these obligations under the Agreement.

<sup>&</sup>lt;sup>0</sup> These are relevant international and regional organizations (such as the International Monetary Fund, the OECD, the United Nations Conference on Trade and Development, the WCO, United Nations Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks) and other agencies of cooperation.

- (a) [Developing or Least-developed country Members/Parties shall submit their lists of articles/issues that are subject to the deadline, on the day of entry into force of the agreement.][ARG: No later than one year following entry into force of this Agreement each developing or least developed country Member shall notify the Committee of its definitive dates for implementation of the provisions designated in paragraph 5 7.]
- (b) Developing or Least developed country Members/Parties requiring an extension of up to two (2) additional years to the implementation period for certain specific articles/issues, in accordance with paragraph 5 7, shall communicate this extension to the Committee on Trade Related Aspects of Electronic Commerce, detailing [the reasons for the extension and] the relevant actions required to complete the implementation thereof. The developing or Least-developed country Members/Parties requiring the extension shall inform the Committee no later than one hundred and twenty (120) days before the expiry of the implementation date.
- 2. [Developing or Least-developed country Members/Parties may designate specific (articles/issues) requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.
  - (a) No later than one year following entry into force of this Agreement each developing or least developed country Member shall notify the Committee of its definitive dates for implementation of the provisions designated in paragraph 5 11 i.
  - (b) Developing or least developed country Members/Parties requiring an extension of up to two (2) additional years to the implementation period for certain specific articles/issues, in accordance with paragraph 5 ±, shall communicate this extension to the Committee on Trade Related Aspects of Electronic Commerce, detailing the relevant actions required to complete the implementation thereof. The developing or Least-developed country Members/Parties requiring the extension shall inform the Committee no later than one hundred and twenty (120) days before the expiry of the implementation date.]

# **Capacity Building Support**

- 3. Donor Members [/Developed Members and developing members in position to do so] [agree to facilitate the provision of] [shall/ [should] provide] assistance and support for capacity building to developing country and least-developed country Members, including through the Framework, on mutually agreed terms either bilaterally or through the appropriate international organizations. [with the objective to assist developing country and least-developed country Members to implement the provisions of this Agreement]
- 4. To provide transparency to developing country Members/Parties and Least-developed country Members/Parties on the provision of assistance and support for capacity building, for implementation of the relevant sections of this Agreement and with the aim to facilitate the effective implementation of the Agreement:
  - (a) Donor Members [shall/shall endeavour] to make available, [at the entry into force of this Agreement and regularly thereafter], relevant information<sup>0</sup> on their respective capacity building programmes to the Committee [to support developing and LDC Members/to assist and address the specific needs of developing and Least-developed country Members/Parties] to implement the JSI agreement [/this agreement]
  - (b) Developing country Members and least-developed country Members/Party intending to avail themselves of relevant assistance and support for capacity building [or implementation period] shall submit to the Committee information on

<sup>&</sup>lt;sup>0</sup> This includes a description of the assistance and support for capacity building, [information on contact point, [information on the process of mechanisms for request assistance and support,]] status and amount committed/disbursed, application [and disbursement] procedure, beneficiary Member(s), and implementing agency, where applicable.

contact point(s) of the office(s) responsible for coordinating and prioritizing such assistance and support.

- 5. Targeted assistance and support should be provided to [recipient] [these] Members, so as to help them build sustainable capacity to implement their commitments. through the relevant development cooperation mechanisms and consistent with the principles of technical assistance and support for capacity building as referred to in paragraph [10] [15]. Development partners shall endeavour to provide assistance and support for capacity building in this area in a way that does not compromise existing development priorities.
- 6. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:
  - (a) take into account the overall development framework of the recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programmes; as well as activities to address challenges and promote regional and subregional integration
  - (b) ensure that ongoing e-commerce [facilitation] reform activities of the private sector are factored into assistance activities;
  - (c) promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:
    - coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors and among bilateral and multilateral donors should aim to avoid overlap and duplication in assistance programs and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;
    - (ii) for least-developed country Members/Parties, the Enhanced Integrated Framework for trade-related assistance for the least-developed countries should be a part of this coordination process; and
    - (iii) Members should also promote internal coordination between their trade and development officials, both in capitals and in Geneva, in the implementation of this Agreement and technical assistance.
  - encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and
  - (e) encourage developing country Members to provide capacity building to other developing and least-developed country Members and consider supporting such activities, where possible.
- 7. [[Implementation period,] Assistance and support for capacity building should be provided to help developing and least -developed country Members implement the provisions of this Agreement, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of this Agreement shall be related to the implementation capacities of developing and least developed country Members. Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.]
- 8. [Least-developed country Members/Parties will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.]

#### **FRAMEWORK**

- 9. The E-Commerce Capacity Building Framework ("Framework"), as an open platform and part of the JSI of E-Commerce, will contribute to the implementation of the Agreement, through mapping out resources, both financial and in-kind from Members, particularly developed Members, as well as international organizations to support developing and Least-developed country Members/Parties to implement the provisions in the JSI, as requested by developing Members.
- 10. The Framework should facilitate consultation between [Parties/Members], as well as between [Parties/Members] and the international agencies and organizations concerned.
- 11. [Parties/Members] should explore utilizing the Framework and other related existing resources to assist developing [Parties/Members], especially Least-developed country Members/Parties to implement the provisions of this Agreement.-

[Comment: The below will be parked in the provision on Committee on Trade-Related Aspects of Electronic Commerce once clean.]

- **[(12) COMMITTEE ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE**. The Committee shall take note of extension communications received under Article XX (implementation periods for developing and least developed country Members) and shall follow up on the relevant actions required for the implementation thereof.
- 1. The Committee will monitor and coordinate the effective implementation of the capacity building and technical assistance provided as per agreed in [Article (X)].
- 2. **Facilitator's suggestion:** [The Committee shall meet within one year of the date of entry into force of this Agreement, and thereafter as necessary].
  - (a) Members are encouraged to conduct information sharing and training programmes, share best practices on facilitating [electronic commerce/digital trade] including domestic institutional experiences, in collaboration with other Members and international organizations, to promote the inclusive development of the global digital economy (from paragraph 2)
  - (b) [2bis] [[The WTO Secretariat/The Committee] shall monitor an annual report on the compliance by developed Members with the obligations to provide assistance and capacity building support to developing countries, including monitoring and annual reporting on the extent, efficacy, and usefulness for the beneficiaries.].
- 3. [The Committee shall hold at least one dedicated session per year to:
  - (a) discuss any problems regarding implementation of provisions or sub-parts of provisions of this Agreement;
  - (b) review progress in the provision of assistance and support for capacity building to support the implementation of the Agreement, including any developing or least developed country Members not receiving adequate assistance and support for capacity building;
  - (c) share experiences and information on ongoing assistance and support for capacity building and implementation programs, including challenges and successes;
  - (d) review donor notifications as set forth in Article XX; and
  - (e) review the operation of paragraph 7 13.]

#### (2) Options for capacity building and technical assistance

- 1. Upon request of a developing [Party/Member] or LDC, developed and developing [Parties/Members] [in a position / with the capacity] to do so shall provide targeted technical assistance and capacity [and skill] building on mutually agreed terms and conditions to developing [Parties/Members], in particular [low-income developing countries and] LDCs, in [order to improve their digital ecosystems and to allow them to develop / improving, promoting, and protecting the development of] electronic commerce [to allow them to / and] implement WTO rules on electronic commerce.
- 2. Electronic Commerce for Development Program: [Parties/Members] should explore the way to establish an Electronic Commerce for Development Program under the WTO framework to encourage, manage and coordinate the contributions that [Parties/Members] [voluntarily] provide, with the aim of assisting developing [Parties/Members], especially [those of low income and] LDCs [to improve development of electronic commerce and implement WTO rules on electronic commerce]. [This Program shall constitute a framework for consultation between [Parties/Members] and between [Parties/Members] and the international agencies and organizations concerned.]

## 3. **[Alt 1**:

Bridge the Digital Divide: Members are encouraged to adopt recommendations and practical measures that contribute to improving the electronic commerce infrastructure and technical conditions of developing Members, to help enterprises and citizens realize digital transition.]

#### [Alt 2:

Developed and developing [Parties/Members] with the capacity to do so undertake to adopt practical measures that contribute to bridging the digital divide and improving the infrastructure and technical conditions of developing [Parties/Members], so as to help their micro, small and medium sized enterprises and their citizens realize digital transition and participate in electronic commerce and the digital economy.]

4. Research, Training and Communication: Members are encouraged to conduct information exchange, joint study and cooperative training, share best practices of electronic commerce development [and facilitation] and implement capacity building among Members and international organizations, to promote the common [and inclusive] development of electronic commerce.

# Paragraph 1:

Based on text proposals by ID and CI.

# Paragraph 2:

Based on text proposals by CN, ID and CI.

#### Paragraph 3:

- Alt 1 based on text proposal by CN.
- Alt 2 based on text proposal by CI.

#### Paragraph 4:

Based on text proposals by CN and CI.

#### D.4. Implementation Periods for developing and least developed country Members

# (1) Implementation Periods for developing and least developed country Members

- 1. Developing or least developed country Members may designate specific (articles/issues) requiring public policy, institutional or legislative changes for implementation on a date following an implementation period not exceeding three (3) years from the entry into force of this Agreement.
- 2. Developing or least developed country Members shall submit their lists of articles/issues that are subject to the deadline, on the day of entry into force of the Agreement.
- 3. Developing or least developed country Members requiring an extension of up to two (2) additional years to the implementation period for certain specific articles/issues, in accordance with paragraph 1, shall communicate this extension to the Committee on Trade Related Aspects of Electronic Commerce, detailing the relevant actions required to complete the implementation thereof. The developing or least developed country Member requiring the extension shall inform the Committee no later than one hundred and twenty (120) days before the expiry of the implementation date.

## Paragraph 1-3:

Based on text proposal by EC, GT and PY.

# D.5. Special and Different Treatment Provisions for Developing Country Members and Least Developed Country Members

(1) Options for capacity building and technical assistance

#### ARTICLE X+1: GENERAL PRINCIPLES

- 1. The provisions contained in Articles 1 to X of this Agreement shall be implemented by developing and least-developed country Members in accordance with this Section.
- 2. Assistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of this Agreement, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of this Agreement shall be related to the implementation capacities of developing and least-developed country Members. Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.
- 3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.
- 4. These principles shall be applied through the provisions set out in Section II.

## **ARTICLE X+2: CATEGORIES OF PROVISIONS**

- 1. There are three categories of provisions:
  - (a) Category A contains provisions that a developing country Member or a least-developed country Member designates for implementation upon entry into force of this Agreement, or in the case of a least-developed country Member within one year after entry into force, as provided in Article X+3.
  - (b) Category B contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement, as provided in Article X+4.
  - (c) Category C contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article X+4.
- 2. Each developing country and least-developed country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories A, B and C.

# ARTICLE X+3: NOTIFICATION AND IMPLEMENTATION OF CATEGORY A

- 1. Upon entry into force of this Agreement, each developing country Member shall implement its Category A commitments. Those commitments designated under Category A will thereby be made an integral part of this Agreement.
- 2. A least-developed country Member may notify the Committee of the provisions it has designated in Category A for up to one year after entry into force of this Agreement. Each least-developed country Member's commitments designated under Category A will thereby be made an integral part of this Agreement.

# ARTICLE X+4: NOTIFICATION OF DEFINITIVE DATES FOR IMPLEMENTATION OF CATEGORY B AND CATEGORY C

1. With respect to the provisions that a developing country Member has not designated in Category A, the Member may delay implementation in accordance with the process set out in this Article.

# **Developing Country Member Category B**

- (a) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category B and their corresponding indicative dates for implementation.
- (b) No later than one year after entry into force of this Agreement, each developing country Member shall notify the Committee of its definitive dates for implementation of the provisions it has designated in Category B. If a developing country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficient to notify its dates.

# **Developing Country Member Category C**

- (c) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category C and their corresponding indicative dates for implementation. For transparency purposes, notifications submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement.
- (d) Within one year after entry into force of this Agreement, developing country Members and relevant donor Members, taking into account any existing arrangements already in place, notifications pursuant to paragraph 1 of Article X+10 and information submitted pursuant to subparagraph (c) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C. The participating developing country Member shall promptly inform the Committee of such arrangements. The Committee shall also invite non-Member donors to provide information on existing and concluded arrangements.
- (e) Within 18 months from the date of the provision of the information stipulated in subparagraph (d), donor Members and respective developing country Members shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each developing country Member shall, at the same time, notify its list of definitive dates for implementation.
- 2. With respect to those provisions that a least-developed country Member has not designated under Category A, least-developed country Members may delay implementation in accordance with the process set forth in this Article.

# **Least-Developed Country Member Category B**

- (a) No later than one year after entry into force of this Agreement, a least-developed country Member shall notify the Committee of its Category B provisions and may notify their corresponding indicative dates for implementation of these provisions, taking into account maximum flexibilities for least-developed country Members.
- (b) No later than two years after the notification date stipulated under subparagraph (a)above, each least-developed country Member shall notify the Committee to confirm designations of provisions and notify its dates for implementation. If a least-developed country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficiently to notify its dates.

## **Least-Developed Country Member Category C**

- (c) For transparency purposes and to facilitate arrangements with donors, one year after entry into force of this Agreement, each least-developed country Member shall notify the Committee of the provisions it has designated in Category C, taking into account maximum flexibilities for least-developed country Members.
- (d) One year after the date stipulated in subparagraph (c) above, least-developed country Members shall notify information on assistance and support for capacity building that the Member requires in order to implement.
- (e) No later than two years after the notification under subparagraph (d) above, least-developed country Members and relevant donor Members, taking into account information submitted pursuant to subparagraph (d) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C. The participating least-developed country Member shall promptly inform the Committee of such arrangements. The least-developed country Member shall, at the same time, notify indicative dates for implementation of corresponding Category C commitments covered by the assistance and support arrangements. The Committee shall also invite non-Member donors to provide information on existing and concluded arrangements.
- (f) No later than 18 months from the date of the provision of the information stipulated in subparagraph (e), relevant donor Members and respective least-developed country Members shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each least-developed country Member shall, at the same time, notify the Committee of its list of definitive dates for implementation.
- 3. Developing country Members and least-developed country Members experiencing difficulties in submitting definitive dates for implementation within the deadlines set out in paragraphs 1 and 2 because of the lack of donor support or lack of progress in the provision of assistance and support for capacity building should notify the Committee as early as possible prior to the expiration of those deadlines. Members agree to cooperate to assist in addressing such difficulties, taking into account the particular circumstances and special problems facing the Member concerned. The Committee shall, as appropriate, take action to address the difficulties including, where necessary, by extending the deadlines for the Member concerned to notify its definitive dates.
- 4. Three months before the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), the Secretariat shall remind a Member if that Member has not notified a definitive date for implementation of provisions that it has designated in Category B or C. If the Member does not invoke paragraph 3, or in the case of a developing country Member subparagraph 1(b), or in the case of a least-developed country Member subparagraph 2(b), to extend the deadline and still does not notify a definitive date for implementation, the Member shall implement the provisions within one year after the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), or extended by paragraph 3.
- 5. No later than 60 days after the dates for notification of definitive dates for implementation of Category B and Category C provisions in accordance with paragraphs 1, 2, or 3, the Committee shall take note of the annexes containing each Member's definitive dates for implementation of Category B and Category C provisions, including any dates set under paragraph 4, thereby making these annexes an integral part of this Agreement.

ARTICLE X+5: EARLY WARNING MECHANISM: EXTENSION OF IMPLEMENTATION DATES FOR PROVISIONS IN CATEGORIES B AND C

1.

- (a) A developing country Member or least-developed country Member that considers itself to be experiencing difficulty in implementing a provision that it has designated in Category B or Category C by the definitive date established under subparagraphs 1(b) or (e) of Article X+4, or in the case of a least-developed country Member subparagraphs 2(b) or (f) of Article X+4, should notify the Committee. Developing country Members shall notify the Committee no later than 120 days before the expiration of the implementation date. Least-developed country Members shall notify the Committee no later than 90 days before such date.
- (b) The notification to the Committee shall indicate the new date by which the developing country Member or least-developed country Member expects to be able to implement the provision concerned. The notification shall also indicate the reasons for the expected delay in implementation. Such reasons may include the need for assistance and support for capacity building not earlier anticipated or additional assistance and support to help build capacity.
- 2. Where a developing country Member's request for additional time for implementation does not exceed 18 months or a least-developed country Member's request for additional time does not exceed 3 years, the requesting Member is entitled to such additional time without any further action by the Committee.
- 3. Where a developing country or least-developed country Member considers that it requires a first extension longer than that provided for in paragraph 2 or a second or any subsequent extension, it shall submit to the Committee a request for an extension containing the information described in subparagraph 1(b) no later than 20 days in respect of a developing country Member and 90 days in respect of a least-developed country Member before the expiration of the original definitive implementation date or that date as subsequently extended.
- 4. The Committee shall give sympathetic consideration to granting requests for extension taking into account the specific circumstances of the Member submitting the request.

These circumstances may include difficulties and delays in obtaining assistance and support for capacity building.

#### ARTICLE X+6: IMPLEMENTATION OF CATEGORY B AND CATEGORY C

- 1. In accordance with paragraph 2 of Article X+1, if a developing country Member or a least-developed country Member, having fulfilled the procedures set forth in paragraphs 1 or 2 of Article X+4 and in Article X+5, and where an extension requested has not been granted or where the developing country Member or least-developed country Member otherwise experiences unforeseen circumstances that prevent an extension being granted under Article X+5, self-assesses that its capacity to implement a provision under Category C continues to be lacking, that Member shall notify the Committee of its inability to implement the relevant provision.
- 2. The Committee shall establish an Expert Group immediately, and in any case no later than 60 days after the Committee receives the notification from the relevant developing country Member or least-developed country Member. The Expert Group will examine the issue and make a recommendation to the Committee within 120 days of its composition.
- 3. The Expert Group shall be composed of five independent persons that are highly qualified in the fields of e-commerce facilitation and assistance and support for capacity building. The composition of the Expert Group shall ensure balance between nationals from developing and developed country Members. Where a least-developed country Member is involved, the Expert Group shall include at least one national from a least-developed country Member. If the Committee cannot agree on the composition of the Expert Group within 20 days of its establishment, the Director-General, in consultation with the chair of the Committee, shall determine the composition of the Expert Group in accordance with the terms of this paragraph.

- 4. The Expert Group shall consider the Member's self-assessment of lack of capacity and shall make a recommendation to the Committee. When considering the Expert Group's recommendation concerning a least-developed country Member, the Committee shall, as appropriate, take action that will facilitate the acquisition of sustainable implementation capacity.
- 5. The Member shall not be subject to proceedings under the Dispute Settlement Understanding on this issue from the time the developing country Member notifies the Committee of its inability to implement the relevant provision until the first meeting of the Committee after it receives the recommendation of the Expert Group. At that meeting, the Committee shall consider the recommendation of the Expert Group. For a least-developed country Member, the proceedings under the Dispute Settlement Understanding shall not apply to the respective provision from the date of notification to the Committee of its inability to implement the provision until the Committee makes a decision on the issue, or within 24 months after the date of the first Committee meeting set out above, whichever is earlier.
- 6. Where a least-developed country Member loses its ability to implement a Category C commitment, it may inform the Committee and follow the procedures set out in this Article.

#### ARTICLE X+7: SHIFTING BETWEEN CATEGORIES B AND C

- 1. Developing country Members and least-developed country Members who have notified provisions under Categories B and C may shift provisions between such categories through the submission of a notification to the Committee. Where a Member proposes to shift a provision from Category B to Category C, the Member shall provide information on the assistance and support required to build capacity.
- 2. In the event that additional time is required to implement a provision shifted from Category B to Category C, the Member may:
  - (a) use the provisions of Article X+5, including the opportunity for an automatic extension; or
  - (b) request an examination by the Committee of the Member's request for extra time to implement the provision and, if necessary, for assistance and support for capacity building, including the possibility of a review and recommendation by the Expert Group under Article X+6; or
  - (c) in the case of a least-developed country Member, any new implementation date of more than four years after the original date notified under Category B shall require approval by the Committee. In addition, a least-developed country Member shall continue to have recourse to Article X+5. It is understood that assistance and support for capacity building is required for a least-developed country Member so shifting.

#### ARTICLE X+8: PROVISION OF ASSISTANCE AND SUPPORT FOR CAPACITY BUILDING

- 1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least-developed country Members on mutually agreed terms either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least-developed country Members to implement the provisions of Section I of this Agreement.
- 2. Given the special needs of least-developed country Members, targeted assistance and support should be provided to the least-developed country Members so as to help them build sustainable capacity to implement their commitments. Through the relevant development cooperation mechanisms and consistent with the principles of technical assistance and support for capacity building as referred to in paragraph 3, development partners shall endeavour to provide assistance and support for capacity building in this area in a way that does not compromise existing development priorities.

- 3. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:
  - (a) take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programs;
  - (b) include, where relevant and appropriate, activities to address regional and sub-regional challenges and promote regional and sub-regional integration;
  - (c) ensure that ongoing e-commerce facilitation reform activities of the private sector are factored into assistance activities;
  - (d) promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:
    - (i) coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors and among bilateral and multilateral donors should aim to avoid overlap and duplication in assistance programs and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;
    - (ii) for least-developed country Members, the Enhanced Integrated Framework for trade-related assistance for the least-developed countries should be a part of this coordination process; and
    - (iii) Members should also promote internal coordination between their trade and development officials, both in capitals and in Geneva, in the implementation of this Agreement and technical assistance.
    - (e) encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and
    - (f) encourage developing country Members to provide capacity building to other developing and least-developed country Members and consider supporting such activities, where possible.
- 4. The Committee shall hold at least one dedicated session per year to:
  - (a) discuss any problems regarding implementation of provisions or sub-parts of provisions of this Agreement;
  - review progress in the provision of assistance and support for capacity building to support the implementation of the Agreement, including any developing or least-developed country Members not receiving adequate assistance and support for capacity building;
  - (c) share experiences and information on ongoing assistance and support for capacity building and implementation programs, including challenges and successes;
  - (d) review donor notifications as set forth in Article X+10; and,
  - (e) review the operation of paragraph 2.

ARTICLE X+9: INFORMATION ON ASSISTANCE AND SUPPORT FOR CAPACITY BUILDING TO BE SUBMITTED TO THE COMMITTEE

- 1. To provide transparency to developing country Members and least-developed country Members on the provision of assistance and support for capacity building for implementation of Section I, each donor Member assisting developing country Members and least-developed country Members with the implementation of this Agreement shall submit to the Committee, at entry into force of this Agreement and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:
  - (a) a description of the assistance and support for capacity building;
  - (b) the status and amount committed/disbursed;
  - (c) procedures for disbursement of the assistance and support;
  - (d) the beneficiary Member or, where necessary, the region; and,
  - (e) the implementing agency in the Member providing assistance and support.

The information shall be provided in the format specified in Annex 1. In the case of the Organisation for Economic Co-operation and Development (referred to in this Agreement as the "OECD") Members, the information submitted can be based on relevant information from the OECD Creditor Reporting System. Developing country Members declaring themselves in a position to provide assistance and support for capacity building are encouraged to provide the information above.

- 2. Donor Members assisting developing country Members and least-developed country Members shall submit to the Committee:
  - (a) contact points of their agencies responsible for providing assistance and support for capacity building related to the implementation of Section I of this Agreement including, where practicable, information on such contact points within the country or region where the assistance and support is to be provided; and,
  - (b) information on the process and mechanisms for requesting assistance and support for capacity building.

Developing country Members declaring themselves in a position to provide assistance and support are encouraged to provide the information above.

- 3. Developing country Members and least-developed country Members intending to avail themselves of e-commerce facilitation-related assistance and support for capacity building shall submit to the Committee information on contact point(s) of the office(s) responsible for coordinating and prioritizing such assistance and support.
- 4. Members may provide the information referred to in paragraphs 2 and 3 through internet references and shall update the information as necessary. The Secretariat shall make all such information publicly available.
- 5. The Committee shall invite relevant international and regional organizations (such as the International Monetary Fund, the OECD, the United Nations Conference on Trade and Development, the WCO, United Nations Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks) and other agencies of cooperation to provide information referred to in paragraphs 1, 2, and 4.

## ARTICLE X+10: E-COMMERCE FACILITATION FUNDING FACILITY

# **Objectives**

1. The role of the E-Commerce Facilitation Funding Facility (ECFFF) is to support the Committee's work in relation to assisting developing Members and LDCs in implementing the Agreement. Guidance concerning the nature of such support will be provided by the Committee.

## **Operational Directives**

# (a) Priorities

- 2. To fulfil its role, the ECFFF will prioritize the following activities:
  - (i) The grant programme;
  - (ii) Technical assistance and capacity building;
  - (iii) Engagement with Annex D and development partners;
  - (iv) Maintain the website.
- 3. These priority activities will be conducted respecting the Paris Principles of Aid Effectiveness, namely ownership, alignment, harmonization, managing for results and mutual accountability.

# (b) Modes of Delivery

- (i) Grant programme: The ECFFF will administer a grant programme to which, when no other funding is available, a Member having notified Category C provisions may apply. The procedures of the grant programme are established in its Operational Rules.
- (ii) Technical assistance and capacity building: The ECFFF will respond to requests from developing Members and LDC Members for technical assistance and capacity building on the Agreement which relate to the following outcomes: identifying implementation assistance, ratification of the Agreement, notifications under the Agreement, and strengthening the operation of national e-commerce facilitation committees. Activities may be organized to address the needs of an individual Member, group of Members or a regional grouping.
- (iii) Engagement with Annex D and development partners: The ECFFF will maintain close contact with Annex D and development partners so as to share information and allow for coordination and non-duplication of efforts on e-commerce facilitation. The ECFFF may respond to requests from those organizations to participate in activities to further support these objectives.
- (iv) Maintain the website: The ECFFF website underpins the three modes of delivery described above. In addition, the maintenance of up-to-date e-commerce facilitation resources on the website ensures that it constitutes a comprehensive information sharing/exchange platform.

# **Management and Transparency**

# **Planning**

- 5. The ECFFF working jointly with a representative group composed of interested Members shall prepare a work plan for the upcoming calendar year.
- 6. This work plan shall be drawn up based on *inter alia* the following:
  - (i) Priorities identified by the Committee as conveyed during a formal meeting held before mid-year, under a specific agenda item entitled "ECFFF Work Plan"; and
  - (ii) E-commerce facilitation needs identified in the UNCTAD eTrade Readiness Assessment on Members' technical assistance needs as well as needs identified in Category C notifications.
- 7. The work plan, accompanied by a draft budget based on the activities identified, shall be reviewed by the Committee during its dedicated session on assistance and capacity building. Requests for activities will be submitted throughout the year, via the activity request form

on the ECFFF website and shared with interested Members via the online tracker to enhance transparency.

#### **Monitoring**

- 8. Activities undertaken by the ECFFF will be monitored using a log frame which will be updated as required during the annual work planning phase.
- 9. Each activity request will identify the targeted outcomes of the activity in the context of the annual work plan priorities, and reports evaluating these activities will be posted thus allowing for results-based management, ensuring transparency and contributing to avoiding duplication of efforts.
- 10. Requests for grants will be submitted using the online expression of interest process, which may progress to a grant application which is then reviewed according to the operational rules of the grant programme. This process should help ensure transparency, non-duplication of activities and enhanced monitoring of the requested grant.

#### Reporting

- 11. The ECFFF shall provide the Committee with an annual report by the end of June of the following year. The report will be composed of two Sections.
- 12. Section I will cover the following elements:
  - (i) a presentation and assessment of achieved outputs and outcomes compared to their aims and presented in the context of the log-frame and work plan priorities;
  - (ii) An estimation of impact; and
  - (iii) An outline of risks identified prior to and during implementation of the ECFFF's activities since the last report and how these risks have been mitigated, as well as lessons-learned for the future.
- 13. Section II will cover the following elements:
  - (i) The financial report which will describe the use of funds in the ECFFF since the last report and be set up in accordance with WTO financial rules and regulations including, as appropriate, any outcomes from the current discussions on trust funds in the context of the Budget Committee. The financial report will be based on the draft budget presented alongside the corresponding work plan, with additional expenditure related to the activities approved by the request forms received throughout the year.
- 14. The ECFFF shall also provide an update of its activities (either orally or in writing) to each regular formal meeting of the Committee.

# **The ECFFF Secretariat**

- 15. The ECFFF Secretariat is housed within the WTO and its responsibilities comprise the delivery of the operational guidelines, as supplemented by this document.
- 16. The ECFFF continues to be subject to the regular audit procedures of the WTO.

## *Article X+1-X+10:*

Based on text proposal by CI.

#### Section E: Telecommunications

# E.1. Disciplines relating to Telecommunications Services

- 1. Each [Party/Member] shall undertake or continue to undertake the obligations contained in the WTO Reference Paper: Negotiating group on basic telecommunications. To that end, those obligations are incorporated into and made a part of this [Agreement], *mutatis mutandis*. Drafting of paragraph 1 is stabilised.
- 2. [When undertaking or continuing to undertake the obligations contained in the WTO Reference Paper: Negotiating group on basic telecommunications, each [Party/Member] shall [to the extent applicable] apply them to value-added telecommunications services, in accordance with its laws and regulations, in addition to basic telecommunications services.]
- 3. Each [Party/Member] shall undertake the obligations included in [paragraphs 5-14].
- 4. [The obligations referred to in Paragraphs 1-3 shall not apply to services providing, or exercising editorial control over, content transmitted using telecommunications networks and services; and broadcasting services as defined in the laws and regulations of each [Party/Member][, other than contribution links].]

# **Telecommunications regulatory authority**

- 5. The telecommunications regulatory authority shall not hold a financial interest or maintain an operating or management role in any supplier of public telecommunications networks and services. This paragraph shall not be construed to prohibit a government entity of a [Party/Member] other than the telecommunications regulatory authority from owning equity in such supplier.
- 6. The telecommunications regulatory authority shall have the power, including the ability to impose sanctions, to carry out the functions assigned to it by law. Such power shall be exercised transparently and in a timely manner.
- 7. Functions undertaken by the telecommunications regulatory authority shall be made public in an easily accessible and clear form.

  Drafting of paragraphs 5-7 is stabilised.

## Assignment of frequency bands

- 8. The assignment of frequency bands for public telecommunication services shall be carried out via an open process that takes into account the overall public interest, including the promotion of competition.
- 9. [Parties/Members] shall endeavour to carrying out such assignment using market-based approaches, such as bidding procedures, where appropriate.

  Drafting of paragraphs 8-9 is stabilised.

#### **Essential Facilities**

- 10. "Network element" means a facility or equipment used in supplying a telecommunications service, including features, functions and capabilities provided by means of that facility or equipment.
- 11. A major supplier of public telecommunications networks or services shall make its essential facilities available to other suppliers of public telecommunications services on reasonable, non-discriminatory and transparent terms and conditions for the purpose of providing public telecommunications services.

- 12. [The telecommunications regulatory authority shall be empowered to/Each [Party/Member] shall]:
  - (a) determine those essential facilities required to be made available by a major supplier; and,
  - (b) require a major supplier to offer access on an unbundled basis to its network elements that are essential facilities.
- 13. A supplier of public telecommunications networks or services shall have access to recourse, within a reasonable period of time, to the telecommunications regulatory authority or other competent authority to resolve disputes with other suppliers of public telecommunications networks or services regarding their rights and obligations arising from this article paragraphs 11-12. The period of time referred to in this paragraph shall be made publicly available. [If a telecommunications regulatory body declines to initiate any action on a request to resolve a dispute, it shall, upon request, provide a written explanation for its decision within a reasonable period of time.]
- 14. Paragraph 13 shall not preclude a party involved in the dispute from bringing an action before judicial authorities.

#### Paragraphs 1-14

Based on text proposals by EU, NO, UA and UK.

#### Scope and general provisions

# (1) Preamble

#### 1. [Alt 1:

[Members/Parties],

Reaffirming the importance of global electronic commerce and the opportunities it creates for inclusive trade and development; and

Determined to further enhance the benefits of electronic commerce for businesses, consumers and the global economy;

Hereby agree as follows:]

#### [Alt 2:

The [Parties/Members]:

Building on their respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization;

Reaffirming the importance of global digital trade and the opportunities it creates for inclusive trade and investment and specifically the importance of promoting an open, transparent, non-discriminatory and predictable digital trading environment;

[Reaffirming the inherent right of [Parties/Members] to regulate to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, and the promotion and protection of cultural diversity and the rights, interests, duties and responsibilities of indigenous peoples in its territory;]

[Recognising the increasing social and economic importance of the use of digital technologies, and the importance of the safe and responsible development and use of such technology including in respect of source code to foster public trust;]

Seeking to enhance the benefits and opportunities stemming from digital trade for businesses and consumers;

Fostering improved economic opportunities and access to information and communications technologies for micro, small and medium-sized enterprises, as well as disadvantaged and under-represented groups, such as women, Indigenous persons, youth, and persons with disabilities;

Hereby agree as follows:]

## Paragraph 1

- Alt 1 based on text proposal by JP.
- Alt 2 based on text proposals by CA and NZ.

#### (2) Definitions

- 1. "[Digital trade/e-commerce]" means the production, distribution, marketing, sale or delivery of goods and services by electronic means;
- 2. "Enterprise" means [an/any] entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including [any branch, / a / any] corporation, trust, partnership, sole proprietorship, joint venture, [or other association / association or similar organisation].
- 3. "GATS" means the General Agreement on Trade in Services, set out in Annex 1B to the WTO Agreement.
- 4. "Government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services [for commercial sale or resale];
- 5. "Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
  - (a) an enterprise;
  - (b) shares, stock and other forms of equity participation in an enterprise;
  - (c) bonds, debentures, other debt instruments and loans; [FN1, FN2]
  - (d) futures, options and other derivatives;
  - (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
  - (f) intellectual property rights;
  - (g) licenses, authorizations, permits and similar rights conferred pursuant to the Party's law; [FN3] and,
  - (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges, but investment does not mean an order or judgment entered in a judicial or administrative action.

**FN1**: Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

**FN2**: A loan issued by one [Party/Member] to another [Party/Member] is not an investment.

FN3: Whether a particular type of license, authorization, permit or similar instrument (including a concession to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the [Party's/Member's] law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the [Party's/Member's] law. For greater certainty, the foregoing is without

prejudice to whether any asset associated with such instruments has the characteristics of an investment.

# 6. **[Alt 1**:

"Measure" means any measure by a [Party/Member], whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;]

#### [Alt 2:

"Measure" includes any law, regulation, procedure, requirement, or practice]

- 7. "Party" means any State or separate customs territory for which this Agreement is in force.
- 8. "Person" means a natural person or an enterprise.
- 9. "User" means a consumer and an enterprise.

# Paragraph 1:

Based on text proposals by BR and CA.

# Paragraph 2:

Based on text proposals by CA, KR and JP.

#### Paragraph 3:

Based on text proposal by KR.

#### Paragraph 4:

Based on text proposals by CA and KR.

#### Paragraph 5:

Based on text proposal by KR.

#### Paragraph 6:

- Alt 1 based on text proposal by JP.
- Alt 2 based on text proposals by CA and KR.

# Paragraph 7:

Based on text proposal by KR.

# Paragraph 8:

Based on text proposals by JP and KR.

# Paragraph 9:

Based on text proposal by KR.

#### (3) Principles

#### 1. [Alt 1:

[Parties/Members] recognise the economic growth and opportunities provided by [digital trade/electronic commerce] and the importance of frameworks that promote consumer confidence in [digital trade/electronic commerce] and of avoiding unnecessary barriers to its use and development.

#### [Alt 2:

The Parties recognize that electronic commerce supports inclusive economic growth and trade opportunities in many sectors and confirm the applicability of relevant WTO rules to electronic commerce.]

- 2. [Parties/Members] recognize that despite some improvement, the traditional size of the digital
  - divide in terms of digital connectivity and readiness to benefit from the digital economy and electronic commerce remains of concern in many developing countries, in particular those of low income and LDCs.
- 3. Considering the potential of digital [electronic commerce/trade] as a social and economic development tool, [Parties/Members] recognize the importance of:
  - (a) Clarity, transparency and predictability in their domestic regulatory frameworks in facilitating, to the maximum extent possible, the development of [digital trade/electronic commerce];
  - (b) Interoperability, innovation and competition; [and]
  - (c) Increased participation in digital trade by micro, small and medium sized enterprises [; and,
  - (d) The common and inclusive development of electronic commerce]
- 4. [The] Internet should remain free and open for all legitimate commercial and development purposes, including by allowing increased access to information, knowledge and new technologies.

[Drafting Note: this was discussed under the Access to and Use of the Internet for [electronic commerce/Digital Trade] provision]

- 5. [Parties/Members] recognize the importance of avoiding barriers that constitute a disguised restriction on digital trade.
- 6. The provisions of this Agreement from Article ( ) to Article ( ) take into account the readiness of each [Party/Member] in terms of capacity, infrastructure and regulation, as well as the needs of developing [Parties/Members] and LDCs.
- 7. Assistance and support should be provided to developing [Parties/Members] and LDCs to help them bridge the digital divide and to build their capacity to implement the provisions of this Agreement, in accordance with their nature and scope.

# Paragraph 1:

- Alt 1 based on text proposals by CI, JP and KR.
- Alt 2 based on text proposal by CA.

# Paragraph 2:

Based on text proposal by CI.

# Paragraph 3

Based on text proposal by BR and CI.

# Paragraph 4:

Based on text proposal by BR and CT.

# Paragraph 5:

Based on text proposal by BR.

# Paragraphs 6-7:

Based on text proposals by CI.

# (4) Scope

#### 1. [Alt 1:

This Agreement shall apply to measures adopted or maintained by a [Party/Member] [affecting/that affect] trade by electronic means.]

- 2. This Agreement does not apply to government procurement.
- 3. This Agreement does not apply to a service supplied in the exercise of governmental authority.
- 4. This Agreement does not apply to [, except for paragraphs 13, 14, and 15 of Article X (Personal Information Protection),] information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection; or.
- 5. This Agreement does not apply to [measures affecting the supply of] financial services [which are/as] defined in GATS Annex on Financial Services.

#### Paragraph 1:

Alt 1 based on text proposals by CA, CN, JP, KR, US.

#### Paragraphs 2:

Based on text proposals by CA, CN, JP, KR, US.

#### Paragraph 3:

Based on text proposal by US.

#### Paragraph 4:

Based on text proposals by CA, JP, KR, US.

#### Paragraph 5:

Based on text proposals by CA and KR.

This provision will be re-examined before the conclusion of the negotiations.

# (5) Relation to other agreements

1. The [Parties/Members] affirm their rights and obligations under the GATS, GATT 1994 and TRIPS Agreement.

# 2. **[Alt 1**:

Nothing in this Agreement [shall be construed as diminishing/affects] the [rights and] obligations of the [Parties/Members] under the agreements listed in Annexes 1A to 1C and Annex 4 to the WTO Agreement.]

#### [Alt 2:

This Agreement shall build on existing WTO agreements and frameworks. Where this Agreement is inconsistent with the provisions of the agreements in Annex 1 to the Marrakesh Agreement Establishing the World Trade Organization, the Annex 1 to the Marrakesh Agreement Establishing the World Trade Organization shall prevail.]

3. For greater certainty, this Agreement shall not be construed to have changed or modified [Parties'/Members'] market access commitments made under the General Agreement on Tariffs and Trade 1994 and the General Agreement on Trade in Services respectively.

#### Paragraph 1:

Based on text proposal by CA.

#### Paragraphs 2:

- Alt 1 based on text proposals by CA and JP.
- Alt 2 based on text proposal by CN.

#### Paragraph 3:

Based on text proposal by CN.

#### (6) General exceptions

## 1. [Alt 1:

For the purposes of this Agreement, Article XX of GATT 1994 and its interpretative note and Article XIV of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement shall apply [to the extent applicable. To this end, the provisions above shall be incorporated into and made an integral part of this Agreement], mutatis mutandis.]

#### [Alt 2:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade and cross-border transfer of information by electronic means, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Party/Member] of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to ensure the equitable or effective imposition or collection of direct taxes in respect of trade through electronic means;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and,
  - (iii) safety.]

Drafter's note: The CN text proposal on General exceptions (previously paragraph 2 of Alt 2) has been moved to D.1 Flow of information, and its final placement will be subject to the discussions under D.1 Flow of information.

#### Paragraph 1:

- Alt 1 based on text proposals by CA, CN and JP.
- Alt 2 based on text proposal by BR.

# (7) Security exception

#### 1. [Alt 1:

For the purposes of this Agreement, Article XXI of the GATT 1994 set out in Annex 1A to the WTO Agreement and Article XIV bis of the GATS set out in Annex 1B to the WTO Agreement apply, mutatis mutandis.]

#### [Alt 2:

Nothing in this Agreement shall be construed:

- (a) to require any [Party/Member] to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any [Party/Member] from taking any action which it considers necessary for the protection of its essential security interest; or,
- (c) to prevent any [Party/Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

#### Alt 3

Nothing in this Agreement shall be construed:

- (a) to require any [Party/Member] to furnish any information, the disclosure of which it considers
- (b) contrary to its essential security interests; or,
- (c) to prevent any [Party/Member] from taking any action which it considers necessary for the protection of its essential security interests:
  - relating to the cross-border transfer of information carried out directly or indirectly for military communication;
  - (ii) taken in time of war or other emergency in international relations; or
  - (iii) to prevent any [Party/Member] from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.]

#### Paragraph 1:

- Alt 1 based on text proposals by CA and JP.
- Alt 2 based on text proposal by CN.
- Alt 3 based on text proposal by BR.

# (8) Indigenous peoples

- 1. Nothing in this Agreement shall preclude a [Party/Member] from adopting or maintaining measures it deems necessary to protect or promote rights, interests, duties, and responsibilities of indigenous peoples in its territory, including in fulfilment of its obligations under its legal, constitutional or Treaty arrangements with those indigenous peoples.
- 2. The [Parties/Members] agree that the interpretation of a [Party's/Member's] legal, constitutional or Treaty arrangements with indigenous peoples in its territory, including as to the nature of its rights and obligations under it, shall not be subject to the dispute settlement provisions in this agreement.

#### Paragraphs 1-2:

Based on text proposal by NZ.

#### (9) Prudential measures

- 1. Nothing in this Agreement shall prevent a [Party/Member] from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the [Party's/Member's] financial system.
- 2. Where such measures do not conform with this Agreement, they shall not be used as a means of avoiding the Member's obligations under this Agreement.
- 3. Nothing in this Agreement shall be construed to require a [Party/Member] to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

#### (9 bis) Taxation

- For the purposes of this Article, designated authorities mean tax authorities that are responsible under the law of each Party/Member for the tax policy or administration, tax convention means a convention for the avoidance of double taxation or other international taxation agreement or arrangement; and taxes and taxation measures include excise duties, but do not include [customs duty].
- 2. Except as provided in this Article, nothing in this Agreement shall apply to taxation measures.
- 3. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such tax convention, that convention shall prevail to the extent of the inconsistency.
- 4. In the case of a tax convention between two or more Parties, if an issue arises as to whether any inconsistency exists between this Agreement and the tax convention, the issue shall be referred to the designated authorities of the Parties in question. The designated authorities of those Parties shall have six months from the date of referral of the issue to make a determination as to the existence and extent of any inconsistency. If those designated authorities agree, the period may be extended up to 12 months from the date of referral of the issue. No procedures concerning the measure giving rise to the issue may be initiated under Article [X.X] (Dispute Settlement) until the expiry of the six-month period, or any other period as may have been agreed by the designated authorities. A panel or tribunal established to consider a dispute related to a taxation measure shall accept as binding a determination of the designated authorities of the Parties made under this paragraph.

# (9) and (9bis):

Based on text proposals by JP.

# (10) Dispute Settlement

1. Articles XXII and XXIII of the GATT 1994 and Articles XXII and XXIII of the GATS, as elaborated and applied by the Dispute Settlement Understanding, apply to consultations and the settlement of disputes arising under this Agreement.

# Paragraph 1:

Based on text proposals by CA and JP.

#### (11) Committee on Trade-Related Aspects of Electronic Commerce

- 1. A Committee on Trade-Related Aspects of Electronic Commerce (hereinafter referred to in this Agreement as the "Committee") is hereby established, and shall be open to all [Parties/Members]. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any [Party/Member].
- 2. The Committee shall carry out responsibilities assigned to it by [the General Council] and shall afford [Parties/Members] the opportunity to consult on any matters relating to the operation and implementation of this Agreement.
- 3. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to [the General Council].
- 4. The Committee shall take note of extension communications received under Article XX (implementation periods for developing and least developed country Members) and shall follow up on the relevant actions required for the implementation thereof.

# Paragraphs 1-3:

Based on text proposal by JP.

#### Paragraph 4

Based on text proposal by EC, GT and PY.