

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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INTERSESSIONAL WORKING PARTY ON THE EUROPEAN COAL AND STEEL COMMUNITY.

Note by the Executive Secretary on the
legal aspects of the application for
waiver submitted by the countries
participating in the Community. (L/17)

I. INTRODUCTION

1. On 18 April 1951 the Governments of Belgium, the Federal Republic of Germany, France, Luxembourg, Italy and the Netherlands concluded a Treaty constituting the European Coal and Steel Community, and of a Convention containing the transitional provisions. The mission of the Treaty is to contribute to the economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the establishment of a common market. The establishment of this market involves the abolition of import and export duties, or charges with an equivalent effect, and of quantitative restrictions on the movement of coal and steel within the Community.

2. The Treaty of 18 April 1951 came into force on 23 July 1952. In accordance with Section 20 of the Convention containing the transitional provisions, the six member States of the Community submitted, through the Netherlands member of the Ad hoc Committee on Agenda and Intersessional Business, a request for a release from certain of their obligations under the General Agreement. This request concerns mainly the most-favoured-nation clause contained in Article I of the General Agreement, but also refers to any other conflicts between the General Agreement and the Treaty.

3. The object of this note is not to discuss the substance of the request for waiver, but merely to list the provisions of the Treaty and of the Convention which could not be implemented unless the present commitments of the member States under the General Agreement are modified, to indicate specifically which provisions of the General Agreement the text of the Treaty and of the Convention conflicts with, and to clear up certain legal points which may arise from this conflict.

II. Scope of waivers requested by the member States of the Community with a view to avoiding any conflict between their obligations under the General Agreement and the various instruments relating to the Community.

4. From the legal point of view, the European Coal and Steel Community cannot be regarded as coming under the exceptions explicitly provided for in the General Agreement. Although it has been stressed that the Treaty of 18 April 1951 is an agreement freely entered into for the purpose of increasing freedom of trade by the development of closer integration between the economies of the countries parties to the Treaty, and that the

mission of the Treaty is therefore in conformity with the spirit of Article XXIV:para. 4., the fact, however, that the Community is limited to one sector of economic activity means that the request is not eligible under Article XXIV. Consequently, this is a case of exceptional circumstances not otherwise provided for in the Agreement. If the Contracting Parties wish to grant to the member States of the Community the waivers requested, they will have to take a decision under Article XXV:5(a) of the Agreement, and such a decision which will necessarily be subject to strict interpretation.

5. In order that the members of the Working Party may appreciate the scope of the waivers in question, it may be useful to enumerate the provisions of the Treaty and of the Convention of 13 April 1951 which could not be implemented unless the present obligations of the member States are alleviated.

A. WAIVERS VALID FOR THE DURATION OF THE TREATY

(1) Waivers of the most-favoured-nation clause in tariff matters.

6. Article IV of the Treaty states that "the following are recognized to be incompatible with the common market for coal and steel, and are, therefore, abolished and prohibited within the community in the manner set forth in the present Treaty: (a) import and export duties, or charges with an equivalent effect,.....".

Section 9 of the Convention provides that these duties and charges shall be eliminated - "...on the dates fixed for the creation of the common market....".

7. Under Section 8 of the Convention, the creation of the common market should take place on 10 February 1953 for coal, iron ore and scrap iron, and on 10 April 1953 for steel.

8. As the member States do not intend to accord to the other contracting parties to GATT the exemptions from duties and charges which they are agreed to grant to each other, the provisions of the Treaty and of the Convention are in conflict with the terms of Article I of the General Agreement. If a release is granted on this point it will have to refer to coal and steel products coming from the territories of any member State; indeed, if the exemption only applied to products originating in the territory of member States, the common market would not have been fully realised and member States would have to levy duties on products originating in third countries which moved in transit over the territories of other member States.

(ii) Extension of preferential treatment granted by non-European Territories to metropolitan territories.

9. The second paragraph of Article 79 of the Treaty states that "Each High Contracting Party binds itself to extend to the other member States the preferential measures which it enjoys with respect to coal and steel in the non-European territories subject to its jurisdiction". At present this provision concerns only certain French non-European territories, as the

Benelux countries do not receive preferential treatment for the importation of their products into the non-European territories of Belgium and the Netherlands. French products enjoy preferential treatment in the following territories of the French Union: French Equatorial Africa (outside the Treaty Basin of the Congo), French West Africa, the French Somali Coast, the French Establishments in Oceania, Guadeloupe, French Guiana, Indo-China, Madagascar, Martinique, New Caledonia, Réunion, St. Pierre and Miquelon, and Tunisia. Algeria should be added to these territories, which are listed in Annex B to the General Agreement. The Treaty of 18 April 1951 does not apply to Algeria which, however, shall necessarily have to exempt from import duties the coal and steel products of the member States, in accordance with the provisions of Article 79.

10. The provisions of Article 79 of the Treaty do not conform with Article I.(1) of the General Agreement, which prohibits any preference other than those referred to in Article I.(2). The effect of the waiver requested would be to extend the preferences granted to the importation of coal and steel products originating in France into the above-mentioned territories to like products originating in the Federal Republic of Germany, Belgium, Italy, Luxembourg and the Netherlands. Any such extension of preferential treatment would be subject to the provisions of Article I(4).

(iii) Waiver of the Rule of Non-discrimination as Regards Quantitative Restrictions.

11. Under Article IV of the Treaty, "Quantitative restrictions on the movement of coal and steel" within the Community are recognized to be incompatible with the common market for coal and steel. Their elimination shall become effective on the date fixed for the creation of the common market except in the special case of Belgium, which is dealt with in Paragraph 13 below.

12. As the member States do not intend to grant the same privileges to coal and steel products imported from the territories of other contracting parties to the GATT, the application of this provision of the Treaty runs counter to the provisions of paragraph 1 of Article XIII of the General Agreement. The waiver, if granted, would apply not only to quantitative import restrictions which a contracting party may institute under Article XII of the Agreement to the extent necessary to safeguard its balance of payments, but also to other import or export restrictions which are permitted under the General Agreement. These measures include export prohibitions or restrictions which may be applied to remedy shortages and which the Community might find it necessary to institute in regard to third countries under Article 59 of the Treaty. Up to the present, four member States have indicated that they are applying quantitative restrictions to safeguard their balance of payments; these restrictions apply to coal and steel products. For the reasons set out in Paragraph 6 above, the waiver requested would have to be in respect of coal and steel products coming from or going to the territories of the member States and not only in favour of products originating in or destined for those territories.

B. TEMPORARY EXCEPTIONS

(i) Temporary separation of the
Belgian Coal Market

13. Section 26(3) of the Convention containing the transitional provisions states that: "Notwithstanding the provisions of Section 9 of the present Convention /referring to the elimination of duties, charges, and quantitative restrictions/, the Belgian Government may maintain or establish, under the control of the High Authority, mechanisms making possible the separation of the Belgian market from the common market. Imports of coal from third countries shall be subject to the approval of the High Authority". These separating mechanisms are to be eliminated not later than the expiration of the transition period (five years after the creation of the common market for coal). The High Authority may grant the Belgian Government not more than two additional one-year periods of grace if exceptional circumstances render such a step necessary.

14. This provision runs counter to the prohibition of quantitative restrictions laid down in Article XI(1) of the General Agreement, and cannot be justified under Article XII since the separation measures are not intended to safeguard the balance of payments of Belgium. Again, since it seems that these restrictions are to apply both to member States and third countries and it is not possible to assess to what extent they are likely to be applied in a discriminatory fashion, it is quite possible that they may conflict also with the provisions of Article XIII. It should be noted, moreover, that under Section 26(3) of the Convention the establishment of such measures is not mandatory upon the Belgian Government, and this fact will have to be taken into account in the wording of any decision which the Contracting Parties may take on the subject.

(ii) Modifications of Tariff Bindings
granted by Member States

15. Section 16 of the Convention containing the transitional provisions states that "Prior bindings /at the time of the entry into force of the Treaty/ resulting from bilateral or multilateral agreements shall be reported to the High Authority, which will examine whether their maintenance appears compatible with the efficient operation of the common organization, and, if necessary, may make such recommendations to the member States as may be necessary to remove these bindings according to the procedures specified in the agreements involved". No request relating to duty rates bound under the General Agreement has been submitted by any member State under this Section.

16. However, a special problem arises in respect to certain Benelux tariff bindings. These bindings affect the following products:

<u>Benelux Tariff Item No.</u>	<u>Description of Products</u>	<u>Rate of Duty</u>
697 (Norway)	Fero-alloys in an un-worked state	free
703 (United States)	Sheet and plate of iron or steel, flat, unprocessed:	
	<u>a.</u> merely forged or hot-rolled, not pickled:	
	1. not over 1.1 millimeters thick...	4 p.c.
	2. others.....	3 p.c.
704 (United States)	Sheet and plate of iron or steel, flat, processed on the surface:	
	<u>c.</u> Tin plate:	
	1. over 0.35 millimeters thick.....	4 p.c.
	2. with a thickness of 0.35 millimeters or less.....	4 p.c.
705 (United States)	Sheet and plate of iron or steel, other:	
	<u>a.</u> corrugated, channelled, ribbed, nipped, with bosses or with rolled or pressed patterns...	4 p.c.

17. Section 15 of the Convention containing the transitional provisions provides for the establishment by the governments of the Benelux countries of tariff quotas for steel imports during a transitional period (third to fifth paragraphs) to be followed by a subsequent increase in the present tariffs on steel applied by the Benelux countries, when the tariff quotas have been eliminated.

18. The mechanism of "tariff quotas" is as follows: the Benelux countries will maintain the duties which they were applying at the time of the entry into force of the Treaty subject to tariff quotas "established annually for each heading of the Benelux tariff code by the governments of the Benelux countries in agreement with the High Authority, subject to revision every three months". The first quotas are to be fixed on the basis of imports during a reference period. Thus, within the limits of such quotas, duties bound by the Benelux countries are not affected for the time being. However, imports which take place over and above the quota are considered to be destined for other countries of the Community, and the Benelux countries have undertaken to subject such imports to duties equal to the lowest duty applied in the other member States upon the entry into force of the Treaty. In order to give effect to this provision which is at variance with Article II(1) of the General Agreement as long as Schedule 2 has not been modified, the Benelux countries would have to be authorized to modify the concessions granted for

these products in respect of imports above the quota. These countries should indicate for each item referred to above, the rate in force for imports above the quota. They will no doubt be invited to enter into undertakings vis-à-vis the other contracting parties as regards the duration of this system and the rules for establishing quotas.

19. As soon as the transitional system of tariff quotas is abandoned, the Benelux countries may have to increase "their present tariffs on steel within a maximum limit of two points..." in order to facilitate the harmonisation of customs duties between member States. This increase in the Benelux tariff rates would thus correspond to reductions of duties by one or more of the ^{other} member States. As in the case of tariff quotas, modifications to Schedule II will have to be made at the appropriate time if a conflict with Article II(1) of the Agreement is to be avoided.

20. The following statement was made by the Benelux delegations on 29 March 1951 in regard to the withdrawal of items referred to in paragraph 16 above:

"If the Benelux countries revalidate their Geneva and Annecy Schedules, they will do so on the understanding that the decision which the Contracting Parties will be called upon to take under the authorisation provided for in paragraph 20 of the Convention will enable them to carry out the obligation included in paragraph 15 of the said Convention."

The Contracting Parties took note of this statement, which was distributed to governments in document GATT/CPS/7. The Chairman stated that the Contracting Parties would "await the Schuman Plan in order to consider the effect on the General Agreement" (GATT/CPS/SR.1).

C) THE EXERCISE, BY THE MEMBER STATES ACTING INDIVIDUALLY OR AS THE COMMUNITY, OF CERTAIN RIGHTS WHICH THE GENERAL AGREEMENT CONFERS ON THE CONTRACTING PARTIES

21. The General Agreement allows contracting parties to take certain measures either to safeguard their markets against dumping and certain subsidy practices to derogate from certain commitments in cases where a product is being imported in such abnormal quantities as to cause or result in serious injury to domestic producers, or to safeguard their balance of payments. The Treaty of 18 April 1951 grants the Community powers comparable to those conferred on member States under international agreements. However, whereas under the General Agreement each government may take into account only the situation of its own market and that of domestic producers, the Treaty provides that the member States will be called upon to act not on the basis of this situation of their own domestic producers, but of the situation of the producers of the common market. If the Community is to exercise its powers under the conditions set forth in the Treaty, it will be necessary to enable each member State in such cases to act as if the common market was its own domestic market. In other words, the Community would exercise those rights in the same way as if the territories of the member States together constituted the territory of one single High Contracting Party with respect to coal and steel products.

22. In this connection Article 71 of the Treaty stipulates that "the powers granted to the Community by the present Treaty concerning commercial policy toward third countries shall not exceed the powers which the member States are free to exercise under the international agreements to which they are parties..."¹

This principle settles in advance in favor of the General Agreement any conflict which might arise between the provisions of the Agreement and those of the Treaty which refer to the same subject. The Community is prohibited, by its own rules, from invoking a provision of the Treaty in order to take, or cause to be taken, any measure at variance with any obligation of a member State resulting from the General Agreement, with due allowance for any waivers which the Contracting Parties may have granted.

23. Article 74 of the Treaty enumerates three cases where the Community envisages the adoption of protective measures under international agreements.

(1) Protection against Dumping and Other Practices condemned by the Havana Charter

24. Under ^{the} General Agreement governments may levy anti-dumping duties to offset dumping in the manner defined in Article VI, paragraph 2. The Agreement also authorises the imposition of countervailing duties in accordance with Article VI:3, to counteract the effect of subsidies granted by an exporting country. No other defense measure may be adopted unilaterally. However, a contracting party may have recourse to the provisions of Article XXIII of the Agreement. If the member States are to apply Article 74:1 of the Treaty in the manner defined in paragraph 21 above, they would have to be free to interpret the provisions of Article VI as if the coal and steel industry were "a domestic industry" within the meaning of paragraph 6 of that Article.

25. The other practices condemned by the Havana Charter and referred to in Article 74:1 of the Treaty are very probably the restrictive business practices dealt with in Chapter V of the Charter. In this connection, the General Agreement does not contain any provision under which a contracting party can, in the commercial policy, adopt unilateral protective measures against such practices. The right of recourse would have to be exercised in accordance with the provisions of Article XXIII of the Agreement.

(ii) Protection against Abnormal Conditions of Competition

26. Article 74:2 provides for the possibility of instituting quantitative restrictions "if a difference between the offers made by enterprises outside the jurisdiction of the Community and those made by enterprises within

¹ This paragraph contains a proviso relating to the application of the provisions of Article 75. However, as Article 75 refers only to proposed agreements, it does not concern the General Agreement.

its jurisdiction is due exclusively to the fact that those of the former are based on competitive conditions contrary to the provisions of the present Treaty". There is no provision in the General Agreement under which a contracting party, acting unilaterally, may apply quantitative restrictions as a measure of protection against such conditions of competition. Article XXIII of the Agreement also applies in this case. In fact, a similar procedure was provided for in Article 7 of the Havana Charter with respect to cases where unfair labour conditions, particularly in production for export, created difficulties for other States.

(iii) Protection Against Abnormal
Import Quantities

27. Article 74:3 provides for the possibility of establishing quantitative restrictions "if one of the products enumerated in Article 81 of the present Treaty is imported into the territory of one or several of the member States of the Community in relatively increased quantities and under such conditions that these imports inflict, or threaten to inflict, serious damage to production, within the common market, of similar or directly competitive products". This clause reproduces in substance Article XIX of the General Agreement and, under Article 71:2 of the Treaty, it is one condition laid down in the General Agreement which will be applicable both to the member States and to the Community.

However, if the Community, in order to accomplish its mission is to organise a defence mechanism in all the member States without waiting until production is threatened in all these States, the expression "domestic producers" which occurs in Article XIX:1 must, in the present case, be interpreted as meaning "producers in the common market".

(iv) Protection of the Domestic Market
against Shortages

28. Article 59:3 of the Treaty provides for the possibility of establishing restrictions on exports to third countries in case of "a serious shortage of certain or all of the products subject" to the jurisdiction of the High Authority. These measures are permitted under Article XI:2(a) of the General Agreement subject to the conditions prescribed therein. However, in this case also the words "products essential to the exporting contracting party" must be interpreted as being equivalent to "products essential to the exporting Community" in order to enable the High Authority to discharge its functions in accordance with the terms of the Treaty.

(v) Measures to Safeguard the
Balance of Payments

29. In paragraph 21 above, it was recalled that the contracting parties may institute quantitative restrictions if their balance-of-payments is seriously threatened. If a member State of the Community is faced with such a situation it will be able to invoke Article XII of the General Agreement and, if necessary, to restrict coal and steel imports coming directly from third countries. Under Article 4 and the second paragraph of Article 86 of the Treaty, member States are forbidden to restrict the importation of these products once they have entered the territory of the Community through the

frontier of another member State. In these circumstances, the maintenance of the common market in such a situation is likely to make inoperative the quantitative restrictions established by a member State which finds itself in a difficult situation in regard to coal and steel imports from third countries. The Treaty of 18 April 1951 does not provide for any method of dealing with this problem, which cannot, however, be passed over in silence; it would, therefore, be useful to review the various possible solutions and the difficulties which they may raise.

30. Since coal and steel are essential products, one would imagine that, generally speaking, the member States would not restrict the importation of these products until the list of other import products has been more or less exhausted. If this assumption is correct, and the member States will undertake to avoid, as far as possible, extending balance-of-payments restrictions to coal and steel, the problem would be of an entirely exceptional character. Where a member State in difficulties was obliged to restrict coal and steel imports from third countries and requested the co-operation of the other States in assuring the effectiveness of these measures, these States could, for example, consider setting up a system of control at the frontier between their territory and that of non-member States. On the basis of the fourth paragraph of Section XV of the Convention, provision could be made for the member States to make coal and steel imports from third countries subject to an undertaking that these imports would not be re-exported to other countries in the Community. This method has the advantage of not restricting imports in the countries which are not in balance-of-payments difficulties, but it also has the defect of introducing certain limitations to the free movement of coal and steel within the Community.

31. Another method would be that the restrictive measures taken by the member State which was in difficulties would be applied at the external frontier of the Community but that coal and steel import quotas for the whole Community should not be less than would be imported if the member in difficulties applied for restrictions to coal and steel from non-member countries, from wherever it might come, and the other member States imported without restriction. Such a solution, which would be more in accordance with the spirit of the Treaty, would be less easy to reconcile with the General Agreement, which contains no provision whereby a contracting party may impose quantitative restrictions to safeguard the balance of payments of another State, and would offer less guarantees to third countries. Perhaps the drawbacks of this system could be reduced if the member States were required to consult with the Contracting Parties as provided for in Article XII:4(b) (end of first sentence).

32. Finally, since these difficulties are of an exceptional nature, a possible solution would be simply to accept the principle of a waiver while inviting the member States to submit this question to the Contracting Parties whenever it arises in practice and settle, in agreement with them, the method of applying the waiver.

IV. APPLICATION OF THE RULES CONCERNING EQUITABLE ALLOCATION
OF RESOURCES AND NON-DISCRIMINATION BY STATE ENTERPRISES

(1) Equitable Allocation of Resources

33. Article 59 of the Treaty of 18 April 1951 stipulates that, in certain cases, the institutions of the Community shall determine "the allocation of the coal and steel resources of the Community among industries subject to its jurisdiction, exports, and other consumption". Insofar as such measures may determine the allocation of export quotas among third countries, they must necessarily comply with the provisions of Article XXII(a), that is to say, they "shall be consistent with any multilateral arrangements directed to an equitable international distribution of such products or, in the absence of such arrangements, with the principle that all contracting parties are entitled to an equitable share of the international supply of such products". Thus, any non-member country would have the right to claim no less equitable treatment than that afforded to any other country. But, under Article 59, the Community does not undertake to accord third countries no less favorable treatment than that granted to member States. It intends to treat the common market in the same way as a contracting party would be entitled to treat its domestic market for the purpose of distributing products in short supply. If this conception is admitted by the Contracting Parties, it would then have to be understood that, in the circumstances, no arbitrary or unjustifiable discrimination within the sense of the preamble to Article XX was being practised.

(ii) The Special Situation of State
Enterprises

34. As a result of decisions taken by the Community in regard to prices, distribution, etc., State enterprises under its jurisdiction may have to accord to customers in third countries less favourable treatment than that granted to customers established in the territories of member States. Other cases might arise where such enterprises would depart from the general principle of non-discrimination in regard to purchases and sales involving imports and exports, referred to in Article XVII of the General Agreement, and the member States would thus not be fulfilling their obligations under paragraph 2(c) thereof. If State enterprises in the countries are to be permitted to afford the common market a treatment compatible with the provisions of the Treaty (in particular those of Chapters 4 & 5), then coal and steel consignments dispatched by State enterprises in a member country to other member countries, and deliveries of coal and steel from these countries to State enterprises in a member country must not be deemed to be "exports" or "imports" within the meaning of Article XVII of the General Agreement.

V. RESPONSIBILITY OF THE GOVERNMENTS AND INSTITUTIONS OF THE
COMMUNITY TOWARDS THE CONTRACTING PARTIES TO THE GENERAL AGREEMENT

35. The governments of the member States of the Community have requested the Contracting Parties to release them from certain of their obligations to enable them to implement the Treaty and Convention of 18 April 1951. These governments, it should be noted, have not requested the Contracting Parties to relieve them of a part of their responsibility towards the other contracting parties because of measures which might be adopted by the Community to which they have entrusted certain tasks, nor have they requested that the

institutions of the Community replace them for the fulfillment of certain of their obligations under the General Agreement. Article 71 of the Treaty provides that "unless otherwise stipulated in the present Treaty, the competence of the governments or member States with respect to commercial policy shall not be affected by application of the present Treaty". It is, therefore, clear that these governments still consider themselves fully responsible towards the other contracting parties with respect to the fulfillment of their commitments under the General Agreement, irrespective of the distribution of powers within the Community.

36. Although the Treaty grants wide powers to the High Authority, the supra-national character of which is proclaimed in Article 9, the competence of the High Authority in matters of commercial policy, is, it seems quite clearly limited by the provisions of Article 71, paragraph 2. Under Article 71, paragraph 2, the High Authority is committed to respect the obligations assumed by member States towards the other High Contracting Parties. If the High Authority were to reach a decision which was incompatible with any of those obligations, then the member State whose responsibility was involved could lodge an appeal before the Court on the grounds of violation of Article 71, paragraph 2 of the Treaty. Furthermore, such a member State might request a stay of execution of the decision in question: under Article 39, paragraph 2 of the Treaty, there is no doubt that the Court would grant such a request.

All those provisions tend to indicate that the member States have at their disposal all the means of action necessary to ensure that the commitments shall be carried out, especially in view of the fact that commercial policy will always be implemented through the action of national administrations.

37. However, one can wonder whether the separation of powers within the Community gives the other contracting parties the same clear guarantees as before the Community was constituted. It could be argued that the principle laid down in Article 71 is limited in its scope by the words "unless otherwise stipulated". Now, it is expressly stipulated in various parts of the Treaty that the High Authority is empowered to take commercial policy measures (Article 74:1), that it can intervene in matters of commercial policy as provided for in the Treaty (Article 57), that it may decide on the establishment of restrictions on exports to third countries (Article 59:5), etc. It could also be observed that the High Authority in discharging its functions may take decisions which, though not contrary to the express obligations resulting from the General Agreement, may give rise to Article XXIII:1 (b) or (c) being invoked. In these circumstances, and perhaps in others as well, a State could not lodge an appeal against the decision of the High Authority before the Court, under article 33 of the Treaty, nor would Article 37 be applicable. Furthermore, the rights of the contracting parties would in a way be settled without appeal by a Court whose jurisdiction does not extend to them, before which they cannot bring an appeal and which does not even have automatically to order a stay of execution of a decision under dispute.

38. Under the circumstances, the question arises as to whether some contracting parties may not wish, as an additional precaution, to obtain from the Community or one of its institutions the assurances necessary to satisfy themselves or their public opinion that, under all circumstances they will have some practical means whereby they can discuss with the responsible

authorities any problems which may arise as a result of commitments undertaken by the member States of the Community, and that the interests of those contracting parties will be as fully protected as if they were dealing with States which were not members of the European Community. From the legal point of view, the Treaty does not appear to contain any provisions which would preclude such a request. In fact, Article 6 of the Treaty stipulates that "in its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends". The Community is represented by its institutions, each within its own field of competence, and it would no doubt be easy to determine which of them were empowered to offer assurances of this kind on behalf of the Community if and when such assurances were requested by contracting parties.