

Brussels, 25 November 1992

NOTE FROM THE SECRETARIAT

Subject : Basic Agreement

The next scheduled meeting of Working Group II beginning on December 14 will address many Articles contained in the Basic Agreement. Accordingly, an updated version of the Basic Agreement has been prepared and is annexed to this note.

Delegations should note that there are two additional documents relevant to the next meeting which will be circulated in advance of the meeting. These are:

- 1) New draft by Chairman of definition of Investment;
- 2) New draft by Chairman on Organisation (Articles 29, 30, 31, 32).

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

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65/92 ANNEX

BA-26

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RESTRICTED

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Brussels, 25 November 1992

REVISED DRAFT

BASIC AGREEMENT FOR THE EUROPEAN ENERGY CHARTER

PREAMBLE

The Contracting Parties to this Agreement,

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990,

Having regard to the European Energy Charter signed at The Hague on 17 December 1991,

Aware that all Signatories to the European Energy Charter undertook to agree a Basic Agreement to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the General Agreement on Tariffs and Trade and its related instruments and as otherwise provided for in this Agreement;

Determined to remove progressively technical, administrative and other barriers to trade in Energy Materials and Products and related equipment, technologies and services;

Looking to the eventual membership of the General Agreement on Tariffs and Trade of those Contracting Parties which are not currently Contracting Parties to the General Agreement on Tariffs and Trade and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation of themselves for such membership;

Having regard to the rights and obligations of certain Contracting Parties who are also parties to the General Agreement on Tariffs and Trade and its related Agreements, as renegotiated from time to time;

Having regard to national competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position where these are already established;

Having regard to the competition rules applicable to member states of the European Community under the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community;

Having regard to the competition rules applicable to contracting parties to the European Economic Area;

Having regard to the work in the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development to increase co-operation between sovereign states on competition matters;

Having regard to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and the obligations of international nuclear safeguards;

Having regard to the increasing urgency of measures to protect the environment, and to the need for internationally agreed objectives and criteria for this purpose;

HAVE AGREED AS FOLLOWS:

PART I

DEFINITIONS AND PRINCIPLES

ARTICLE 1

DEFINITIONS

For the purposes of this Agreement unless the context otherwise requires :

- (1) "Charter" means the European Energy Charter signed at The Hague on 17 December 1991;
- (2) "Contracting Party" means a State or Regional Economic Integration Organisation which has consented to be bound by the Agreement and for which the Agreement is in force;<sup>(1)</sup>
- (3) (2)"Energy Materials and Products", based on the Harmonised System (HS) of the Customs Cooperation Council and the Combined Nomenclature (CN) of the European Communities, means the following

items of HS or CN:

Nuclear Energy	26.12	Uranium or thorium minerals and their compounds.
	26.12.10	Uranium minerals and their compounds.
	[26.12.20	Thorium minerals and their compounds]. <sup>(3)</sup>

28.44 Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.

28.44.10 Natural uranium and its compounds.

28.44.20 Uranium enriched in U235 and its compounds; [plutonium and its compounds].(3)

28.44.30 Uranium depleted in U235 and its compounds; [thorium and its compounds].(3)

28.44.40 Radioactive elements and isotopes and radioactive compounds other than 28.44.10, 28.44.20 or 28.44.30.

28.44.50 Spent fuel elements (cells) of nuclear reactors.

[28.45.10 Heavy water.](4)

Chapter 27

Coal, Natural Gas,  
Petroleum and  
Petroleum products,  
Electrial Energy

Mineral fuels, mineral oils and  
products of their distillation;  
bituminous substances; mineral  
waxes.

27.01 Coal, briquettes, ovoids and similar fuels  
manufactured from coal.

- 27.02 Lignite, whether or not agglomerated, excluding Jet.
- 27.03 Peat (including peat litter), whether or not agglomerated.
- 27.04 Coke and semi-coke or coal, of lignite or of peat, whether or not agglomerated; retort carbon.
- 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.
- 27.06 Tar distilled from coal, lignite or peat and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.
- [27.07 Oils and other products of the distillation or high temperature coal tars, whether or not dehydrated or partially distilled, including reconstituted tars (e.g. benzoles, toluoles, xyloles, naphthalenes, other aromatic hydrocarbon mixtures, phenoles, creosote oils and others).]<sup>(5)</sup>
- 27.08 Pitch and pitch coke obtained from coal tar or from other mineral tars.
- 27.09 Petroleum oils and oils obtained from bituminous minerals, crude.
- 27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.

27.11 Petroleum gases and other gaseous hydrocarbons  
liquified:

- natural gas
- propane
- butane
- [27.11.14.00 - ethylene, propylene, butylene,  
butadiene](8)
- other

in gaseous state:

- natural gas
- other

27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or oils obtained from bituminous minerals.

27.14 Bitumen and asphalt natural; bituminous or oil shale and tar sands; asphaltities and asphaltic rocks.

27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (e.g. bituminous mastics, cut-backs).

27.16 Electrical energy.

Acyclic and  
Cyclic  
Hydrocarbons

[29.01 Acyclic hydrocarbons (saturated or non saturated as ethylene, propylene, butylene and its isomeres, butadiene and its isomeres and others).](5)

[29.02 Cyclic hydrocarbons (e.g. cyclohexane, benzene, toluene, xylenes and their mixtures, styrene, ethylbenzene and others).](5)

Renewable Energy

[22.07.20 Ethylalcohol and any forms or denaturated spirits.](6)(7)

[29.05.11 Methanol (methylalcohol).](8)

44.01 Firewood, logs, twigs, bundles of firewood and similar forms; woodboards and particles; sawdust, wastes and fragments of wood, whether or not agglomerated, in the form of logs, briquettes, balls or similar forms.

44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

(4) "Investment" means every kind of [ asset in energy field](9) owned [or controlled, directly or indirectly],(10) by Investors of one Contracting Party(11). [In particular, though not exclusively, it includes any of the following:](12)

(a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;(13)

(b) shares in, or stock, or other forms of equity, bonds or debentures or debt(14) of, or any other form of participation including minority forms in, a company or business enterprise;

(c) claims to money and claims to performance under contract having an economic value [and associated with an Investment;](15)

(d) [Intellectual Property(16)];(17)

(e) [any right conferred by law or contract, relating to an Investment or by virtue of any licences and permits pursuant to law];(18)(19)

(20)

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement of the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the "effective date") provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

(5) "Investor" means with regard to a Contracting Party:

(a) natural persons having the citizenship or nationality of [or who are permanently residing in]<sup>(21)</sup> that Contracting Party in accordance with its laws;

(b) companies or other organisations under the laws and regulations applicable in that Contracting Party.

(6) "Make Investments" means establishing a new Investment, acquiring all or part of an existing Investment, expanding an existing Investment, or substantially altering the type or the objective of an existing Investment;

(7) "Returns" means the amounts yielded in pecuniary form or in kind by an Investment and includes profits, interest, capital gains, dividends, royalties and fees.

(8) "Domain" means in respect of a Contracting Party the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea, and the sea, seabed and its subsoil over which that Contracting Party exercises, in accordance with international law, sovereign rights or jurisdiction. [With respect to a Regional Economic Integration Organisation which is or becomes a Contracting Party to this Agreement the term "Domain" shall be construed as meaning the respective territories of those member states of such organisation which are also Contracting Parties to this Agreement, to the extent of that organisation's competence in the matters which are the subject of this Agreement in those territories](22).

(9) "GATT and related instruments" means:

(a) the General Agreement on Tariffs and Trade, signed at Geneva October 30, 1947;

(b) agreements, arrangements, decisions, understandings, or other joint action pursuant to the General Agreement on Tariffs and Trade;

and any successor agreement or agreements thereto.

(10) ["Intellectual Property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967(23)(24).](25)

(11) "Protocol" means an agreement entered into by any of the Contracting Parties under the auspices of the Charter in order to complement, supplement, extend or amplify the provisions of this Agreement to specific sectors or categories of activity comprised within the scope of this Agreement, including areas of cooperation referred to in Title III of the Charter.

(12) "Freely Convertible Currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

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General comment

The Chairman of WG II asked delegations to provide him with comments and suggestions on definitions of Energy Materials and Products relevant for Investment Articles in order for him to make a new draft of the definition of Investments.

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Specific comments

- 1.1 : EC will submit the definition of the Regional Economic Integration Organization for the November meeting of Legal Drafting Sub-Group.
- 1.2 : General scrutiny reserve. This definition has been considered only in relation to trade Articles.
- 1.3 : CDN supported by USA suggests deletion.
- 1.4 : J scrutiny reserve.
- 1.5 : CDN, USA and H suggest deletion.
- 1.6 : CDN and H suggest deletion.
- 1.7 : CH scrutiny reserve.
- 1.8 : CDN suggests deletion.

- 1.9 : The Chairman seeks to draft a proposal in light of written observations.
- 1.10 : RUF scrutiny reserve.
- 1.11 : H suggests insertion of: "aquired after 17 December 1991".
- 1.12 : CDN proposes substituting with: "It consists of the following:". CDN considers the list should be exclusive rather than illustrative.
- 1.13 : CDN proposes the addition of: "acquired in the expectation or used for the purpose of economic benefits or the business purposes".
- 1.14 : CDN proposes the addition of: "with a repayment period of one year or more".
- 1.15 : CDN proposes replacing with: "and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain."
- 1.16 : H asks for adding: "related to industrial projects".
- 1.17 : CDN scrutiny reserve pending clarification of relationship between Articles 7, 16 and 18.
- 1.18 : Subject to scrutiny reserve by all delegations.
- 1.19 : On the basis of the previous text, CDN proposed the addition of the proviso that "such activity includes the commitment of capital or other resources in the Domain of another Contracting Party." The Chairman suggested consideration of this as a substantive provision under Article 16.

1.20 : CDN suggests additional language following subpara (e) reading:

"For greater clarity:

(a) claims to money which arise solely from:

i) commercial sales contracts of a national or enterprise in the Domain of one Contracting Party to an enterprise in the Domain of another Contracting Party; or

ii) the extension of credit in connection with a commercial transaction (e.g. trade financing), or

(b) any other claim to money;

which do not involve the kinds of interests as specified in portions (a) through (d) in the preceding paragraphs shall not be considered investments."

1.21 : Final position pending the discussion of Article 27, in particular F.N. 27.22.

1.22 : EC will propose a new text.

1.23 : AUS suggests adding: "and shall also include confidential information (including trade secrets and know-how), circuit layouts and semi-conductor chips and unregistered trademarks".

1.24 : USA supports AUS footnote 1.23 with some amendments, such that the addition should read: "including confidential information (including trade secrets and know-how), layout designs of integrated circuits and unregistered trademarks".

1.25 : Sub-Group chaired by AUS and consisting of USA, CDN, EC and the Chairman of Legal Sub-Group shall prepare prior to December meeting of WG II or in the margins of the December meeting of WG II a new draft of the definition of Intellectual Property taking into account the implications for the Investment Articles of the Basic Agreement and also the relation to industrial and commercial property (see square bracketed part in draft of Article 7).

**ARTICLE 2**  
**OBJECTIVE OF THE AGREEMENT**

The objective of this Agreement is to establish a legal framework in order to promote long-term cooperation in the energy field, based on mutual benefits and complementarities, in accordance with the objectives and the principles of the Charter.

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Chairman's note

Negotiations finished.

**ARTICLE 3**  
**PRINCIPLES - Deleted.**

**[ARTICLE 4]<sup>(1)</sup>**  
**SOVEREIGNTY OVER ENERGY RESOURCES**

The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. in accordance with and subject to its international legal rights and obligations, each State holds in particular the rights to decide the geographical areas within its Domain to be made available for exploration and development of its energy resources and the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation and to regulate the environmental and safety aspects of such exploration and development within its Domain.

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Specific comments

4.1 : USA reserve.

[ARTICLE 4A]<sup>(1)</sup>

ACCESS TO RESOURCES

The Contracting Parties undertake to facilitate access to and development of energy resources by Investors by formulating transparent rules regarding the acquisition, exploration and development of energy resources. They shall apply such rules [on a non-discriminatory basis]<sup>(2)</sup> in accordance with this Agreement, particularly Article 16, and any relevant Protocol<sup>(3)</sup>.

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General comments

- Finalisation of this Article dependant on satisfactory completion of trade and investment Articles, as well as Articles 26 and 28.
- N has submitted new text containing three paragraphs reading:

(1) First sentence of current draft.

(2) The Contracting Parties shall maintain or adopt procedures, which shall not discriminate Investors from other Contracting Parties on grounds of nationality or country of origin, governing acceptance and treatment prior to allocation of applications for authorisations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

(3) In allocating authorisations, licences, concessions and contracts pursuant to paragraph (2), a Contracting Party shall treat Investors from other Contracting Parties no less favourably than Investors from any other Contracting Party or any third country, whichever is most favourable.

Specific comments

4A.1 : USA general reserve.

4A.2 : USA scrutiny reserve. Preferentially to be replaced with "on the basis of national treatment".

4A.3 : It is noted that the relevant Protocols would affect the application of such rules by only the Parties to this Protocol.

[ARTICLE 4B](1)

ACCESS TO MARKETS

(1) The Contracting Parties will strongly promote access to local, export and international markets for the disposal of Energy Materials and Products on commercial terms and undertake to remove progressively barriers to trade. Energy Materials and Products originating from any Contracting Party shall be given [non-discriminatory] access to markets in other Contracting Parties in accordance with this Agreement and any relevant Protocol. Similarly, and in particular in accordance with Article 16, Investors of one Contracting Party shall not be excluded or restricted from entering and operating in the market of another Contracting Party.

(2) The Contracting Parties agree to work to alleviate market distortions and barriers to competition in markets in the energy [sector/cycle/field]. [In general, price formation shall be based on market principles](2).

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General comment

Finalisation of this Article dependant on satisfactory completion of trade and investment Articles, as well as Articles 26 and 28.

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Specific comments

4B.1 : USA general reserve.

4B.2 : J scrutiny reserve.

**PART II**

**MARKETS**

**ARTICLE 5**

**TRADE IN ENERGY MATERIALS AND PRODUCTS [AND RELATED SERVICES]**

Trade in Energy Materials and Products between Contracting Parties shall be governed by the provisions of the GATT and related instruments, other than the Agreement on Government Procurement and agreements, arrangements, decisions, understandings, declarations and other joint action pursuant to that latter Agreement.

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General comments

- Substance of this Article has been agreed on 16 November 1992. Article is now referred to the Legal Drafting Sub-Group for ensuring compliance with some concerns raised by delegations, in particular:
  - a) how to deal with services if Uruguay Round negotiations are not finished before signature of the Basic Agreement (e.g. by means of the ministerial declaration accompanying BA expressing the wish of Contracting Parties for inclusion of related services in the BA after Uruguay Round negotiations are completed or by means of some other provision),
  - b) how to incorporate relevant text in case of earlier conclusion of the Uruguay Round negotiations,
  - c) whether free-standing Article for services would not be a better solution when seeking for coverage of both options (a) and (b),

d) that compliance should be ensured in the relevant terminology (related instruments - associated legal instrument).

- There are presently 4 alternative texts for Article 5. This draft represents Chairman's compromise text. For reference to the other three texts, see document 40/92, BA-18 of 18 September 1992.

ARTICLE 5 BIS

(1) A Contracting Party which establishes or maintains an enterprise in the energy field, or grants to any enterprise in the energy field exclusive or special privileges, shall not require such enterprise to accord, to the products or suppliers of any other Contracting Party, treatment less favorable than :

- a) that accorded to domestic products and suppliers; and
- b) that accorded to products and suppliers of any other Contracting Party;

with respect to procedures or practices regarding procurement.

(2) A Contracting Party which establishes or maintains an enterprise, or grants to any enterprise exclusive or special privileges, shall not require such enterprise to accord to the Energy Materials and Products or the suppliers of Energy Materials and Products of any other Contracting Party, treatment less favorable than :

- a) that accorded to domestic Energy Materials and Products and suppliers thereof; and
- b) that accorded to Energy Materials and Products and suppliers of Energy Materials and Products of any other Contracting Party;

with respect to procedures or practices regarding procurement.

**ARTICLE 6**  
**PROCUREMENT POLICIES**

(1) A Contracting Party shall accord, to a supplier of any other Contracting Party, treatment not less favorable than :

- a) that accorded to domestic suppliers; and
- b) that accorded to suppliers of any other Contracting Party;

with respect to the provision of information on its procedures and practices regarding government procurement.

(2) A Contracting Party which establishes or maintains an enterprise, or grants to any enterprise exclusive or special privileges, shall not require such enterprise to accord, to the products or suppliers of any other Contracting Party, treatment less favorable than :

- a) that accorded to domestic products and suppliers; and
- b) that accorded to products and suppliers of any other Contracting Party;

with respect to the provision of information on its procedures and practices regarding procurement.

**[ARTICLE 7](1)**  
**INTELLECTUAL PROPERTY**

[Each Contracting Party shall ensure effective and adequate protection of intellectual [, industrial and commercial] property rights according to the applicable international conventions, and particularly the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971) and the Paris Convention for the Protection of Industrial Property (Stockholm Act of 14 July 1967)](2).

General comment

The Chairman will draft a new Article of general nature committing Contracting Parties to renegotiations of certain provisions in the Basic Agreement taking into account the outcome of Uruguay Round negotiations.

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Specific comments

- 7.1 : General contingency reserve pending a proper definition of "Intellectual Property".
- 7.2 : USA reserve.

[ARTICLE 8]<sup>(1)</sup>

COMPETITION

- (1) [The Contracting Parties agree, subject to their existing international rights and obligations, to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission, distribution and marketing) and supply of Energy Materials and Products in relevant markets, insofar as they may affect trade between Contracting Parties.]<sup>(2)</sup>
- (2) Contracting Parties shall ensure that within their jurisdiction they have and enforce such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct<sup>(3)</sup> in markets relevant to areas covered above by this Agreement.<sup>(4)</sup>
- (3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.
- (4) Contracting Parties may co-operate in the enforcement of their competition rules by consulting and exchanging information, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy.
- (5) <sup>(5)</sup>If a Contracting Party considers that any specified anticompetitive conduct carried out within the Domain of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other and may request that the other's competition authorities initiate appropriate [enforcement activities].<sup>(6)</sup>

The notifying Contracting Party shall include in such notification sufficient information to permit the other Contracting Party to identify the anticompetitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as that Contracting Party is able to provide.

The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the other and shall [accord full consideration to]<sup>(7)</sup> the request of the other Contracting Party in deciding whether or not to initiate enforcement activities with respect to the alleged anticompetitive conduct identified in the notification. The notified Contracting Party shall inform the other of its decision or the decision of the relevant competition authorities and, [at the sole discretion of the notified Contracting Party]<sup>(8)</sup>, of the grounds for the decision. If enforcement activities are initiated, the notified Contracting Party will advise the notifying Contracting Party of their outcome and, to the extent possible, of significant interim developments.

(6) [The procedures set forth in paragraph (5) above shall be the exclusive means within this Agreement of resolving any disputes that may arise over the implementation of this Article.]<sup>(9)</sup>

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Specific comments

8.1 : N scrutiny reserve.

8.2 : CDN scrutiny reserve, pending review of whether CDN concerns on regulated entities are met.

8.3 : In the accompanying document to the Basic Agreement it will be noted that anti-competitive conduct includes unjustified price discrimination as elaborated in the individual laws of the Contracting Parties. Subject to scrutiny reserve.

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8.4 : In case no agreement be reached on substance of Article 8 some delegations may wish to propose this additional wording:

"Where Contracting Parties already have such laws, their scope, interpretation or enforcement shall not be affected by this Article".

8.5 : General scrutiny reserve on para 5.

8.6 : "Enforcement activities" cover also "investigative activities" and "seeking for remedies". The Chairman will address the substance of the first sentence in the accompanying document to the Basic Agreement.

8.7 : Subject to USA reservation who prefers substituting with "consider".

8.8 : EC scrutiny reserve.

8.9 : EC scrutiny reserve. Considerations deferred until the negotiations of Articles 8(5), 24 and 41 TER are finished.

#### ARTICLE 9

MONOPOLIES - Deleted

#### ARTICLE 10

STATE AID - Deleted

PART III

OTHER PROSPECTIVE

[ARTICLE 11]<sup>(1)</sup>

TRANSPORT AND TRANSIT

- (1) Each Contracting Party [shall take the necessary measures to facilitate]<sup>(2)</sup> the transit through its Domain of Energy Materials and Products from the Domain of another Contracting Party to the Domain of a third Contracting Party or to or from port facilities in its Domain for loading or unloading, without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to the pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.
- (2) <sup>(3)</sup>Contracting Parties shall encourage relevant entities to cooperate in:
- (a) modernising transit networks necessary to the supply of Energy Materials and Products;
  - (b) the development and operation of transport infrastructure serving the Domain of more than one Contracting Party;
  - (c) measures to mitigate the effects of the interruption in the supply of Energy Materials and Products;
  - (d) facilitating the connection to high-pressure transmission pipelines and the synchronous interconnection of high-voltage transmission grids.

- (3) (3)(6) Each Contracting Party undertakes that its provisions relating to [transport of Energy Materials and Products and the use of harbour facilities]<sup>(4)</sup>, high-pressure transmission pipelines or high-voltage transmission grids shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international [agreement]<sup>(5)</sup>.
- (4) (3) In the event that access to existing [high-pressure transmission pipelines or high-voltage transmission grids]<sup>(7)</sup> within a Contracting Party cannot be obtained [on commercial terms for transit of energy from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing financially and economically viable new capacity—subject to their applicable legislation, inter alia on safety, technical standards, environmental protection and land use]<sup>(8)</sup>.
- (5) A Contracting Party through whose Domain Energy Materials and Products transit [through high-pressure transmission pipelines or high-voltage transmission grids]<sup>(9)</sup> from the Domain of another Contracting Party to the Domain of a third Contracting Party or to or from port facilities in its Domain for loading or unloading shall not in the event of a dispute over the terms and conditions of that transit interrupt nor permit any entity subject to its [jurisdiction]<sup>(10)</sup> to interrupt the existing flow of Energy Materials and Products until after [the dispute has been referred to the Governing Council and the Governing Council has had]<sup>(11)</sup> adequate time to seek conciliation between the parties in dispute.

- (6) (3) The provisions of this Article shall not require a Contracting Party to take action [- other than the protection of existing flows - which it demonstrates to the other Contracting Parties concerned would endanger its] (12) [security of] (13) energy supply, quality of service and the most efficient development and operation of all parts of its electricity and gas systems(14).

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Specific comments

- 11.1 : CDN, AUS, N, J and AZB general on whole Article.
- 11.2 : USA scrutiny reserve. EC conditional reserve subject to withdrawal of USA reserve.
- 11.3 : GR reserve.
- 11.4 : USA reserve pending further instructions from capital.
- 11.5 : AUS asks for substituting with "law".
- 11.6 : EC may prepare additional language reducing any possible doubt that this provision does not require third party access.
- 11.7 : AUS asks for replacing with: "facilities for the transport of Energy Materials and Products and harbour facilities".
- 11.8 : GR suggests substituting with "for transit of energy from another Contracting Party, the first Contracting Party shall, if requested, attempt to resolve the issue - including if appropriate by considering the possibility of new capacity being established - in accordance with its applicable legislation, inter alia on safety, environmental protection and land use".

11.9 : AUS supported by RUF suggests deletion.

11.10: SF supported by S and CH requests substituting with "control".

11.11: General reserve by J, N, USA, AUS and A. Chairman noted that the appropriate form of conciliation procedure could be discussed in the context of Article 29 but asked AUS, USA, RUF to come up with a compromise solution.

11.12: A suggests replacing with: "which - apart from existing supply flows and contractual relations to be maintained - proves to endanger its own".

11.13: RUF and AUS reserve.

11.14: RUF suggests adding the following text:

", subject to the requirement, that the relevant policies, measures and practices in the fields covered by this Article are not applied in a manner which causes disturbances to the principles of the present Agreement, would constitute a means of discrimination between the Contracting Parties or its Investors, or cause serious damage to existing contractual relations in the fields covered by this Agreement or to the trade flows, and that such relevant policies, measures and practices shall be discontinued as soon as the conditions giving rise to them have ceased to exist".

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Chairman's note

Work has been completed on this Article in WGII and is being referred to Plenary.

ARTICLE 12

TRANSFER OF TECHNOLOGY

- (1) The Contracting Parties agree to promote in accordance with their laws and regulations access to and transfer of technology on a commercial and non-discriminatory basis to assist effective trade and investment and to implement the objectives of the Charter, subject to the provisions of Article 7.
  
- (2) Accordingly to the extent necessary to give effect to paragraph (1), the Contracting Parties shall eliminate existing and create no new obstacles for transfer of technology, in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

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Chairman's note

Negotiations finished.

[ARTICLE 13]<sup>(1)</sup>

**ACCESS TO CAPITAL**

- (1) Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the issuance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles.
- (2) Each Contracting Party shall provide the fullest possible access to public credits, guarantees and insurance for investors in extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products.
- (3) The Contracting Parties shall seek to the greatest extent possible to take advantage of the expertise and to support the operations of relevant international financial institutions in mobilising private investments in connection with the subject matter of this Agreement.

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General comment

This Article shall be revisited at the December WG II meeting. To this end CDN shall circulate the OECD definition on capital market and H will forward to the Secretariat by 30 November 1992 the description of its financial schemes.

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Specific comments

13.1 : General scrutiny reserve.

[ARTICLE 14]<sup>(1)</sup>

ENVIRONMENTAL ASPECTS

(1) [In pursuit of sustainable development [and consistently with those international environmental agreements to which they are parties]<sup>(2)</sup>, each Contracting Party shall strive [to minimise]<sup>(3)</sup> in an economically efficient manner adverse effects on the environment occurring both within and outside its Domain from all operations within its Domain and within the energy cycle taking proper account of safety. In doing so each Contracting Party shall act cost effectively. In its policies and actions each Contracting Party shall [be guided by [, inter alia,]<sup>(4)</sup> the principles]<sup>(5)</sup> that they should take [, according to their capabilities,]<sup>(6)</sup> precautionary measures to anticipate, prevent or minimise environmental degradation and that the polluter should, in principle bear the cost of pollution, with due regard to the public interest and without<sup>(7)</sup> distorting investment in the energy cycle or international trade. Contracting Parties shall accordingly:]<sup>(8)</sup>

- (a) take account of environmental considerations throughout the formulation and implementation of their energy policies;
- (b) promote market[-oriented]<sup>(9)</sup> price-formation throughout the energy cycle and [a fuller reflection therein of environmental costs and benefits and promote]<sup>(9)</sup> research in appropriate fora on methods to quantify and appropriately recognize such environmental costs and benefits;<sup>(10)</sup>

- (c) encourage cooperation in the attainment of the environmental objectives [of minimising]<sup>(3)</sup> in an economically efficient manner adverse environmental effects in a cost-effective way by taking into account the differences among Contracting Parties<sup>(11)</sup> in abatement costs of any given reduction of such adverse [effects]<sup>(12)</sup> [and by coordination measures as appropriate]<sup>(13)</sup>;
- (d) have particular regard to improving energy efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies that reduce pollution;
- (e) promote the dissemination of information on environmentally sound and economically efficient energy policies and cost effective practices and technologies, in order to increase public awareness of the environmental considerations, ways in which adverse environmental effects arising from the energy cycle can be abated, and the costs associated with various abatement measures. They shall share their experience on how to promote such awareness most effectively. [In particular where such promotion includes, inter alia, labelling and similar schemes for informing the public about comparative energy efficiencies of energy consuming products available on the market, they shall seek to avoid related barriers to trade];<sup>(14)</sup>
- (f) promote and cooperate in the research, development, application and diffusion, including<sup>(15)</sup> transfer, of [energy efficient and environmentally sound]<sup>(16)</sup> technologies, practices and processes to attain [environmental goals ]<sup>(17)</sup> cost effectively, consistent with the need for adequate and effective protection of Intellectual Property;

(g) promote the transparent assessment [at an early stage and prior to decision]<sup>(18)</sup> of environmental impacts of environmentally significant energy investment projects<sup>(19)</sup> [and subsequential monitoring of such impacts]<sup>(20)</sup>;

(h) promote internationally awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards.

[(2) For the purposes of this Article:

i) ["energy cycle" means the entire energy-chain including prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, the decommissioning and treatment of energy-related physical structures and [activities related to disposal of waste]<sup>(21)</sup>.]<sup>(22)</sup>

ii) "environmental impacts" means any effect caused by a [proposed]<sup>(23)</sup> activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.<sup>(24)</sup>

iii) "improving energy efficiency" means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, whilst reducing the amount of energy required to produce that output.<sup>(25)</sup>

(26)

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General comments

- The redraft of this Article expresses the outcome of negotiations by an Ad-Hoc Sub-Group on 11 November 1992 taking into account Terms of Reference as indicated in BA-22 and the USA memorandum on various expressions as contained in BA-24.
- Discussion was based on the premise that Article 14 will not be subject to binding arbitration. CH and A delegations expressed their strong reservations on this assumption.
- The Chairman shall redraft the chapeau to more elegant form while retaining the substance unchanged.

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Specific comments

- 14.1 : USA general reserve.
- 14.2 : USA reserve.
- 14.3 : USA reserve. (USA prefers replacing with "to limit".)
- 14.4 : N and A scrutiny reserve. A prefers substituting with "in particular".
- 14.5 : USA and J reserve.
- 14.6 : A, N, H and CDN shall seek the deletion.
- 14.7 : A suggests insertion of "unduly" for achieving better balance between Trade and Investment Articles and the Article on Environment.

- 14.8 : General scrutiny reserve, except EC, on the chapeau.
- 14.9 : USA reserve. (USA suggests deletion.)
- 14.10: USA suggests with respect to second footnote 14.8 in this subpara adding: "and encourage implementation of methods which each Contracting Party finds appropriate in internalisation".
- 14.11: N supported by CH and S suggests inclusion: "in costs environmental degradation and".
- 14.12: Legal Drafting Sub-Group will examine whether to use the word "effects" or "environmental impacts".
- 14.13: USA and AUS reserve.
- 14.14: N, J and USA scrutiny reserve.
- 14.15: USA wants to have inserted: "commercial".
- 14.16: EC and H wish to consider inserting "best practicable" (H) or "best available" (EC) before the word "energy".
- 14.17: J and A reserve pending the resolution of their concerns as in subpara (c).
- 14.18: J reserve. (J asks for deletion.)
- 14.19: USA suggests adding : "which are subject to a decision of a competent authority in accordance with an applicable national procedure".
- 14.20: USA substantial reserve. Scrutiny reserve by all other delegations.
- 14.21: TR suggests replacing with : "waste management". Subject to consideration in the Legal Drafting Sub-Group.

14.22: USA scrutiny reserve.

14.23: A suggests deletion, since activity which is only proposed cannot have environmental impacts.

14.24: RO asks for incorporation of concept of transboundary pollution and environmental accidents into this definition.

14.25: AUS suggests moving definitions to Article 1. Legal Drafting Sub-Group considers this possibility in the context of all Basic Agreement Articles.

14.26: A suggests inclusion of definition "cost-effective measures" indicating that general understanding is that they are measures with effects on cost and not on the environment.

[ARTICLE 15]<sup>(1)</sup>

TRANSPARENCY

- (1) Laws, regulations, judicial decisions and administrative rulings and standards of general application which relate to matters covered by Article 5 of this Agreement shall be subject to the transparency disciplines of Article X of the GATT.
- (2) Laws, regulations, judicial decisions, and generally applicable administrative rulings or standards made effective by a Contracting Party, [and agreements in force between a Contracting Party and one or more other Contracting Parties,]<sup>(2)</sup> which relate to other matters covered by this Agreement shall also be made public promptly in such a manner as to enable other Contracting Parties and Investors to become acquainted with them.
- (3) The provisions of paragraphs (1) and (2) above shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
- (4) Each Contracting Party undertakes to nominate one or more enquiry points to which requests for information about relevant laws, regulations, judicial decisions and administrative rulings may be addressed and to communicate promptly the location of these enquiry points to the Secretariat established under Article 31, for provision by the Secretariat to any Investor on request.

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Specific comments

15.1 : EC reserve.

15.2 : General scrutiny reserve.

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Chairman's note

Subject to the 2 specific reserves negotiations finished in WGII. The Article is being referred to the Legal Drafting Sub-Group.

**PART IV**

**INVESTMENT PROMOTION AND PROTECTION**

**ARTICLE 16<sup>(1)(2)</sup>**

**PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS**

Note : Following is the Chairman's compromise text based on Working Hypotheses. For purposes of clarity, relevant Working Hypotheses are set out beneath the appropriate paragraph. (3)(4)

- (1) Each Contracting Party shall in accordance with the objectives and principles of the Charter and the provisions of this Agreement encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Domain. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less than that required by international law, including that Contracting Party's international obligations. This Part shall not derogate from the duty of each Contracting Party to observe any obligations it may have entered into with regard to Investments of Investors of any other Contracting Party to the extent that they are more favorable than those accorded by this Part.

- (2) Each Contracting Party shall permit Investors of other Contracting Parties to Make Investments in its Domain on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable subject to the provisions of paragraphs (3) to (6) below.

Working Hypothesis 5

Barriers to Making Investment shall be applied on an MFN basis subject to the Article 27 exception clause.<sup>(5)</sup> Working Group II is proceeding on the assumption that the BA will satisfy reciprocity requirements in those cases where they exist in domestic legislation.<sup>(6)</sup>

- (3) Notwithstanding paragraph (2) above Contracting Parties may maintain limited exceptions to the obligations of paragraph (2) which correspond to their domestic legislation in force on the date of signature of this Agreement, provided :

(a) any exception shall not be a greater departure from the obligations of paragraph (2) than that required by or specified in the relevant laws, regulations or administrative commitments;

(b) details of the relevant laws, regulations and administrative commitments are available publicly in line with Contracting Parties' obligations under Article 15 of this Agreement.

The rights and treatment accorded pursuant to any such exceptions shall be on a most favoured nation basis.

Working Hypothesis 4

All barriers to NT in the pre-establishment phase cannot be eliminated before Entry into Force of the Basic Agreement. (7)

Working Hypothesis 7

Independent of NT or MFN being introduced for the pre-establishment phase, a national summary list of discriminatory rules pre-establishment will usefully assist Investors to assess existing barriers to Making an Investment in a Contracting Party.

Working Hypothesis 8

As concerns the national summary list of discriminatory rules pre-establishment, such list should include any measures, broadly construed, which constitute departures from NT pre-establishment.

Working Hypothesis 9

Governments also need transparency as concerns barriers to NT to enable the process of signature and ratification.

- (4) For the avoidance of doubt, the provisions of this Article do not affect the application of a Contracting Party's laws, regulations and administrative commitments concerning the technical fitness of Investors of another Contracting Party to carry out certain particular activities or possible Investments in its Domain under the terms of this Agreement, whether or not such Investors have already made other Investments in such Domain.

- (5) Each Contracting Party agrees not to introduce after its signature of this Agreement any new measures (being laws, regulations or administrative commitments) or changes to measures which would have the effect at any time of adding to any discrimination maintained between the right and ability of its own Investors and Investors of any other Contracting Party or third state, whichever is the most favourable, to Make Investments in its Domain.

Provided that a Contracting Party may, after its signature of this Agreement, take any relevant measures which are necessary for the ending of any monopoly or privatisation of a state enterprise provided that the totality of such additional measures taken by a Contracting Party, when considered together with existing measures, does not constitute an additional barrier to investment opportunities in the energy field for investors of other Contracting Parties. Any such measures shall also be subject to the other provisions of this Article.

#### Working Hypothesis 6

There should be standstill precluding any changes to barriers to investment which would add at any time to discrimination against investors from other Contracting Parties. (8)(9)

- (6) The Contracting Parties agree to make every effort to reduce progressively existing restrictions which affect the ability of investors of other Contracting Parties to make investments in their Domain. The Governing Council shall review progress in this direction periodically and, in the first instance, no later than 1996 .

Working Hypothesis 3

Progressive reduction of exceptions to NT in the pre-establishment stage in an objective both before and after the Entry into Force of this Agreement. (10)

Working Hypothesis 10

There should be [regular]<sup>(11)</sup> reviews of countries' exceptions to NT, the first such review coming soon after Entry into Force of the Agreement.

Working Hypothesis 11

Rollback shall not be subject to dispute resolution.

- (7) In addition each Contracting Party shall in its Domain accord to Investments of Investors of another Contracting Party, and their management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state, and their management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

Working Hypothesis 1

Treatment post-establishment shall be the better of National Treatment (NT) or Most Favourable Nation Treatment (MFN). (12)(13)

Working Hypothesis 2

There shall be no exceptions to NT or MFN post-establishment subject to the conclusions of the Taxation Sub-Group on 11.09.92. (8)(14)  
(15)(16)

(17)

(8) (18) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons:

[(a)](19) permit Investors of another Contracting Party who(20) have made Investments in the Domain of the first Contracting Party to employ within its Domain key personnel of their choice regardless of nationality or citizenship;

[(b) favourably examine requests made by natural persons who are employed by Investors of another Contracting Party to enter and remain in its Domain for the purpose of engaging in activities connected with relevant Investments](19).

(9) Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.

(10) (21) [Nothing in this Article shall apply to : [maritime and inland waterway, transport facilities and services; or](22) [subsidies and grants provided by a Contracting Party or a state [enterprise for development of advanced energy technology or guarantees for encouraging companies to invest in the Domain of a Contracting Party which has requested transitional arrangements under Article 42](23); or](24) [minority programmes](25)(26)

(11) The GATT Agreement on Technical Barriers to Trade shall govern the provisions of Contracting Parties relating to the technical regulations and standards for Investments.(27)

- (12) [No Contracting Party shall impose trade-related performance requirements as a condition for the making or the operation of an investment. Such requirements include commitments to export goods produced, or commitments that goods or services must be purchased locally, or other similar commitments](28).
- 

General comments

- While most of Article 16 has been discussed, certain paragraphs have yet to be addressed in WG II. These include paras (8), (12) and the portion of para (5) dealing with monopoly and privatisation.
- Plenary on 15 October 1992 agreed that Chairman in his continuing work on Article 16 be guided by the Working Hypotheses, though without commitment to the final resolution of matters involved and taking note of the opinions expressed by certain delegations.
- Plenary of October 1992 agreed on the procedure which those Working Hypotheses require for reviewing barriers to establishment including a draft declaration subject to further examination detail ministers might make when initialling the Basic Agreement in order to establish the necessary procedures. For ease of reference the draft Declaration is enclosed as an Annex to Article 16.
- It has not been decided yet whether or not the list of exceptions to national treatment pre-investment (Annex A) should form an integral part of the Basic Agreement.
- N proposes an alternative approach to that set forth in Article 16. The N proposal would either add the following language to or substitute the following language for language in the Articles and paragraphs indicated below :

Article 16, paras (2)-(6) replaced by :

**Alternative A**

- (2) Each Contracting Party shall in areas under its jurisdiction as a minimum standard permit Investors of other Contracting Parties to Make Investments on a basis no less favourable than that accorded to Investors of any other Contracting Party or any third state, whichever is most favourable.

**Alternative B**

- (2) Each Contracting Party shall in areas under its jurisdiction permit Investors of other Contracting Parties to Make Investments on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is most favourable.

Article 41 :

- (1) Notwithstanding the provisions of Article 16, any Contracting Party may upon signing this Agreement reserve its right to apply to Investors of other Contracting Parties Most Favoured Nations treatment as a minimum standard. Such reservation shall be confirmed when ratifying, accepting or approving the Agreement.
- (2) The Contracting Parties agree to make every effort to eliminate reservations made pursuant to paragraph (1) which affect the ability of Investors of other Contracting Parties to Make Investments in areas under their jurisdiction.

- (3) Any Contracting Party may accord to Investors of any other Contracting Party the same treatment on a reciprocal basis as that Contracting Party pursuant to paragraph (1) accords to Investors from other Contracting Parties.

Article 44, para (2) (Note subparas (2) (a), (b), (c) and (d) remain unchanged)

- (2) The Depositary shall inform the Contracting Parties, other states being signatories to the European Energy Charter, and Parties with an Association Agreement pursuant to Article 38, in particular of :

Article 44, para (2) (e) and (f) (Note subpara (2) (e) replaces existing text and subpara (2) (f) is new text).

- (e) any reservation pursuant to Article 41;  
(f) any other declaration or notification concerning this Agreement.

Article 1, (Addition of following Definition) :

"Most Favoured Nation treatment" means, unless the GATT otherwise entails, that a Contracting Party in laws, regulations, judicial decisions, administrative rulings or general applications may treat its National Investors more favourably than Investors from other Contracting Parties, but all Investors from other Contracting Parties must be treated equally, and no less favourable than Investors from any third state.

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Specific comments

- (1) N general reserve on Article 16.
- (2) N requests a new Article, to precede Article 16 which would read as follows:

"Without prejudice to Article 4A, 11(4), 25 and 26A, Part IV of this Agreement shall apply to Investments in the energy sector."

- (3) AUS and N indicate that they cannot take a final position on any of the Working Hypotheses until there is greater clarity with respect to the definitions for "Energy Materials and Products", "Make Investments" and "Investment". N also indicates it needs a better definition of "Investor".
- (4) H and N general reserve on Working Hypotheses.
- (5) J reserve pending contemplated change in inward investment legislation.
- (6) USA reserve subject to consideration of possible relevance of reciprocity provisions.
- (7) N, IC, AUS and H comment that the elements of exceptions so far submitted to the principle of NT removes Article 16 from NT to such a degree that it is no longer correct to describe it as NT. In their view it will be more correct and pertinent to accept that the basis of Article 16 is more in line with the principle of MFN, which should consequently be reflected as the basis for Article 16.
- (8) See Article 16, paragraph 10 which represents compromise text designed to meet concerns expressed by USA that it is not clear that taxation is the only exception to the principles of NT post-establishment and standstill reflected in current legislation or policies of negotiating parties.
- (9) AUS and J reserve.
- (10) N comments that the objectives of the BA are spelled out in Article 2 on which negotiations are finished. It is of special

interest in this respect that the objective of long term cooperation shall be based on mutual benefits and complementarities, in accordance with the objectives and the principles of the Charter. It is stated in the Concluding Document of the Hague Conference on the European Energy Charter that "in the context in the European Energy Charter, the principle of non-discrimination means Most-Favoured-Nation Treatment as a minimum standard. National Treatment may be agreed to in provisions of the Basic Agreement and/or Protocols".

(11) J and H reserve.

(12) N may be ready to consider favourably NT post-establishment provided that MFN is accepted pre-establishment and all exceptions to NT are spelled out in the BA itself.

(13) General scrutiny reserve.

(14) RUF notes that it cannot yet state that it will have no exception to NT post-establishment.

(15) J reserve pending clarification of definition of "Make Investments".

(16) CDN can accept this principle on the assumption that the pre-establishment stage covers all elements of "Make Investments" as defined in Article 1 (6) of BA-15.

(17) CDN suggests insertion of additional para before para (8) reading as follows:

"Paragraphs (2) and (7) do not apply to any measure that is an exception to or derogation from the obligations under Article 1, as provided in that Article."

(18) CDN suggests the following with respect to para (8) and a related definition of "Key Personnel":

A. Further to the undertaking recorded in BA-14 Note 16.27 the following is a definition for inclusion in Article 1:

"Key Personnel:

A natural person or natural persons who will:

- (i) provide advice or key technical services for an Investment,
- (ii) establish, develop, or administer an Investment, in a capacity that is supervisory, executive or that involves special qualifications that are vital to the effectiveness of the Investment over and above the qualifications required of an ordinary skilled worker.

The natural person and the Investor who makes or has made the Investment may be one and the same."

B. In the Canadian view, however, Article 16(8) as currently proposed, is deficient in that it commits Contracting Parties only to allowing employment by the Investor. CDN believes there should also be a commitment to allow the entry and temporary stay as well as work by key personnel as defined in Article 1. That is the purpose of CDN additional wording in 8(a) hereunder. CDN also considers it important to include a commitment not to require labour certification tests as in the proposed 8(bis).

(8) "A Contracting Party shall, subject to its laws and regulations relating to the entry, temporary stay [and work] of natural persons:

- (a) [permit] Investors of another Contracting Party who have made [Investments in the Domain of the first Contracting Party to employ within its Domain Key

Personnel or their choice regardless of nationality or citizenship; grant entry into its Domain, grant authorisation to temporarily remain and work therein, and provide confirming documentation to key personnel of an Investor of another Contracting Party that commits a substantial amount of capital to an Investment in its Domain;

(8bis) A Contracting Party shall not require, as a condition for temporary stay and work under paragraph 8(a), labour certification tests or other procedures of similar effect, nor shall a Contracting Party maintain or impose numerical restrictions in relation to the entry and stay of natural persons under this Article."

CDN would also prefer "examine in good faith" rather than "favourably examine" and believe that "to enter and remain" should read "to enter, remain and work temporarily".

Paragraph 8(b) would therefore read as follows:

"examine in good faith requests made by natural persons who are employed by Investors of another Contracting Party to enter, remain and work temporarily in its Domain for the purpose of engaging in activities connected with relevant Investments."

(19) A suggests deletion.

(20) A suggests adding the words "seek or".

(21) General scrutiny reserve on entire paragraph. This paragraph represents text as it emerged from WG II discussion of USA concerns about Working Hypotheses 1 and 2 and in based on USA suggestion for an additional Article creating limited exceptions to National Treatment and MFN Treatment post-establishment and

standstill. Present draft would result in listed items being excepted from NT and MFN post-establishment and standstill. However, as indicated in the appropriate footnotes below, consensus as to whether the items should be excepted from NT and MFN post-establishment or standstill or from all three was not reached in each case.

- (22) General consensus was reached that there should be an exception for "maritime and maritime services" from NT and MFN post-establishment but there was no consensus regarding exception from standstill. N states it can accept that "maritime and maritime services" will not be a part of this Agreement.
- (23) CDN reserve.
- (24) Consensus was reached that this exception should apply to both standstill and NT and MFN post-establishment.
- (25) Consensus was not reached in any respect on this proposed exception. Chairman has requested USA to further research the necessity of this exception and to delete if at all possible. Should the USA conclude this exception is necessary, Chairman requests that USA draft as tight a definition of "minority programmes" as is possible taking into account potential implications of such a definition on other negotiating parties.
- (26) USA had requested an additional exception covering "procurement of goods or services by a Contracting Party or a state enterprise". However, Chairman has indicated that this issue will be considered in relation to Article 26 on Sub-Federal Authorities.
- (27) In discussion of Article 5 in WG II on 16 November 1992 it was decided that paragraph (3) should be removed from Article 5 and possibly incorporated within Article 16.
- (28) USA proposal subject to later deliberation.

Annex to Article 16

Ministerial Declaration on Exceptions to National Treatment at the  
Stage of Making an Investment

Ministers or their representatives intend that the exceptions under Article 16 (3) to the obligations of Article 16 (2) should be in a form which facilitates review and is transparent and helpful to potential investors and other interested parties. To facilitate this:

- ( i) The representatives of the Negotiating Parties have communicated to the Secretariat lists of exceptions in summary form. Those provided on behalf of Negotiating Parties which have requested transitional arrangements under Article 42 are wholly or in part provisional and subject to completion of their domestic legislative processes. Where possible, such lists also contain statements of intention in relation to further liberalisation. The Conference is invited to review those lists within [\_\_\_ months] and make any appropriate recommendations;
  
- ( ii) Final lists of exceptions corresponding to their domestic legislation will be communicated to the Secretariat by those Negotiating Parties which requested a transitional period within [\_\_\_ months]. Those lists also can be supplemented by statements of intention on further liberalisation together with the expected timetable. The Conference is invited to review those final lists within [\_\_\_ months];

- (iii) Any Negotiating Party may amend its list of exceptions at any time before or after the entry into force of this Agreement: Such amendments would of course be subject to the standstill obligations.

Ministers or their representatives invite the Conference to consider how best to present the summary lists of exceptions to facilitate review and make them transparent to investors and other interested parties.

## ARTICLE 17

### COMPENSATION FOR LOSSES

- (1) Investors of any Contracting Party whose Investments in the Domain of another Contracting Party suffer losses owing to any armed conflict, including war, a state of national emergency or civil disturbances or other similar events in the Domain of the latter Contracting Party and where the procedure laid down in Article 18 is not applicable shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, which is the most favourable of that which the latter Contracting Party accords to its own Investors or the Investors of any other Contracting Party or any third State.
- (2) Without prejudice to paragraph (1) above Investors of a Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the Domain of another Contracting Party resulting from
- (a) requisitioning of their property by the latter's forces or authorities, or
  - (b) destruction of their property by the latter's forces or authorities, which was not caused in combat action [or was not required by the necessity of the situation]<sup>(1)</sup>,
- shall be accorded restitution or compensation which in either case will be prompt, adequate and effective.

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#### Specific comment

17.1 : J waiting reserve.

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#### Chairman's note

Negotiations in WG II finished.

ARTICLE 18

EXPROPRIATION

(1) Investments of Investors of any Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the Domain of any other Contracting Party except where such expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law;
- (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the Investment (the "valuation date").

Such compensation shall be calculated on the basis of the prevailing market rate of exchange on the valuation date and shall include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

(2) Under the law of the Contracting Party making the expropriation the Investor affected shall have a right to prompt review, by a judicial or other independent competent authority of that Party, of its case, of the payment of compensation and of the valuation of its Investment, in accordance with the principles set out in paragraph (1).

(3) Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own Domain, and in which Investors of any other Contracting Party have a shareholding, the provisions of paragraph (1) above shall apply to the extent necessary to guarantee prompt, adequate and effective compensation for those Investors.

(4) Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.

(5) For the purposes of this Article the laws and regulations of a Contracting Party at the time an Investment is made with regards to the reversion of properties and rights for a resource owner in force shall not be regarded as an act of expropriation.

(1)

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Specific comments

18.1 : CDN suggests new paragraph (6) :

This Article does not apply to the issuance of compulsory licenses granted in relation to Intellectual Property Rights, or the revocation, limitation or creation of Intellectual Property Rights to the extent that such issuance, revocation, limitation or creation is permitted by relevant multilateral conventions on Intellectual Property.

ARTICLE 19

TRANSFER OF PAYMENTS RELATED TO INVESTMENTS

- (1) Each Contracting Party shall in respect to Investments by Investors of any other Contracting Party in its Domain guarantee the freedom of transfers related to these Investments into and out of its Domain. In particular, though not exclusively, including the transfer of:
  - (a) the initial capital plus any additional capital for the maintenance and development of an Investment;
  - (b) Returns;
  - (c) payments arising out of the settlement of a dispute;
  - (d) payments under a contract, including amortisation of principal and accrued interest payment pursuant to a loan agreement;
  - (e) compensation pursuant to Articles 17 and 18;
  - (f) proceeds from the sale or liquidation of all or any part of an Investment.
  - (g) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment.<sup>(1)</sup>
- (2) Transfers under paragraph (1) above shall be effected without delay and in a Freely Convertible Currency.
- (3) <sup>(2)</sup>Transfers shall be made at the prevailing spot market rate of exchange on the date of transfer. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.

(4) Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may maintain laws and regulations (a) requiring reports of currency transfer[; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers].<sup>(3)</sup> Furthermore, a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgments in civil and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its law.

(4)

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General comment

RUF and other CIS delegations have raised certain concerns in applying this Article to CIS countries in a transitional period. As a consequence, it was agreed that an effort would be undertaken to investigate whether it might be possible to alleviate these concerns through use of an additional document, side letter, or possible incorporation into transitional provisions.

It was additionally agreed that any such carve-out or exemption should be worked out between former USSR countries, seeking not to interfere with any rights and obligations vis a vis companies of other Contracting Parties. It was also agreed it should be temporary in nature.

Specific comments

19.1 : H wants to add: "according to the domestic laws of the Contracting Party".

19.2 : The new text is based on Room Document 6 of 13 November 1992 from Germany and on the full agreement that the rate used should be the one that closest reflects the market rate of exchange.

19.3 : This language should be deleted after consideration by WG II of Article 20 on assumption that issues raised herein are adequately covered by that Article.

19.4 : CDN suggests a new para dealing with Balance of Payments:

"Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may, in exceptional circumstances, exercise such controls as are necessary to regulate international capital movements. No restrictions under this provision shall affect the making of payments or transfers for current international transactions nor provide for discriminatory treatment among Contracting Parties. The Contracting Party taking a measure pursuant to this paragraph shall ensure that such measure least infringes the rights of the other Contracting Parties and is no broader in scope or duration than necessary."

ARTICLE 20

[TAXATION]<sup>(1)</sup>

(1) GENERAL EXCLUSION

Except as set out in this Article, nothing in this Agreement shall apply to taxation measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of this Agreement, this Article shall prevail to the extent of the inconsistency.

(2) [APPLICATION OF PROVISIONS RELATING TO TRADE]<sup>(2)</sup>

Notwithstanding paragraph (1),

- a) Article 5(2) (c) shall apply to taxation measures other than those on income or on capital; and
- b) the provisions of this Agreement requiring a Contracting Party to provide most favoured nation treatment relating to trade in goods and services shall apply to taxation measures other than taxes on income or on capital, except that such provisions shall not apply to:
  - i) an advantage accorded by a Contracting Party pursuant to the tax provisions in any convention, agreement or arrangement, described in paragraph 6.1(b) of this Article; or

- ii) any taxation measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates between goods of the Contracting Parties or arbitrarily restricts benefits accorded under the above-mentioned provisions.

**(3) APPLICATION OF PROVISIONS RELATING TO INVESTMENT**

Notwithstanding para (1), the provisions imposing national treatment obligations or most favoured nation obligations under Part IV (Investment Promotion and Protection) shall apply to taxation measures of the Contracting Parties other than taxes on income or on capital, except that nothing in Part IV shall apply to:

- a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions in any convention, agreement or arrangement, described in paragraph 6.1(b) of this Article; or
- b) any taxation measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates between Investors of the Contracting Parties or arbitrarily restricts benefits accorded under the Investment provisions of this Agreement.

(4)

**(4) EXPROPRIATORY AND DISCRIMINATORY TAXATION**

- a) Notwithstanding paragraphs (1) and (3), Article 18 shall apply to taxation measures.

b) Whenever an issue arises under Article 18, to the extent it pertains to whether a taxation measure constitutes an expropriation or nationalisation or whether a taxation measure alleged to constitute an expropriation or nationalisation is discriminatory<sup>(7)</sup>, the Investor or the Contracting Party alleging expropriation shall refer the issue of whether the measure is not an expropriation or whether the measure is discriminatory to the competent tax authorities. Referral is required at the earlier of the time when amicable settlement procedures under Article 23(1) or 24(1) begin or the time the issue is submitted to arbitration or dispute resolution. Competent tax authorities shall, within a period of six months, strive to resolve the non-discrimination issue so referred, applying the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the measure or no such tax convention is in force between the Contracting Parties concerned, applying the non-discrimination principles under the OECD Model Tax Convention on Income and Capital. Bodies called upon to settle disputes pursuant to Articles 23 and 24 may take into account any conclusions arrived at by the competent tax authorities regarding whether the measure is not an expropriation. Such bodies shall take into account any conclusions arrived at by the competent tax authorities regarding whether the measure is discriminatory. Under no circumstances shall involvement of competent tax authorities lead to a delay of proceedings under Articles 23 and 24.

(5) WITHHOLDING TAX

Without limiting the application of the foregoing, and for greater certainty, Article 19 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(6) DEFINITIONS

6.1 [The term "taxation measure" includes:]<sup>(8)</sup>

- a) the provisions relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
- b) the provisions relating to taxes of any convention for the avoidance of double taxation and any international agreement or arrangement to which the Contracting Party is bound.

6.2 There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

6.3 "A competent tax authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when there is no such agreement between the countries in question, the Minister of Finance or his authorized representatives.

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Specific comments

20.1 : RUF scrutiny reserve pending in-depth consideration in capital.

20.2 : CDN would like to come back under the circumstance that services will be covered by trade provisions on the BA. US, N and F reserve pending further review when the text of Article 5 is completed.

20.3 : D supported by NL, did not obtained support from other delegations for its proposal. However, it was not in a position to withdraw it during the meeting.

"RULES RELATING TO INCOME, CAPITAL, ESTATES AND INHERITANCE

The following rules shall apply with respect to taxes on income, capital, estates and inheritance:

- a) Nationals of a Contracting State shall be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.
- b) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

- c) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

In applying the foregoing principles, the Contracting States should take into account the principles governing the OECD Model Tax Convention on Income and Capital."

- 20.4 : NL supported by D proposed the following text. Because of the lack of support it could not be included in the main text.

"or whenever an issue arises under paragraph 1 of Article 16, to the extent it pertains to whether a taxation measure impairs in a discriminatory manner, the operation or disposal of an investment, it shall be referred by".

- 20.5 : An addition to the definition might be needed if substance of Article 27 on the subject of economic unions has not been successfully issued.

ARTICLE 21

ASSIGNMENT OF RIGHTS

(1) If a Contracting Party, its designated agency or a company or enterprise incorporated in a Contracting Party other than an Investor (the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment [and Returns]<sup>(1)</sup> in the Domain of another Contracting Party (the "Host Party") or otherwise acquires the rights and claims to such an Investment, the Host Party shall recognise

(a) the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims resulting from such an Investment, and

(b) that the Indemnifying Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original Investor. [This provision is without prejudice to any right of a Contracting Party under this Agreement, or consistent with its obligation under this Agreement, to require approval of the subrogation of rights referred to in this paragraph].<sup>(2)</sup>

(2) The Indemnifying Party shall be entitled in all circumstances to

(a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1) above, and

(b) any payments received in pursuance of those rights and claims, as the original Investor was entitled to receive by virtue of this Agreement in respect of the Investment concerned and its related Returns.

(3) Without prejudice to Article 19 any payments received in non-convertible currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the Domain of the Host Party.

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Specific comments

21.1: CDN scrutiny reserve.

21.2: General scrutiny reserve.

ARTICLE 22

RELATIONSHIP TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part IV and V of this Agreement, nothing in this Agreement shall derogate from the terms of the other international agreement to the extent that those terms are more favourable to the Investors or Investment.

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Chairman's note

Negotiations finished with full agreement on substance.  
(Subject to examination by the Legal Drafting Sub-Group.)

**PART V**

**DISPUTE SETTLEMENTS**

**ARTICLE 23**

**SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY**

- (1) Disputes between one Contracting Party and an Investor of another Contracting Party concerning an obligation of the former under Part IV of this Agreement, relating to an Investement of the latter in the Domain of the former shall, if possible, be settled amicably.
- (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date at which either party to the dispute requested amicable settlement, the dispute shall, subject to paragraph 3 below, at the request of the Investor concerned be submitted to international arbitration or conciliation.
- (3) An Investor that has submitted the dispute to the courts or administrative tribunals of the Contracting Party that is a party to the dispute, or that has submitted the dispute for resolution in accordance with any previously agreed dispute settlement procedures, shall not be able to submit the dispute to international arbitration or conciliation in accordance with the terms of this Article.
- (4) Each Contracting Party which is or has become a member of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965 hereby consents to submit any dispute as defined in paragraph (1) of this Article to the International Centre for Settlement of Investment Disputes for arbitration or conciliation under that Convention.

(5) In case the Contracting Party concerned is not or has not yet become a Contracting State of the Convention referred to in paragraph (4), the dispute may, at the choice of the Investor concerned, be submitted to:

(a) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in paragraph (3) under the rules governing the Additional Facility for the Administration of Proceedings by the secretariat of the Centre (Additional Facility Rules); or

(b) an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(c) an arbitral proceedings under the Institute of Arbitration of the Stockholm Chamber of Commerce; or

(d) an international arbitrator or ad hoc arbitration tribunal appointed by a special agreement.

In the event that the dispute is submitted to an international arbitrator or ad hoc arbitration tribunal in accordance with subparagraph (d) above and no agreement on the appointment of that international arbitrator or ad hoc arbitration tribunal has been reached within sixty days of the submission of this dispute, the Investor may submit the dispute to (a), (b) or (c) above.

(6) A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by Investors of another Contracting Party shall for the purpose of article 25 (2)(b) of the Convention referred to in paragraph (5)(a) above be treated as an Investor of that other Contracting Party.

(7) Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article.

(8) The awards of arbitration, which may include an award of interest, shall be final and binding and shall be enforced in accordance with domestic law.

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General comment

Sub-Group composed of AUS, CDN, SF, EC, S, N, USA and chaired by Mr. Ervik from the Secretariat shall report at the December WG II meeting on its results.

[ARTICLE 24]<sup>(1)</sup>

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through diplomatic channels.
- (2) If such a dispute can be brought under the provisions of a bilateral agreement between Contracting Parties, those provisions shall prevail in relation to dispute settlement.
- (3) Subject to paragraph (2) above, if the dispute cannot be settled in accordance with paragraph (1) above [within 180 days],<sup>(2)</sup> except as otherwise provided in this Agreement, it shall, if one of the Contracting Parties to the dispute so requests in writing, be submitted to dispute resolution under paragraph (4) below, unless otherwise agreed between such Contracting Parties.
- (4) Where the dispute between the Contracting Parties has not been settled according to paragraph (1) above, and has not been submitted to dispute resolution within 60 days of the request referred to in paragraph (3) above, it shall be submitted, if one of the Contracting Parties to the dispute so requests in writing, to an ad hoc arbitral tribunal. Such an ad hoc arbitral tribunal shall be constituted as follows :
  - (a) The Contracting Party instituting the proceedings shall appoint one member of the Tribunal, who may be its national or citizen;

- (b) Within 30 days of the receipt of notification of that appointment, the other Contracting Party to the dispute shall, in turn, appoint one member, who may be its national or citizen. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within a further period of 30 days request that the appointment be made in accordance with sub-paragraph (d) below;
  
- (c) A third member, who may not be a national or citizen of a Contracting Party to the dispute, shall then be appointed between the Contracting Parties to the dispute. That member shall be the President of the Tribunal. If, within 180 days of the receipt of the request referred to in paragraph (3) above, the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with sub-paragraph (d) below, at the request of any Contracting Party submitted within 30 days of the expiry of the 180 day period provided for in this paragraph;
  
- (d) Appointments pursuant to sub-paragraphs (b) or (c) above shall be made by the President of the International Court of Justice within 30 days of the receipt of a request to do so. If he is prevented from discharging this task or is a national or citizen of a Contracting Party to the dispute, the appointments shall be made by the Vice-President. If the latter, in turn, is prevented from discharging this task or is a national or citizen of a Contracting Party, the appointments shall be made by the most senior Judge of the Court who is not a national or citizen of a Contracting Party;
  
- (e) Appointments made in accordance with sub-paragraphs (a), (b), (c) and (d) above shall have regard to the qualifications and experience, particularly in matters covered by this Agreement, of the members to be appointed;

- (f) The Tribunal shall establish its own rules of procedure, unless otherwise agreed by the Contracting Parties to the dispute, and shall take its decisions by a majority vote of its members;
- (g) The arbitral award shall be final and binding upon the Contracting Parties to the dispute;
- (h) The expenses of the Tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties to the dispute.
- (5) (3) Notwithstanding paragraphs (3) and (4) above, in the event of a dispute between Contracting Parties who are also parties to the GATT and related instruments, which could also be brought under the provisions of the GATT and related instruments concerned, the Contracting Parties to the dispute, except where they have agreed to an alternative procedure, shall, without prejudice to the initial application of paragraph (1) above, settle the dispute [according to the procedures provided for]<sup>(4)</sup> in the GATT and related instruments concerned. Should a Contracting Party who is not a party to the GATT and related instruments but who has made or received a written request under paragraph (3) above become a party to the GATT and related instruments, the dispute in question shall be resolved in accordance with paragraph (3) above except where the Contracting Parties agree to an alternative procedure.

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General comments

CDN believes that consideration should be given to measures for :

- a) settlement of disputes involving more than one Contracting Party;
- b) intervention in dispute settlement by a Contracting Party not party to the dispute; and

- c) ensuring the consistency of interpretation given to provisions of the Basic Agreement in dispute resolution.

The question regarding disputes arising from Protocols is deferred until discussion of Article 28.

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Specific comments

- 24.1: Subject to scrutiny by all delegations. CDN scrutiny reserve also concerns relationship between this Article and Article 27.
- 24.2: EC and RO reserve.
- 24.3: Finalisation of this paragraph awaits outcome of a Sub-Group established for Article 41TER under the Chairmanship of Mr. Ervik.
- 24.4: AUS asks for deletion.

[ARTICLE 25]<sup>(1)</sup>

**EXCLUSIVE OR SPECIAL PRIVILEGES AND GOVERNMENT PARTICIPATION**

- (1) Each Contracting Party undertakes that if it establishes or maintains a state entity wherever located and grants to any such entity formally or in effect, exclusive or special privileges, such entity shall conduct its activities in a manner consistent with this Agreement.
- (2) Each Contracting Party undertakes that if it grants to any other entity exclusive or special privileges, in the field of energy, it shall not require that entity to conduct its activities in a manner inconsistent with this Agreement.

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General comment

To be able to proceed with negotiations on Article 16 the Chairman of WG II proposed the compromise text on Article 25 leaving it open for further discussion at a later stage. This is without prejudice to addressing trade in Energy Materials and Products by state trading enterprises through the GATT-reference approach.

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Specific comments

25.1 : EC suggests this Article should read:

**"EXCLUSIVE OR SPECIAL PRIVILEGES**

Each Contracting Party undertakes that if it grants to any entity exclusive or special privileges, in the field of energy, such entity shall conduct its activities in a manner consistent with this Agreement".

25.2 : N has submitted its suggestion on Article 25 reading:

"GOVERNMENT PARTICIPATION

Any Contracting Party shall be free to participate in energy activities through direct participation by the Government or through government-controlled Investors. Such Investors may be granted exclusive or special privileges in this respect. In such cases they shall conduct these activities in a manner consistent with this Agreement."

25.3 : USA has submitted its suggestion with reference to move it under the Part IV of the BA:

"(1) Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining or establishing a state enterprise.

(2) Each Contracting Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes, and any other enterprise owned or controlled through ownership interest by a Contracting Party, acts in a manner that is not inconsistent with the Contracting Party's obligations under Part IV, whenever such enterprise exercises any regulatory, administrative, or other governmental authority that the Contracting Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees or other charges.

(3) Each Contracting Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to Investments in the Contracting Party's Domain of Investors of another Contracting Party."

[ARTICLE 26]<sup>(1)</sup>

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

Each Contracting Party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and other governmental authorities within its Domain.

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Specific comments

26.1: USA, CDN, EC and RUF reserve.

[ARTICLE 26A]<sup>(1)</sup>

PROPERTY

This Agreement shall in no way prejudice the system existing in Contracting Parties in respect of property.

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Specific comment

26.A.1: N proposal.

[ARTICLE 27]<sup>(1)(2)(3)</sup>

EXCEPTIONS

- (1) [General and security exceptions to trade provisions are addressed in Article 5 via reference to Articles XX and XXI of the GATT. In particular, nothing in Article 5 of this Agreement shall preclude any Contracting Party from taking any action in pursuance of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear safeguards obligations provided any such action shall not constitute disguised restrictions on trade or arbitrary discrimination between Contracting Parties.]<sup>(4)</sup>
- (2) <sup>(5)</sup> Other provisions of this Agreement shall not preclude any Contracting Party from taking any action [ [which it considers]<sup>(6)</sup> necessary for the purposes of protecting its public order, or [human, animal or plant life or health, [or conservation of exhaustible natural resources]<sup>(7)</sup>]<sup>(8)</sup>, or from taking any action in pursuance of]<sup>(9)</sup> its obligations under the United Nations Charter for the maintenance of international peace and security, [or]<sup>(10)</sup> its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and [ [of international nuclear safeguards obligations, provided that such prohibitions]<sup>(11)</sup> shall not constitute disguised restrictions on trade<sup>(12)</sup> or arbitrary discrimination as between Contracting Parties]<sup>(13)(14)</sup>. Such actions shall be duly motivated and shall not be disproportionate to this end.
- (3) <sup>(5)</sup> A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential [defence]<sup>(15)</sup> interests.
- (4) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the <sup>(16)(17)</sup> benefit of any treatment, preference or privilege resulting from

(a) (18) the membership to [or association with] (19) any existing [or future] (19) customs [or economic] (19) union or a free trade area [or similar international agreement] (19) to which any of the Contracting Parties concerned is or may become a party, or

(b) [any regulation to facilitate frontier traffic] (20).

(21)(22)

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Specific comments

27.1 : EC reserve.

27.2 : CDN believes that substantive and organizational changes are required in Article 27. It proposes the following illustrative text as addressing those needs :

(1) The provisions of this Agreement shall not preclude any Contracting Party from adopting or enforcing any measures :

- a) necessary to protect its public [order/morals];
- b) necessary to protect human, animal or plant life or health;
- c) relating to the conservation of exhaustible energy resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

d) essential to the acquisition or distribution of [Energy Materials and Products] in general or local short supply, if such measures are consistent with the principle that all Contracting Parties are entitled to an equitable share of the interantional supply of such [Energy Materials and Products] and that any such measures that are inconsistent with this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist; or

e) necessary for prudential, fiduciary or consumer protection reasons;

provided that such measures shall not constitute disguised restrictions on trade or investment, or arbitrary or unjustifiable discrimination between Contracting Parties or between investors of Contracting Parties. Such measures shall be duly motivated and shall not be disproportionate to the stated end.

(2) Nothing in this Agreement shall be construed :

a) to require any Contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests;

b) to prevent any Contracting Party from taking any measure which it considers necessary for the protection of its essential security interests :

i) relating to the supply of [Energy Materials and Products] to a military establishment;

ii) taken in the time of war or other emergency in international relations involving the Contracting Party taking the measure;

iii) relating to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons or other international nuclear non-proliferation undertakings, or required by national nuclear non-proliferation laws, regulations or policies;  
or

c) to prevent any Contracting Party from taking any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;

provided that any such measure shall not constitute a disguised restriction on trade or investment and that any such measure shall be duly motivated.

(3) If a Contracting Party considers that any measure taken by another Contracting Party pursuant to paragraph (2) constitutes a disguised restriction on trade or investment or otherwise nullifies or impairs any benefit reasonably expected under this Agreement, it may request consultations with the Contracting Party taking the measure. Such consultations shall be held promptly, and the Contracting Party whose measure is the subject of the consultations shall give full and sympathetic considerations to the views of the other Contracting Party and shall explain, in as much detail as is consistent with its security interests, the reasons for the measure.

(4) No Contracting Party may invoke the provisions of this Article to derogate from the requirements to pay compensation pursuant to Articles 17 and 18 or to permit the transfer of an Investment or Returns in accordance with Article 19.

(5) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the benefit of any treatment, preference or privilege resulting from

(a) the membership to or association with any existing or future customs or economic union or a free trade area or similar international agreement to which any of the Contracting Parties concerned is or may become a party, or

(b) any regulation to facilitate frontier traffic.

27.3 : N suggests substituting whole Article with the following:

"The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend to another Contracting Party the benefit of any treatment, preference or privilege resulting from the membership to or association with any existing or future customs union or a free trade area or interim agreement leading to the formation of a customs union or a free trade area, unless also that other Contracting Party is or becomes a member to or associated with such customs union, free trade area or interim arrangement; provided that the Contracting Party's membership to or association with the customs union, free trade area or interim arrangement has been duly notified to the other Contracting Parties."

To this N adds that other possible exceptions will have to be considered in view of the outcome of the discussion concerning the handling of trade policy articles (the relationship to GATT).

27.4 : USA prepared drafting contribution at the request of the Chairman to facilitate discussion in WG II. The draft which should substitute para (1) is submitted without prejudice to the position of the USA in the negotiations:

"(1) Exceptions to this Agreement which relate to matters covered by Article 5 [and Article 41 Bis] are governed by the provisions of that Article [those Articles] and by the relevant provisions of the GATT and its related instruments as those provisions are incorporated via reference into this Agreement.

(2) Nothing in this Agreement shall be construed:

(a) to preclude application by a Contracting Party of measures it considers necessary for the maintenance of public order, the fulfillment of obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests; or

(b) to require application of the most-favoured-nation provisions of this Agreement to advantages accorded by a Contracting Party to nationals or companies of another country by virtue of:

i) such Contracting Party's binding obligations pursuant to full membership in a free trade area or customs union; or

ii) such Contracting Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Agreement."

27.5 : EC final position reserved on this para.

27.6 : N reserve.

27.7 : N reserve as paraphrasing of Art. XX (g) of GATT code is used here in a different context. Should be replaced rather with "energy purposes".

27.8 : CH suggests deletion subject to the purview of Part IV of this Agreement. USA supports deletion.

27.9 : EC suggests substituting with: "justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of intellectual, industrial and commercial property, or the protection of national treasures, possessing artistic, historic or archaeological value,".

27.10: EC in context with footnote 27.9 suggests deletion.

27.11: EC suggests substituting with: "its international nuclear safeguards obligations or in pursuance of other issues of nuclear proliferation. Such actions".

27.12: USA asks for adding "and Investment".

27.13: J suggests deletion, and replacement with: "obligations under other nuclear non-proliferation regimes".

27.14: RUF asks for addition of subpara. (j) of Art. XX and Art XII of GATT.

- 27.15: USA and EC ask for substituting with "security".
- 27.16: USA suggests insertion: "most favoured nation".
- 27.17: EC suggests insertion: "to another Contracting Party".
- 27.18: J reserved position and argued that since this Agreement should be based on the principle of non-discrimination among the Contracting Parties, the provision of exception of MFN treatment with regard to customs union, etc ..., should not be included.
- 27.19: Left for later discussion. USA suggests deletion.
- 27.20: For consideration at next meeting.
- 27.21: EC - a statement in the minutes of the concluding document could substitute, if necessary, the ex-paragraph (4) concerning a Community exception:
- (4) In their mutual relations, Contracting Parties which are Members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned.
- 27.22: AUS proposes new para, which provides wording to prevent "double-dipping" (i.e. repeated action on the same matter by an Investor who is a citizen/national of one Contracting Party and a permanent resident of another Contracting Party):
- "( ) This Agreement shall not apply to a natural person who is not a citizen or national of a Contracting Party (the first Contracting Party) but who is a permanent resident of that Contracting Party, if :

(a) that person has already invoked the provisions of this Agreement against the Contracting Party in which that person has made an Investment (the second Contracting Party), provided that this has occurred in respect of the same matter or,

(b) the person is a citizen or national or permanent resident of the second Contracting Party."

Note

The proposed new para (4) should be read in conjunction with Article 1(5)(a) (Definition of "Investor"), as it would read with the insertion of the words "or who are permanently residing in".

PART VII

STRUCTURAL AND INSTITUTIONAL

General comment

In meetings of 12 and 14 November 1992, WGII discussed the institutional Articles of the BA (Articles 29-32). Based on the results of the 12 November WG II meeting, the Chairman prepared a note on institutional provisions (Room Document 9) which was discussed on 14 November. Based on that discussion the Chairman indicated that he will produce new suggestions for these Articles. Reference is also made to Room Document 10 which suggests other international bodies which could fulfill certain objectives or requirements of the BA.

ARTICLE 28

RELATIONSHIP BETWEEN THE AGREEMENT AND ITS PROTOCOLS

- (1) The Contracting Parties agree that in order to give further effect in detail to the objectives and principles of the Charter it will be necessary to negotiate some appropriate Protocols to this Agreement, [for adoption by the Governing Council in accordance with Articles 29... and 30....]<sup>(1)</sup> Each Protocol shall only apply to the Contracting Parties which enter into it. Any Contracting Party may participate in negotiations or enter into any Protocol<sup>(2)</sup>.
- (2) [In the event of a conflict between the obligations of a Contracting Party under this Agreement and [its]<sup>(3)</sup> obligations<sup>(4)</sup> under a Protocol, its obligations under this Agreement shall prevail, except as otherwise provided in this Agreement]<sup>(5)(6)</sup>.

(3) A State or Regional Economic Integration Organisation shall not become a Party to a Protocol unless it is, or becomes at the same time, a Party to this Agreement.

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Chairman's note

This article was discussed by Working Group II in its meeting of 17 November 1992. Given the interrelationship of this Article with the Articles covering institutional matters (Articles 29-32), the Chairman indicated that he would produce new text for this Article.

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General comments

N argues that this Article should specify that the BA, in addition to being fully applied in Protocols, should also apply equally in areas, if any, covered by the term Energy Materials and Products, which are not explicitly dealt with in any Protocol.

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Specific comments

- 28.1: Pending discussion of Articles 29 and 30 and a clearer understanding of the impact of portions of those Articles on this Article.
- 28.2: RUF requests additional sentence : "The Contracting Parties may subsequently increase the number of Protocols concluded as the need for them arises".

28.3: USA requests deletion.

28.4: USA suggests insertion of : "that may be established".

28.5: D asks for deletion.

28.6: EC general reserve.

[ARTICLE 29]<sup>(1)</sup>

GOVERNING COUNCIL

- (1) A Governing Council composed of one representative of each Contracting Party is hereby established. The first meeting of the Governing Council shall be convened by the Secretariat designated on an interim basis under Article 31 not later than [one year]<sup>(2)</sup> after the closing date for signature of this Agreement in accordance with Article 33. Thereafter, ordinary meetings of the Governing Council shall be held at [regular] intervals to be determined by the Council.
- (2) Extraordinary meetings of the Governing Council shall be held at such other times as may be deemed necessary by the Council, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to them by the Secretariat, it is supported by at least one-third of the Contracting Parties.
- (3) The Governing Council shall agree upon and adopt rules of procedure and financial rules for itself [and for any subsidiary bodies it may establish within the scope of this Agreement]<sup>(3)</sup>, as well as the staff matters referred to in Article 31 paragraphs (2) and (3) below and the financial provisions governing the functioning of the Secretariat.
- (4) The Governing Council [,while taking care to]<sup>(4)</sup> avoid duplication and taking full advantage of the work and expertise of competent international or other bodies, [shall]<sup>(5)</sup> keep under continuous review the implementation of the principles of the Charter, and of the provisions of this Agreement and the Protocols and, in addition, [shall]<sup>(6)</sup>

- (a) promote in accordance with this Agreement and Protocols the coordination of appropriate [policies, strategies and]<sup>(7)</sup> measures to carry out the principles of the Charter and the provisions of this Agreement and Protocols, and [make recommendations on]<sup>(8)</sup> any other measures relating to this Agreement and Protocols;
- (b) consider and adopt programmes of work to be carried out by the Secretariat, in accordance with this Agreement and Protocols;
- (c) [consider and approve annual accounts and budget estimates in respect of administrative costs]<sup>(9)</sup>;
- (d) consider and approve the terms of any headquarters agreement, including privileges and immunities necessary for the Secretariat to carry out its functions under this Agreement and Protocols;
- (e) encourage joint efforts aimed at facilitating and promoting market oriented reforms and modernization of energy sectors in the countries of Central and Eastern Europe and the [Commonwealth of] Independent States;
- (f) monitor the implementation of measures undertaken pursuant to transitional arrangements in accordance with Article 42 with a view to assisting any Contracting Party in meeting its objectives and obligations ;
- (g) consider and adopt, as required, in accordance with Article 37 of this Agreement, amendments to this Agreement;
- (h) consider and adopt Protocols together with amendments thereto;
- (i) [consider and undertake any additional action that may be required for the achievement of the purposes of this Agreement]<sup>(10)</sup>.

- (5) [In 1999]<sup>(12)</sup> and every 5 years thereafter the Governing Council shall review the functions remaining to it in the light of the extent to which the provisions of this Agreement and Protocols have been implemented. Following each review the function specified in paragraph (4) above may be amended or abolished by the Governing Council [by a vote,<sup>(13)</sup> in accordance with [Article 30.](<sup>14</sup>)

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General comments

- EC has a general reserve on this Article pending the clarification of the following issues:
  - a) the role of the Secretariat and of the Governing Council,
  - b) length of life of Governing Council should normally coincide with that of the Secretariat,
  - c) need for a sunset clause for both the Governing Council and the Secretariat,
  - d) need to clarify the tasks of the Governing Council in relation to Protocols (in particular paragraph 4(h), Article 28(2) and Article 30(4) and (5).
  
- J asks for clarification on "programmes of work" in (4)(b).

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Specific comments

- 29.1: AUS, CDN and EC general reserve on whole Article 29.
  
- 29.2: EC suggests substituting with: "three months".
  
- 29.3: J reserve on the grounds that there is no need for subsidiary bodies.  
EC suggests deletion.

- 29.4: EC suggests replacing with: "shall".
- 29.5: EC suggests, in relation to its footnote 29.4, substituting with "and".
- 29.6: EC deletion.
- 29.7: EC proposes deletion.
- 29.8: EC suggests replacing with: "undertake".
- 29.9: EC amends this subpara to read: "in respect of administrative costs, consider and approve annual accounts and, before the beginning of the budget year, budget estimates;"
- 29.10: AUS, EC, USA, J, reserve; an open-ended commitment.  
RUF supports retaining this subpara.  
EC suggests deletion.
- 29.11: EC proposes adding a new subparagraph which should read:  
"(j)where appropriate, delegate, if economic and efficient, the tasks of the Secretariat as far as possible to other organisations or institutions on a contractual basis".
- 29.12: EC suggests replacing with: "Not later than 5 years after entry into force".
- 29.13: EC delete.
- 29.14: EC suggests, in the context of footnote 29.13, substituting with: "Article 30(2)".

ARTICLE 30

VOTING

- (1) The Contracting Parties shall make every effort to reach agreement by consensus on any matter requiring their decision, adoption or approval under this Agreement.
- (2) The adoption of amendments to this Agreement shall be by [consensus]<sup>(1)</sup>.
- (3) Procedures for adoption of amendments to any Protocol shall be defined in that Protocol.
- (4) [Decisions regarding funding principles for the Governing Council, or other budgetary matters of the Council [or the Secretariat]<sup>(2)</sup>, shall, subject to paragraph (1) above, be taken by a qualified majority consisting of that proportion of the Contracting Parties which together contribute at least three fourths of the funding to meet the administrative costs of the Council [and the Secretariat]<sup>(2)</sup> under Article 32 below].<sup>(3)</sup>
- (5) In all other cases, unless [a contrary intention appears herein]<sup>(4)</sup>, decisions shall be taken by a three fourths majority vote of the Contracting Parties present and voting at the meeting of the Governing Council at which such matters fall to be decided.
- (6) For the purposes of this Article, "Contracting Parties present and voting" means Contracting Parties present and casting an affirmative or negative vote.
- (7) Subject to paragraph (4) above and paragraph (9) below each Contracting Party shall have one vote.

(8) With the exception of paragraph (4) above, no voting decision shall be valid unless it has positive and expressed support of a majority of all Contracting Parties.

(9) [For the purposes of this Article a Regional Economic Integration Organisation shall, when voting, do so in the following manner:

(a) in votes concerning this Agreement such organisation shall have a number of votes equal to the number of its member States which are Contracting Parties to this Agreement;

(b) notwithstanding paragraph (3) above, in votes concerning a Protocol such organisation shall have a number of votes equal to the number of its member States which are Parties to that Protocol.

In either case such organisation shall not exercise its right to vote if its member States exercise theirs, and vice versa.]<sup>(5)</sup>

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General comments

CDN asks how to deal with new and unidentified Protocols.

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Specific comments

30.1: J replacing with "3/4 majority vote".

30.2: AUS wishes to delete.

30.3: RUF reserved position on para (4).

30.4: EC suggests replacing with: "otherwise stated".

30.5: EC reserved position on para (9).

**ARTICLE 31**

**SECRETARIAT**

- (1) The Secretariat shall be composed of a Secretary General and such staff as the minimum consistent with efficiency.
- (2) The Secretary General shall be appointed by the Governing Council, initially for a period of maximum 5 years.
- (3) In the performance of their duties under this Agreement the Secretary General and the staff shall be responsible to and report to the Governing Council.
- (4) The Governing Council, acting by majority, shall take all decisions necessary for the establishment and the functioning of the Secretariat including the structure, staff levels and standard terms of employment of officials and employees. The Secretariat shall carry out the functions assigned to it in this Agreement or in any Protocol and any other assigned to it by the Governing Council, and shall seek to the extent possible the services of competent international or other bodies.
- (5) The Secretariat functions will be carried out on an interim basis by a provisional Secretariat until the entry into force of this Agreement pursuant to Article 39 and the appointment of a permanent Secretariat under this Article.

ARTICLE 32

FUNDING PRINCIPLES

- (1) Each Contracting Party shall meet its own costs of representation at meetings of the Governing Council.
- (2) Expense of meetings of the Governing Council shall be regarded as an administrative cost of the Secretariat.
- (3) [The administrative costs]<sup>(1)</sup> of the Secretariat shall be met by the Contracting Parties by contributions payable in the proportion specified in Annex [B].

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Note

Consideration will have to be given to Secretariat costs arising from provisions in Protocols, and to the method of updating Annex [B] to allow for changes in membership.

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Specific comments

32.1: RUF reserved position until the structure and nature of administrative costs could be more closely defined.

**PART VIII  
FINAL PROVISIONS**

General comment

AUS, CDN and USA have a general reserve on "Governing Council" pending completion of the Article 29.

**ARTICLE 33  
SIGNATURE**

This Agreement shall be open for signature at Lisbon from [ ] to [ ] by the States and Regional Economic Integration Organisations whose representatives signed the Charter.

**ARTICLE 34  
RATIFICATION, ACCEPTANCE OR APPROVAL**

This Agreement and any Protocol shall be subject to ratification, acceptance or approval by [Signatories].<sup>(1)</sup> Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

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Specific comments

34.1 : The Legal drafting Sub-Group recommends introducing a definition of "Signatory". The Chairman of this Subgroup submits this definition for the November meeting of the Subgroup.

[ARTICLE 35]<sup>(1)</sup>

APPLICATION TO OVERSEAS TERRITORIES

- (1) Any State or Regional Economic Integration Organization may at the time of signature, ratification, acceptance, approval or accession declare that the Agreement shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Agreement enters into force for that Contracting Party.
- (2) Any Contracting Party may at a later date, by a declaration addressed to the Depository, extend the application of this Agreement to other territory specified in the declaration. In respect of such territory the Agreement shall enter into force on the ninetieth day following the receipt by the Depository of such declaration.
- (3) Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Depository. The withdrawal shall, subject to the applicability of Article 43(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depository.

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General comment

AUS might come back to this Article after finalisation of use of the word Domain.

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Specific comment

35.1: EC and N scrutiny reserve.

## ARTICLE 36

### ACCESSION

This Agreement and any Protocol shall with the agreement by consensus of the Contracting Parties thereto, be open for accession by States and Regional Economic Integration Organisations which have signed the Charter from the date on which the Agreement or the Protocol concerned is closed for signature<sup>(1)</sup>. The instruments of accession shall be deposited with the Depositary.

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#### Specific comments

36.1: EC suggests adding: "according to Article 33".

## ARTICLE 37

### AMENDMENT

- (1) Any Contracting Party may propose amendments to this Agreement.
- (2) The text of any proposed amendment to this Agreement or to any Protocol shall be communicated to the Contracting Parties by the Secretariat at least three months before the meeting at which it is proposed for adoption.
- (3) Amendments to this Agreement which have been adopted in accordance with Article 29 shall be submitted by the Depositary to all Contracting Parties for ratification, acceptance or approval.

(4) Ratification, acceptance or approval of amendments to this Agreement shall be notified to the Depository in writing. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after the receipt by the Depository of notification of their ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

### ARTICLE 38

#### ASSOCIATION AGREEMENTS

Where, in order to further the implementation of the objectives and the principles of the Charter or the provisions of this Agreement or any Protocol, it is considered necessary or desirable by the Governing Council referred to in Article 29 to permit a State, international organisation or Regional Economic Integration Organisation to associate itself with this Agreement and any Protocol, an Association Agreement shall be submitted to the Governing Council for its consideration. Such Association Agreement shall set out clearly the rights, responsibilities and limitations of associate status for that State or organisation, it being agreed that differing limitations may be applicable to different States or organisations depending upon the number of Protocols with which the State or organisation wishes to be associated, the nature of such Protocols and the level of association envisaged by the associating State or organisation and permitted by the Governing Council.

**ARTICLE 39**  
**ENTRY INTO FORCE**

- (1) This Agreement shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof.
- (2) For each State or Regional Economic Integration Organisation which ratifies, accepts or approves this Agreement or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, it shall enter into force on the ninetieth day after the date of deposit by such State or Regional Economic Integration Organisation of its instrument of ratification, acceptance, approval or accession.
- (3) For the purposes of paragraph (1) above, any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to those deposited by member States of such organisation.

**[ARTICLE 40]<sup>(1)</sup>**  
**PROVISIONAL APPLICATION**

[The signatories agree to apply this Agreement and any amendments thereto provisionally following signature, to the extent that such provisional application is not inconsistent with their laws or constitutional requirements pending its entry into force in accordance with Articles 37 or 39]<sup>(2)</sup>.

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Specific comments

- 40.1: CDN reserve.  
N scrutiny reserve.

40.2: J suggests replacing the whole Article with :

"(1) Any Signatory of this Agreement may notify the Depository that it will apply this Agreement provisionally to the extent that the obligations of this Agreement are not inconsistent with its national laws and regulations.

(2) The Depository shall inform all Contracting Parties and Signatories of the notification made in accordance with paragraph (1) of this Article."

[ARTICLE 41]<sup>(1)</sup>

RESERVATIONS

[No reservations may be made to this Agreement but the following:

Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity if citizens or nationals of a non-signatory country control such entity and if that entity has no substantial business activities in the Domain of the Contracting Party in which it is organised; or the denying Contracting Party does not maintain diplomatic relationship with the non-signatory or adopts or maintains measures with respect to the non-signatory that prohibit transactions with the Investor or that would be violated or circumvented if the advantages in part IV of this Agreement were accorded to the Investor or to its Investments.]<sup>(2)</sup>

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Specific comments

41.1: AUS and N reserve pending the outcome of the Norwegian proposal of reservations in Article 16.

CDN reserve subject to finalization of this Agreement.

41.2: If no adequate solution shall be found in Article 16(3), the following reservation can also be made:

"Each Contracting Party reserves the right to deny an Investor to Make an Investment if the Investor has no substantial business activities in the Domain of a Contracting Party or if the ultimate parent company of the Investor is not located in the Domain of a Contracting Party."

In such a case attempt should be made to combine both types of reservations.

[ARTICLE 41 BIS]<sup>(1)</sup>

INTERIM PROVISIONS ON TRADE RELATED MATTERS

By derogation from Article 5, so long as one or more Contracting Party is not a contracting party to the GATT and related instruments, the following provisions shall apply to trade between Contracting Parties at least one of which is not a member of the GATT:

- (1) <sup>(2)</sup>If such trade is governed by an existing bilateral agreement between those Contracting Parties, that agreement shall apply between them following notification to all other Contracting Parties by both Contracting Parties concerned provided that its application does not distort the trade of any third Contracting Party.
- (2) [In all other cases trade in Energy Materials and Products shall be governed by the provisions of the GATT and related instruments, as in effect on 1 July 1992 save those listed in Annex G]<sup>(3)</sup>.
- (3) <sup>(4)</sup>Each signatory to this Agreement, and each State or Regional Economic Integration Organization acceding to this Agreement, shall on the date of its signature or of its deposit of its instrument of accession, deposit with the Depository a list of all tariff rates and other charges level applied on such date of signature or deposit, on Energy Materials and Products imported into its Domain.
- (4) <sup>(4)(5)</sup>Subject to paragraph (5) below, each Contracting Party undertakes not to increase any tariff rates or other charges on Energy Materials or Products above the level on the date of its signature or deposit as referred to in paragraph (3).
- (5) <sup>(4)</sup>Notwithstanding paragraph (4), a Contracting Party may maintain limited exceptions to the obligations of paragraph (4), provided that it deposits with the Depository on the date

of signature or deposit as referred to in paragraph (3), along with the list referred to in paragraph (3), a list of such exceptions, specifically identified by reference to the HS or CN items to which such exceptions apply.

(6) Notwithstanding the exceptions in Annex G the Contracting Parties will make best efforts to apply the provisions of the GATT Agreement on Government Procurement to the procurement of Energy Materials and Products by government controlled entities and to the procurement of works, equipment and services by government controlled entities producing Energy Materials and Products.

(7) [The Governing Council] shall review the provisions of this Article from time to time and, in the first instance, no later than three months after the conclusion of the Uruguay Round negotiations.

#### ANNEX G

##### NON-APPLICABLE PROVISIONS OF THE GATT AND RELATED INSTRUMENTS

II	Schedule of Concessions
IV	Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXV	Joint Action by CPs
XXII	Consultations
XXIII	Nullification and Impairment
XXVI	Acceptance, Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules
XXVIII bis	Modification of Schedules
XXIX	The relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXIII	Accessions

XXXVI-XXXVIII Trade and Development

Appendix H

All ad articles in Appendix I related to above GATT Articles.

Arrangement Regarding Bovine Meat

International Dairy Arrangement

The Multifiber Arrangement

Agreement on Trade in Civil Aircraft

[Agreement on Government Procurement.](1)

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Specific comments

41Bis.1 : General scrutiny reserve.

41Bis.2 : RUF reserve on para (1).

41Bis.3 : CDN raised a question about GATT codes for possible inclusion in Annex G. Chairman requested certain delegations to examine particular codes and indentify any articles in them which should be included in annex G and forward their findings to the Secretariat by 30 November 1992. The responsible delegations are :

CDN - Technical Barriers to Trade

USA - Articles VI, XVI and XXIII - subsidies and countervailing duties

CH - Article VII - customs valuation

[J - Import licencing procedures]\*

AUS - Article VI - Antidumping code

\* After negotiations in WG II had been concluded on 17 November 1992 J informed the Secretariat that it could not take on the task.

Other Tokyo Round agreements appeared not to be applicable and would be excluded unless delegations notified the Secretariat by 30 November 1992 (pages 147 and on of Tokyo Round Negotiations).

41Bis.4 : USA reserve on paragraphs (3), (4) and (5).

41Bis.5 : H reserve on para (4) pending the final agreement on the scope of definitions in Article 1.

41Bis.G.1: N reserve.

[ARTICLE 41 TER]<sup>(1)</sup>

INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT

- (1) This Article applies only to disputes regarding compliance with provisions applicable to trade under Article 41 Bis.
- (2) This Article does not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:
  - (a) has been notified in accordance with and meets the other requirements of paragraph (1) of Article 41 Bis; or
  - (b) establishes a free-trade area or a customs union as described in paragraph 5 of Article XXIV of the GATT.
- (3) (a) In their relations with one another, Contracting Parties shall at all times make every effort through co-operation and consultations to arrive at a mutually satisfactory resolution of any difference of views that might materially affect compliance with the provisions applicable to trade under Article 41 Bis.
  - (b) A Contracting Party may make a written request for consultations with any other Contracting Party regarding any existing or proposed measure of or any other matter involving the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 41 Bis. A Contracting Party that requests consultations shall to the fullest extent possible indicate the measure or other matter complained of and specify the provisions of Article 41 Bis and of the GATT and Related Instruments that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretary-General, who shall periodically inform the Contracting Parties of pending consultations that have been notified.

(c) A Contracting Party shall treat any confidential or proprietary information identified as such and contained in or received in response to a written request, or received in the course of consultations, in the same manner that it is treated by the Contracting Party providing the information.

(4) (a) If the Contracting Parties fail to resolve a matter through consultations within 45 days of a request under paragraph (3)(b) above, or within such other period as may be agreed between them, either Contracting Party involved in the consultations may ask the other Contracting Party to participate in third-party dispute settlement; where a Contracting Party refuses a request under paragraph (3)(b), the requesting Contracting Party may, without need for delay, ask the refusing Contracting Party to participate in third-party dispute settlement. A request for third-party dispute settlement shall be in writing, state the matter complained of, and indicate which provisions or Article 41 Bis and of the GATT and Related Instruments are considered relevant.

(b) Third-party dispute settlement may involve:

(i) the assistance of a mediator acceptable to both Contracting Parties and acting on terms agreed by both Contracting Parties, to facilitate a satisfactory resolution of the dispute;

(ii) arbitration on such terms as both Contracting Parties may agree; or

(iii) such other means of dispute settlement as both Contracting Parties may agree.

Any agreement on third-party dispute settlement pursuant to a request under subparagraph (a) above shall be promptly notified to the Secretary-General, who shall at the earliest practicable opportunity notify all Contracting Parties of that agreement. Such notification should be given as far in advance of the commencement of the settlement process as possible.

- (c) If the requested Contracting Party refuses third-party dispute settlement, or if the two Contracting Parties fail to agree on a means of third-party dispute settlement within 30 days of the date of a request for third-party dispute settlement made pursuant to paragraph (4)(a) above, a Contracting Party which complains of the non-compliance, with provisions applicable to trade under Article 41 Bis, of any existing or proposed measure of, or any other matter involving another Contracting Party, may deliver to the Secretary-General a written request for the establishment of a panel to resolve a dispute between the other Contracting Party and itself in accordance with paragraph (6) below. In its request it shall state the matter complained of and indicate which provisions of Article 41 Bis and of the GATT and Related Instruments are considered relevant. The Secretary-General shall promptly deliver copies of the request to all Contracting Parties, and the question of compliance with provisions applicable to trade under Article 41 Bis shall be resolved in accordance with the procedures described in paragraphs (6) through (9) below. Despite the initiation of these procedures, the Contracting Parties are encouraged to consult throughout the pendency of the dispute resolution proceedings with a view to settling their dispute.

(d) Any other Contracting Party which considers that it has a substantial interest in the matter shall be entitled to join as a complainant in the dispute resolution by delivering to the two original disputing Contracting Parties, to any other Contracting Party that has joined as a complainant under the subparagraph, and to the Secretary-General, no later than the date of establishment of a panel as determined in accordance with paragraph (6)(b) below, written notice of its intention to participate.

(e) In seeking to resolve matters that are considered by a Contracting Party to affect compliance with Article 41Bis as between itself and another Contracting Party, the Contracting Parties participating in consultations or other dispute settlement shall make every effort to avoid a resolution that adversely affects the trade of any other Contracting Party.

(5) Every Contracting Party may designate [one/two] individual[s], and the Secretary-General may also designate, with the approval of the [Governing Council], acting by consensus, not more than [ten/twenty] individuals, who are willing and able to serve as panelists for purposes of dispute resolution in accordance with paragraphs (6) and (7) below. The Governing Council may in addition decide, acting by consensus, to designate for the same purposes, [up to 15/20] individuals who serve on dispute settlement rosters of other international bodies, who are willing and able to serve as panelists. The names of all of the individuals so designated shall constitute the dispute settlement roster. Individuals shall be designated strictly on the basis of objectivity, reliability and sound judgement and, to the greatest extent possible, shall have expertise in international trade and energy matters, in particular as relates to provisions applicable under Article 41 Bis; they need not be citizens of the designating country. In fulfilling any function under this Article, designees shall not be affiliated with or take instructions from any Contracting Party. Designees shall serve for renewable terms of five years and until their successors

have been designated. A designee whose term expires shall continue to fulfil any function for which that individual has been chosen under this Article. In the case of death, resignation or incapacity of a designee, the Contracting Party or the Secretary-General, whichever designated said designee, shall have the right to designate another individual to serve for the remainder of that designee's term, the Secretary-General's designation being subject to approval of the [Governing Council], acting by consensus.

- (6) (a) A panel shall be composed of three members who shall be chosen from the dispute settlement roster. Within 15 days of establishment of the panel each of the two original disputing Contracting Parties shall choose one member of the panel, who [may/shall not] be a citizen of any of the Contracting Parties participating in the dispute resolution unless all of the participating Contracting Parties agree otherwise. If one or more other Contracting Parties have joined the dispute resolution proceedings as complainants in accordance with paragraph (4)(d) above, all of the complaining Contracting Parties shall endeavour to agree upon the member of the panel to be chosen by the original complaining Contracting Party; if they are unable to reach agreement within 10 days the Secretary-General shall choose such member by lot from among their respective proposed panelists. The Contracting Parties shall agree on the identity of the third panelist, who shall not be a citizen of any of them unless all of the participating Contracting Parties agree otherwise, and who shall chair the panel. If a Contracting Party fails to choose a panelist within 15 days, such panelist shall be selected promptly by the Secretary-General from the roster described in paragraph (5) above. If the Contracting Parties are unable to agree upon the third panelist within 10 days of the selection of the second of the first two panelists, the third panelist shall be chosen promptly by the Secretary-General from the roster described in paragraph (5) above. A third panelist chosen by the Secretary-General shall not be a citizen of any of the Contracting Parties to the dispute, unless all of the participating Contracting Parties agree otherwise.

- (b) A panel shall be deemed to be established 30 days after the date of delivery of the written request of a Contracting Party to the Secretary-General pursuant to paragraph (4)(c) above.
- (c) The Secretary-General shall promptly notify all Contracting Parties that a panel has been composed. At any time prior to completion of the review of the panel's interim report, any other Contracting Party may deliver to the Secretary-General a written request to participate in or to observe the dispute resolution proceedings. Such request shall address the issues raised in the request for establishment of the panel, state the manner in which the requesting Contracting Party's interests might be affected, and specify the nature of the participation proposed. The Secretary-General shall promptly provide such request to the panel. It shall be for the panel to decide, in its discretion, upon the request.
- (d) The [Governing Council], acting by consensus, may adopt [model] rules of procedure and model terms of reference for panels composed under this Article. [To the extent it considers necessary for a fair and efficient dispute resolution, a panel may establish additional rules of procedure not inconsistent with the rules of procedure in this Article or with the rules adopted by the Governing Council]. The rules of procedure for dispute resolution under this Article shall assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and written rebuttal arguments. The proceedings of the panel shall be confidential. A panel should make an objective assessment of the matters before it, including the facts of the dispute and the compliance of measures and conduct with the provisions applicable under Article 41 Bis. In exercising its functions, a panel shall consult regularly with the participating Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by all of the participating Contracting Parties, the

panel shall base its decision primarily on the arguments and submissions of the participating Contracting Parties. Panels shall be guided by the interpretations given to the GATT and Related Instruments within the GATT and GATT bodies. [A panel shall act by majority.]

Unless otherwise agreed by all of the participating Contracting Parties, all procedures involving the panel, including the issuance of its final report, should be completed within 180 days of the date of establishment of the panel; however, a failure to complete all procedures within this period shall not affect the validity of a final report.

- (e) A panel shall be the judge of its own jurisdiction. Any objection by a Contracting Party participating in the dispute resolution that a dispute is not within the jurisdiction of the panel shall be considered by the panel, which shall decide whether to deal with the objection as a preliminary question or to join it to the merits of the dispute.
- (f) With the consent of all participating Contracting Parties, two or more panels may agree to consolidate their dispute resolution proceedings. In that event the consolidated panel may adopt any necessary additional rules of procedure, not inconsistent with the rules of procedure in this Article or adopted by the [Governing Council].
- (7) (a) After having considered rebuttal arguments, a panel shall submit to the participating Contracting Parties the descriptive sections of its draft written report, including a statement of the facts and a summary of the arguments made by the participating Contracting Parties. All participating Contracting Parties shall be afforded an opportunity to submit written comments on the descriptive sections within a period set by the panel.

Following the date set for receipt of comments from the Contracting Parties, the panel shall issue to the participating Contracting Parties an interim written report, including both the descriptive sections and the panel's proposed findings and conclusions. Within a period set by the panel a participating Contracting Party may submit to the panel a written request that the panel review specific aspects of the interim report before issuing a final report. Before issuing a final report, the panel shall meet with the participating Contracting Parties to consider, in its discretion, the issues raised in such a request.

The final report shall include both descriptive sections, including a statement of the facts and a summary of the arguments made by the participating Contracting Parties, and the panel's findings and conclusions; it also shall include a discussion of arguments made on specific aspects of the interim report at the stage of reviewing the interim report. The final report shall deal with every substantial issue raised before the panel and shall state the reasons for the panel's conclusions. [Panelists may furnish separate concurring or dissenting opinions.]

A panel shall issue its final report by providing it promptly to the Secretary-General and to the participating Contracting Parties. The Secretary-General shall at the earliest practicable opportunity distribute the final report, together with any written views that a participating Contracting Party desires to have appended, to all Contracting Parties.

- (b) Where a panel concludes that a measure proposed, introduced or maintained by, or other conduct of a Contracting Party does not comply with a provision of Article 41 Bis or with a provision of the GATT and Related Instruments that applies under paragraph (2) or Article 41 Bis, the panel may recommend in its

final report that the Contracting Party alter or abandon the measure or conduct so as to be in compliance with all applicable provisions of Article 41 Bis and of the GATT and Related Instruments. The panel also may include in its report specific advice, or advice on alternatives, as to how the Contracting Party might alter or abandon the measure or conduct, if the panel considers that such advice is necessary or could be useful in bringing the measure or conduct into compliance; such advice shall not be considered part of the panel's recommendation unless the panel expressly makes it so.

(c) Panel reports shall be adopted by the [Governing Council], acting by a three fourths majority vote in accordance with Article 30(5). In order to provide sufficient time for the [Governing Council] to consider panel reports, a report shall not be considered for adoption by the [Governing Council] until at least 30 days after it has been provided to all Contracting Parties by the Secretary-General. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretary-General at least 10 days prior to the date on which the report is to be considered for adoption by the [Governing Council], and the Secretary-General shall promptly provide them to all Contracting Parties. Contracting Parties that participated in the resolution of a dispute shall have the right to participate fully in the consideration of the panel report on that dispute by the [Governing Council], and their views shall be fully recorded.

(d) In order to ensure effective resolution of disputes to the benefit of all Contracting Parties, prompt compliance with rulings and recommendations of a final panel report that has been adopted by the [Governing Council] is essential. A Contracting Party which is subject to a ruling or recommendation of a final panel report that has been adopted by the [Governing Council] shall inform the [Governing Council] of

its intentions in respect to complying with such ruling or recommendation. If it is impracticable to comply immediately, the Contracting Party concerned shall explain to the [Governing Council] why this is so and shall, in light of this explanation, have a reasonable period of time in which to so comply.

(8) (a) Compensation and the suspension of obligations owed under Article 41 Bis are temporary measures available in the event that a Contracting Party does not comply with a ruling or recommendation within a reasonable period of time.

(b) The Contracting Parties that participated in the resolution of a dispute should consult with the aim of resolving the dispute in light of the final panel report. Where a Contracting Party has failed within a reasonable period of time to comply with a ruling or recommendation of a final panel report that has been adopted by the [Governing Council], a Contracting Party injured by such noncompliance may deliver to the noncomplying Contracting Party a written request that the noncomplying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the noncomplying Contracting Party shall promptly enter into such negotiations.

(c) If the noncomplying Contracting Party refuses to negotiate, or if the Contracting Parties have not reached agreement within 30 days after delivery of the request for negotiations, the injured Contracting Party may make a written request for authorisation of the [Governing Council] to suspend obligations owed by it to the noncomplying Contracting Party under Article 41 Bis.

(d) The Governing Council, acting by a three fourths majority vote in accordance with Article 30(5), may authorize the injured Contracting Party to suspend obligations to the noncomplying Contracting Party which the injured Contracting Party considers appropriate in the circumstances.

- (9) (a) Before suspending such obligations the injured Contracting Party shall inform the noncomplying Contracting Party of the nature and level of its proposed suspension. If the noncomplying Contracting Party delivers to the Secretary-General a written objection to the level of suspension of obligations proposed by the injured Contracting Party, the objection shall be referred to arbitration as provided below in this paragraph, and the suspension of obligations shall be stayed until the arbitration has been completed and the determination of the arbitral panel has become final and binding in accordance with subparagraph (e) below.
- (b) The Secretary-General shall establish an arbitral panel, which if practicable shall be the same panel that made the ruling or recommendation referred to in paragraph (8)(b) above, to examine the level of obligations that the injured Contracting Party proposes to suspend. The [Governing Council], acting by consensus, may adopt special rules of procedure for panels composed under this subparagraph. If the [Governing Council] has not adopted special rules, or to the extent that the panel considers it necessary to supplement such rules, a panel composed under this subparagraph may establish its own rules of procedure.
- (c) The arbitral panel shall determine whether the level of obligations proposed to be suspended by the injured Contracting Party is excessive in relation to the injury it experienced, and if so, to what extent. It shall not review the nature of the obligations suspended, except insofar as the nature of such obligations may be inseparable from the panel's determination with regard to the level of suspended obligations.
- (d) The arbitral panel shall deliver its written determination to the suspending and the noncomplying Contracting Parties and to the Secretary-General within 60 days after the panel has been

established or within such other period as may be agreed by the suspending and the noncomplying Contracting Parties. The Secretary-General shall present the determination to the [Governing Council] at the earliest practicable opportunity, and no later than its next meeting following his receipt of the determination.

(e) The determination of the arbitral panel shall become final and binding 30 days after the date of its presentation to the [Governing Council], and any level of suspension of benefits allowed thereby may thereupon be put into effect by the injured Contracting Party in such manner as that Contracting Party considers appropriate in the circumstances, unless prior to the expiration of the 30 days period, the [Governing Council], acting by a three fourths majority vote in accordance with Article 30(5), decides otherwise.

(f) In suspending any obligations to a noncomplying Contracting Party, an injured Contracting Party shall make every effort not to adversely affect the trade of any other Contracting Party.

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General comments

- This is the first draft of Article 41 TER elaborated by the Sub-Group under the chairmanship of Mr. C. Bamberger based on USA conceptual approach.
- Following the initial review the Chairman established a Sub-Group chaired by Mr. Ervik and composed of Mr. Bamberger and representatives of USA, CDN, EC, CH and RUF with a very broad and flexible Terms of Reference.

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Specific comments

41TER.1: General reserve.

Article 41 QUAT

By derogation from Article 5 bis, so long as a Contracting Party is not a member of GATT or has not completed its renegotiations with GATT and its related instruments, the following additional provisions shall apply to Article 5 bis:

Contracting Parties may take special measures in protecting industries newly born or undergoing structural difficulties, particularly when creating social tensions or grave regional unemployment.

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General Comment

Proposed by Chairman of sub-group in order to fulfill the idea of Article 5 bis only being of post-GATT relevance.

## ARTICLE 42

### TRANSITIONAL ARRANGEMENTS

- (1) The Signatories recognise that, due to the need to adapt to the requirements of a market economy, certain Contracting Parties of Central and Eastern Europe and the former USSR may be unable to implement some of the provisions of this Agreement immediately or fully upon entry into force thereof. Therefore, any of the eligible Contracting Parties which wishes to be exempted from the implementation of provisions of this Agreement other than Article 41Bis (4) should invoke transitional arrangements by depositing, prior to signing this Agreement, a Note setting out the provisions with which it cannot fully and immediately comply and a timetable for the implementation of the measures to effect complete compliance.
- (2) Transitional arrangements shall be agreed upon before the end of the negotiations of this Agreement and will constitute an integral part of it.
- (3) Transitional arrangements will not exceed [a period of three years after entry into force of this Agreement]<sup>(1)</sup>. In exceptional cases the Governing Council can decide to prolong this period by one year<sup>(2)</sup>.
- (4) A Contracting Party which has invoked transitional arrangements shall notify the Secretariat:
  - (a) of the implementation of any measures needed to effect compliance;
  - [(b) of the need for technical assistance facilitating full and complete implementation of this Agreement;]<sup>(3)(4)</sup>

- (c) of any application to the Governing Council to extend the timetable for achieving compliance in respect of any particular provision which is subject to the maximum periods in paragraph (3) above.

(5) The Secretariat shall:

- (a) circulate to all Contracting Parties the Notes referred to in paragraph (1) above;
- [(b) circulate and actively promote the matching of requests and offers for technical assistance referred to in paragraph 4(b);]<sup>(3)(4)</sup>
- (c) circulate to all Contracting Parties at the end of each six month period a summary of any notifications made under subparagraph 4(a) above and of any applications under subparagraph 4(c) above.

- (6) The Governing Council shall review annually the progress by Contracting Parties towards implementation of the provisions of this Article in accordance with Article 29(4) [at the same time as it reviews progress under Article 16 (6)].<sup>(6)</sup>

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General comment

It is agreed that Article 42 is also applicable to Protocols, as appropriate.

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Specific comments

42.1: H can accept 5 years after entry into force as a minimum. As an alternative a substitution with a specific date (1.1.98) had been suggested.

- 42.2: It was suggested to add after one year "at a time, taking into account provisions of Article 30(5)".
- 42.3: J does not deny the importance of technical assistance in general, but doubts relevance of stipulating in the BA arrangements including matchmaking for specific technical assistance measures, since there are other appropriate international fora which deal with those issues in detail and effectiveness.
- 42.4: H points out that this formulation does not reflect the views expressed by delegations during the discussion of TA Sub-Group in relation to the need for undertaking obligations for assisting to the transformation process in a broad sense.
- 42.5: H reserve on para (5) pointing out that review mechanism and frequently should be agreed only after cleaning up of the institutional aspects.
- 42.6: EC asks for deletion in accordance with a similar deletion in para (2).

ARTICLE 43

WITHDRAWAL

- (1) At any time after five years from the date on which this Agreement has entered into force for a Contracting Party, that Contracting Party may withdraw from this Agreement by giving written notification to the Depository.
- (2) Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depository, or on such later date as may be specified in the notification of the withdrawal.
- (3) [The provisions of this Agreement and any relevant Protocol shall continue to apply to Investments made in the Domain of a Contracting Party as of the date when that Contracting Party's withdrawal from this Agreement takes effect for a period of twenty years from such date]<sup>(1)</sup>.
- (4) Any Contracting Party which withdraws from this Agreement shall be considered as also having withdrawn from all Protocols to which it is Party.

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Specific comments

- 43.1: N suggests deleting para (3) pointing out that if a country has taken a step of withdrawing from the Charter system, that country will not consider it of a great importance to see to it that the provisions of the BA and Protocols are adhered to after the withdrawal.

**ARTICLE 44**

**DEPOSITARY**

- (1) The Government of the Portuguese Republic shall assume the functions of Depositary of this Agreement.
- (2) The Depositary shall inform the Contracting Parties, in particular, of:
  - (a) the signature of this Agreement, or Association Agreement and the deposit of instruments of ratification, acceptance, approval or accession in accordance with Articles 34 and 36;
  - (b) the date on which the Agreement, or Association Agreement will come into force in accordance with Article 39;
  - (c) notification of withdrawal made in accordance with Article 43;
  - (d) amendments adopted with respect to the Agreement, or Association Agreement, their acceptance by the Contracting Parties thereto and their date of entry into force in accordance with Article 37;
  - (e) any other declaration or notification concerning this Agreement.

ARTICLE 45

AUTHENTIC TEXTS

[The original of this Agreement of which the English, French, German, Italian, Russian and Spanish<sup>(1)</sup> texts are equally authentic, shall be deposited with the Government of Portugal.]<sup>(2)</sup>

In witness whereof the undersigned, being duly authorised to that effect, have signed this Agreement<sup>(3)</sup>.

Done at [ ] on the [ ] day of [ ].

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Specific comments

- 45.1: J wishes to add Japanese language as the seventh language for the authentic text or, if not accepted, to limit the number to two or three (English, French and Russian).
- 45.2: D suggests deletion.
- 45.3: D, subject to the footnote 42.2, suggests adding : "in English, French, German, Italian, Russian and Spanish language, of which every text is equally authentic, in one original, which will be deposited with the Government of Portugal."