

Brussels, 21 December 1992

NOTE FROM THE SECRETARIAT

Subject: Basic Agreement

1. Enclosed find an updated version of the Basic Agreement. It contains amendments and changes adopted at the Working Group II meeting on 14-18 December 1992.
2. Articles 23 and 24 have been substantially reformulated and Article 41 TER restructured so that its substance has been moved into Appendix D of Article 41 BIS, with a reference paragraph 6 bis under the same Article. All changes are summarised in comments following the Articles.
3. Since some Articles are in or close to final form, the Chairman has referred Articles 5, 8 (paragraph 1), 12, 15, 17, 18 (subject to footnote 18.1), 19 (paragraphs 1 to 4), 22, 28 to 39, 43 (except para 3), 44 and 45 (except footnote 45.1) and footnotes 14.12, 14.21 and 14.25 to the Legal Sub-Group for review.

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

76/92 ANNEX

BA-31

RESTRICTED

Brussels, 21 December 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;⁽¹⁾
- (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]. ⁽³⁾

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 of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g. benzoles, toluoles, xyloles, naphthalenes, other aromatic hydrocarbon mixtures, phenoles, creosote oils and others).]⁽⁵⁾

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 owned [or controlled, directly or indirectly], by Investors of one or more Contracting Parties [in the Domain of another Contracting Party] employed in association with the exploration, production, conversion, storage, transport, distribution and [supply] of Energy Materials and Products [and related services]. In particular, Investments include:](9)

(a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;(10)

(b) [shares in, or stock, or other forms of equity, bonds or debentures or debt(11) of, or any other form of participation including minority forms in, a company or business enterprise;](12)

(c) claims to money and claims to performance [under contract](13) having an economic value [and associated with an Investment;](14)

(d) [Intellectual Property(15)];(16)

(e) [any right conferred by law or contract, [relating to an Investment or by virtue of]⁽¹⁷⁾ any licences and permits pursuant to law];⁽¹⁸⁾⁽¹⁹⁾⁽²⁰⁾

(21)

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 for 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.

(*) Note for accompanying document

The energy field includes, for example, such energy specific activities as the laying of energy pipelines, the provision of energy meters, the decommissioning of oil rigs and nuclear power stations and contract energy management; but excludes activities which are not principally devoted to energy, such as road, rail, maritime and air transport, or the manufacture of energy consuming equipment.

Working Groups preparing Protocols are invited further to define the operations covered by their work in which Investments should be given the protection of this Agreement. Such definitions could be incorporated in this Agreement by way of amendment or be applied only by the parties to the relevant Protocol. It is particularly urgent to provide appropriate coverage of activities relating to energy efficiency.

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

(a) natural persons having the citizenship or nationality of [or who are permanently residing in]⁽²²⁾ that Contracting Party in accordance with its⁽²³⁾ laws;

(b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.]⁽²⁴⁾

(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;]⁽²⁵⁾

(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.]⁽²⁶⁾

(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, [sea-bed and its subsoil over which that Contracting Party exercises, in accordance with international law, sovereign rights or jurisdiction.]⁽²⁷⁾ [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]⁽²⁸⁾.

(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⁽²⁹⁾⁽³⁰⁾.] ⁽³¹⁾

(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.

General comment

The Chairman of WG II asked delegations to provide him with comments and suggestions on definition of Energy Materials and Products relevant for Investment Articles.

Specific comments

- 1.1 : EC will submit the definition of the Regional Economic Integration Organization for the next meeting of the Legal Sub-Group.
- 1.2 : General scrutiny reserve. This definition has been considered only in relation to trade Articles.
- 1.3 : 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 chapeau was discussed during the WG II meeting on 18 December 1992. The current draft is based on Chairman's proposal as contained in BA-30 and USA suggestion presented during negotiation. Square bracketed words indicate certain concerns by delegations.

Chairman invited delegations to forward to the Secretariat in a written form their comments on both definitions related to Investment including the note for the accompanying document under Article 1 or under Part IV by 17 January 1993.

The delegations should also focus on deletions of inappropriate suggestions, comments or reserves in footnotes in relation to the most recent drafts. Reflecting those responses the Secretariat will prepare a separate document containing all options together with a possible architecture for the next WG II meeting.

- 1.10 : CDN proposes the addition of: "acquired in the expectation or used for the purpose of economic benefits or business purposes".
- 1.11 : CDN proposes the addition of: "with a repayment period of one year or more".
- 1.12 : USA suggests a tighter reformulation as follows:
- "shares, stock, or other forms of equity participation (including minority participation) in, and bonds, debentures and debt instruments of, a company or business enterprise".
- 1.13 : USA suggests substituting with: "pursuant to contract".
- 1.14 : 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."
USA requests retention of the phrase in the main text.
- 1.15 : H asks for adding: "related to industrial projects".
- 1.16 : CDN scrutiny reserve pending clarification of relationship between Articles 7, 16 and 18.
- 1.17 : USA suggests replacing with: "and".
- 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 : RO asks for adding: "including concessions to search for, extract or exploit natural resources in the energy field".

1.21 : 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 claims to money;

which do not involve the kinds of interests specified in subparagraphs (a) through (d) above shall not be considered Investments."

1.22 : Final position pending the discussion of Article 27 and Article 16.

1.23 : RO request insertion of: "applicable".

1.24 : RO wants this subpara used as follows:

"companies and other entities, legally constituted under the laws and regulations applicable in that Contracting Party, whether or not organised for pecuniary gain, or privately or governmentally owned or controlled".

1.25 : USA reserve until further progress is made on Article 16.

1.26 : RO suggests replacing the whole definition with:

"Returns means the amounts derived from or associated with an investment, irrespective of the form in which it is paid, including profit, dividends, interest, capital gain, royalty payment, management, technical assistance or other fee, or returns in kind."

1.27 : RO suggest this part sentence should read:

"seabed adjacent to the territorial sea and its subsoil over which that Contracting Party exercises sovereign rights or jurisdiction, in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea."

1.28 : EC will propose a new text.

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

1.30 : 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".

1.31 : A Sub-Group established by the Chairman of WG II under Article 18 chaired by EC and consisting of AUS, CDN, J and USA shall prepare 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.

Chairman's note

Negotiations finished.

ARTICLE 3
PRINCIPLES - Deleted.

[ARTICLE 4](1)
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.

Specific comments

4.1 : USA reserve.

[ARTICLE 4A]⁽¹⁾

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]⁽²⁾ in accordance with this Agreement, particularly Article 16, and any relevant Protocol⁽³⁾.

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⁾.

General comment

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

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]

Except as otherwise provided in this Agreement 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.

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 for covering 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. The underlined language has been proposed by the Sub-Group on Article 24 as indicated in Room Document 25 of 18 December 1992. 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).

Specific comments

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

7.2 : USA reserve.

ARTICLE 7 BIS

In the event of the adoption of agreements within the framework of the Uruguay Round of the General Agreement on Tariffs and Trade, Contracting Parties undertake to consider appropriate amendments to this Agreement.

General comment

The Chairman's proposal covering the possible incorporation into the Basic Agreement of the substance of the Uruguay Round when that is completed. This was requested during the November discussion on Article 7, but could be also relevant to trade Articles and Article 16(2).

[ARTICLE 8]⁽¹⁾

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]⁽²⁾ markets, insofar as they may affect trade between Contracting Parties.]⁽³⁾
- (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 in markets relevant to areas covered above by this Agreement.⁽⁴⁾
- (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) If a Contracting Party considers that any specified anti-competitive 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 action.

The notifying Contracting Party shall include in such notification sufficient information to permit the other Contracting Party to identify the anti-competitive 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 the request of the other Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive 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, of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party will advise the notifying Contracting Party of its 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.](5)

Chairmans' note

The accompanying Ministerial statement shall contain these interpretative understandings:

[Anti-competitive conduct(6) may include pricing behaviour designed to undermine the operation of a competitive market or to benefit the enterprise(s) involved to the detriment of other parties in a manner which would not be possible in a competitive market. An example might be unreasonable price discrimination between comparable consumers seeking similar supplies.](7)

[Enforcement action may include investigation activities and judicial or administrative remedies by the Contracting Party or its competition authorities, or available to third parties, in accordance with the laws and rules of the Contracting Party concerned.](8)

Specific comments

8.1 : N contingency reserve.

8.2 : AUS supported by J wants to substitute with: "their own".

8.3 : CDN scrutiny reserve until agreement on Chairman's interpretative understanding is reached.

8.4 : J and CDN wish to retain as a reminder the possibility of proposing this additional wording:

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

The Chairman asked J and CDN to reconsider this issue before the next WG II meeting.

8.5 : EC scrutiny reserve. Consideration deferred until the negotiations of Articles 24, 24BIS, 24TER and 41 BIS are finished.

8.6 : CDN requests insertion of the following language:

"is to be defined by the individual laws of the Contracting Parties and".

8.7 : USA cannot concur with this lengthy text which it considers to go beyond the original Chairman's draft of Room Document 18 of 17 November 1992. In USA's view the current broad language of para (2) is sufficient to achieve the twin goals of (i) requiring Contracting Parties to establish mechanisms to discipline anti-competitive conduct, while (ii) enabling individual Contracting Parties to decide what specific mechanisms to establish.

8.8 : USA is of the opinion that this definition is not necessary. Moreover the reference to remedies "available to third parties" is in its view confusing and inaccurate, since the point of para (5) is that notified Contracting Parties may undertake enforcement action at the request of notifying Contracting Parties. The activities of third parties are irrelevant.

If the definition is deemed necessary USA suggests to consider something along the lines of USA-EC Antitrust Cooperation Agreement:

"Enforcement activities shall mean any application of competition law by way of investigation or proceeding conducted by the competition authorities of a Party."

Chairman's conclusions

After discussion on 18 December 1992 WG II was not able to make any further progress towards agreement. The Chairman then established a Sub-Group of competition experts chaired by EC and composed of USA, CDN, J and AUS to meet in Brussels, at the end of January 1993. EC agreed to make all necessary organisational arrangements.

The Sub-Group should seek to resolve all remaining problems under Article 8. Before or at its meeting the Legal Sub-Group will report on its recommendations on para (1).

ARTICLE 9
MONOPOLIES - Deleted

ARTICLE 10
STATE AID - Deleted

PART III

OTHER PROSPECTIVE

[ARTICLE 11]⁽¹⁾

TRANSPORT AND TRANSIT

- (1) Each Contracting Party [shall take the necessary measures to facilitate]⁽²⁾ 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) ⁽³⁾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]⁽⁴⁾, 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]⁽⁵⁾.
- (4) (3) In the event that access to existing [high-pressure transmission pipelines or high-voltage transmission grids]⁽⁷⁾ 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]⁽⁸⁾.
- (5) A Contracting Party through whose Domain Energy Materials and Products transit [through high-pressure transmission pipelines or high-voltage transmission grids]⁽⁹⁾ 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]⁽¹⁰⁾ to interrupt the existing flow of Energy Materials and Products until after [the dispute has been referred to the Charter Conference and the Charter Conference has had]⁽¹¹⁾ 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 reserve 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".

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.

Chairman's note

Negotiations finished.

[ARTICLE 13]⁽¹⁾

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.

General comment

In the December WG II meeting it was decided that, in good time for the next WG II meeting:

- RUF will produce a note indicating the need for this Article and, if so, which paragraphs need to be maintained. Other delegations which see advantage in maintaining this Article, are invited to do the same.

- USA will explore in a note the relation with Article 16(7) and provide - if necessary - adaptive formulations which should minimise any restrictions on a free flow of capital.

Reference is also made to the R0 notes on this subject as indicated in Room Documents 19 of 17 December 1992 and 23 of 18 December 1992.

Specific comments

13.1 : General scrutiny reserve.

[ARTICLE 14]⁽¹⁾

ENVIRONMENTAL ASPECTS

(1) [In pursuit of sustainable development [and consistently with those international environmental agreements to which they are parties]⁽²⁾, each Contracting Party shall strive [to minimise]⁽³⁾ 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,]⁽⁴⁾ the principles]⁽⁵⁾ that they should take [, according to their capabilities,]⁽⁶⁾ 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⁽⁷⁾ distorting investment in the energy cycle or international trade. Contracting Parties shall accordingly:]⁽⁸⁾

(a) take account of environmental considerations throughout the formulation and implementation of their energy policies;

(b) promote market[-oriented]⁽⁹⁾ price-formation throughout the energy cycle and [a fuller reflection therein of environmental costs and benefits and promote]⁽⁹⁾ research in appropriate fora on methods to quantify and appropriately recognize such environmental costs and benefits;⁽¹⁰⁾

- (c) encourage cooperation in the attainment of the environmental objectives [of minimising]⁽³⁾ in an economically efficient manner adverse environmental effects in a cost-effective way by taking into account the differences among Contracting Parties⁽¹¹⁾ in abatement costs of any given reduction of such adverse [effects]⁽¹²⁾ [and by coordination measures as appropriate]⁽¹³⁾;
- (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];⁽¹⁴⁾
- (f) promote and cooperate in the research, development, application and diffusion, including⁽¹⁵⁾ transfer, of [energy efficient and environmentally sound]⁽¹⁶⁾ technologies, practices and processes to attain [environmental goals]⁽¹⁷⁾ 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]⁽¹⁸⁾ of environmental impacts of environmentally significant energy investment projects⁽¹⁹⁾ [and subsequential monitoring of such impacts]⁽²⁰⁾;

(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]⁽²¹⁾.]⁽²²⁾

ii) "environmental impacts" means any effect caused by a [proposed]⁽²³⁾ 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.⁽²⁴⁾

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.]⁽²⁵⁾

(26)

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.
-

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]⁽¹⁾

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,]⁽²⁾ 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.

Specific comments

15.1 : EC reserve.

15.2 : General scrutiny reserve.

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⁽¹⁾⁽²⁾

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.⁽⁵⁾ Working Group II is proceeding on the assumption that the BA will satisfy reciprocity requirements in those cases where they exist in domestic legislation.⁽⁶⁾

- (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.]⁽⁸⁾

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.⁽⁹⁾⁽¹⁰⁾

- (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.⁽¹¹⁾

Working Hypothesis 10

There should be [regular]⁽¹²⁾ 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).⁽¹³⁾⁽¹⁴⁾

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.⁽⁹⁾⁽¹⁵⁾
(16)(17)

(18)

(8)⁽¹⁹⁾ (a) A Contracting Party shall permit Investors of another Contracting Party who have Investments in its Domain to employ key personnel of their choice regardless of nationality or citizenship.

(b) A Contracting Party shall, subject to its laws and regulations, examine in good faith requests by key personnel who are employed by Investors of another Contracting Party to enter and remain temporarily in its Domain to seek to Make or to Make Investments or otherwise to engage in activities connected with relevant Investments.

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

(10) ⁽²⁰⁾[Nothing in this Article shall apply to : [maritime and inland waterway, transport facilities and services; or]⁽²¹⁾ [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]⁽²²⁾; or]⁽²³⁾ [minority programmes]⁽²⁴⁾⁽²⁵⁾

(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].⁽²⁶⁾

(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]⁽²⁷⁾.

General comments

- 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 of detail, which ministers might make when initialling the Basic Agreement in order to establish the necessary procedures. For ease of reference the draft Declaration is given in 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.

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) USA has proposed alternate version. USA stated that it is particularly desirous that the language concerning "initial purchase" contained therein be a part of any final language in this regard. After discussion in the WG II on 15 December 1992, the Chairman asked that delegations consider both versions in capitals. The alternate USA proposal reads as follows:

"A Contracting Party may, however, when demonopolising a monopoly existing at the time of signature of this Agreement or privatising an enterprise owned or controlled by it at the time of signature of this Agreement, reserve to its nationals eligibility for the initial purchase of all or a portion of the equity interests in the enterprise [and add such measures to the Annex A], provided that the totality of such additional measures taken by the Contracting Party, together with any existing measures, are not significant barriers to Investments in [the energy field] for Investors of other Contracting Parties. In any case, all such measures shall be on a most favoured nation basis and shall also be subject to the other provisions of this Article".

(9) 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.

(10) AUS and J reserve.

(11) 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".

(12) J and H reserve.

(13) 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.

(14) General scrutiny reserve.

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

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

(17) 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.

(18) 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 7, as provided in that Article."

(19) CDN made two suggestions concerning para (8). The first concerns a proposal for a definition of "Key Personnel" and the other concerns the text of para (8).

A. CDN suggestion for a definition of "Key Personnel" for inclusion in Article 1 reads as follows:

"Key Personnel:

A natural person or natural persons who will:

(i) provide advice or key technical services for an Investment or

(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."

The Chairman asked delegations to submit any written proposals for amendment of the CDN text to the Secretariat as soon as possible. The Secretariat will then circulate those views upon receipt and the WG II will address CDN text together with comments at its February meeting with the goal of completing the work on this matter.

B. CDN suggested alternate text for para (8):

(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 of 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."

(b) 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."

C. After discussion of para (8) and the CDN alternate proposal on 15 December 1992, the Chairman appointed a Sub-Group composed of USA, GB and CDN which suggested the language now appearing in the main text. For the purpose of possible future need the former language read as follows:

"A Contracting Party shall, subject to its laws and regulations relating to the entry, 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 of their choice regardless of nationality or citizenship;

(b) favourably examine requests made by such key personnel 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."

- (20) 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 is 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.
- (21) 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.
- (22) CDN reserve.
- (23) Consensus was reached that this exception should apply to both standstill and NT and MFN post-establishment.
- (24) 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.
- (25) 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.

- (26) In discussion of Article 5 in WG II on 16 November 1992 it was decided that former paragraph (3) should be removed from Article 5 and possibly incorporated within Article 16.

In discussion of para (11) in the WG II on 15 december 1992 two alternate formulations for this para were circulated. The first reads:

"A Contracting Party shall abide by the provisions of the GATT Agreement on Technical Barriers to Trade with respect to standards, technical regulations and conformity assessment procedures as they relate to Investments of Investors of other Contracting Parties."

The second alternate text was proposed by EC and reads as follows:

"Contracting Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to Investment".

After discussion of both versions, the Chairman indicated that consideration of para (11) will be deferred until the February WG II meeting by which time it is hoped that negotiations in the Uruguay Round on this matter become more clear.

- (27) USA proposal. After discussion in WG II on 15 December 1992, the Chairman indicated that para (12) will be considered at the same time as para (11) in the February WG II meeting.

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,

shall be accorded restitution or compensation which in either case will be prompt, adequate and effective.

Chairman's note

Negotiations in WG II finished and Article is now being referred to the Legal Sub-Group.

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 in a Freely Convertible Currency 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)

Specific comments

18.1 : CDN supported by USA and J 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."

Chairman's conclusions

A.

The Chairman of WG II established a Sub-Group chaired by EC and invited AUS, CDN, J and USA to be represented in the Sub-Group. The Sub-Group will meet in Geneva on the occasion of the next negotiating meeting on TRIPS. It shall submit a report to Working Group II by 25 January.

The Sub-Group is invited to consider :

- i) The appropriate definition of intellectual property under Article 1(10);
- ii) The appropriateness of including in Article 18 a provision on the lines of the CDN proposal in footnote 18.1;

In relation to (ii) above the Sub-Group shall consider :

- a) whether the issuance of compulsory licenses or the revocation, limitation or creation of property rights as described in the footnote could be regarded as expropriation and under what circumstances;
- b) whether such circumstances, if any, could have relevance to an Investment as defined in Article 1;

If the answer to either (a) or (b) is "no", the Sub-Group will recommend that there be no such provision in Article 18;

If the answer to both (a) and (b) above is "yes", the Sub-Group shall consider whether an expropriation under circumstances relevant to an Investment as defined in Article 1(4) would meet the tests at (a), (b), (c), and (d) in paragraph (1) of Article 18.

If it should be considered as failing, or possibly failing one of those tests, the Sub-Group shall nevertheless consider whether it should be permitted under the terms of the Basic Agreement and if so, under what conditions, and shall make recommendations.

If it should be considered as meeting all of those tests, the Sub-Group shall consider whether the compensation provisions in paragraph 1 and the provisions of paragraphs (2), (3) and (4) of Article 18 should apply to such expropriations. If not, the Sub-Group shall recommend either that such expropriation be excepted from the application of Article 18 or that other provisions should apply.

The Sub-Group shall also take into account an explanatory note to be submitted by the CDN delegation to the Sub-Group by 18 December 1992.

B.

Subject to footnote 18.1 and Chairman's conclusions under A, the Article 18 paragraphs (1) to (5) is now being referred to the Legal Sub-Group.

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.⁽¹⁾

(2) Transfers under paragraph (1) above shall be effected without delay and in a Freely Convertible Currency.

(3) Transfers shall be made at the [prevailing]⁽²⁾ 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) (3) Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may maintain laws and regulations (a) requiring reports of currency transfer.⁽⁴⁾ 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.

(5) (5) Notwithstanding paragraphs (2) and (3) a Contracting Party may in respect of Investments by Investors of another Contracting Party which shared the same currency as the former Contracting Party at the time the Investment was made, require transfers under paragraph (1) above to be made in the currency of the latter Contracting Party.

(6)

(7)

Specific comments

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

19.2 : RUF waiting reserve.

19.3 : CH expresses serious doubts about the appropriateness of this para (see BA-28 Annex II for more details).

19.4 : EC suggests insertion of subpara (b) reading:

"(b) laying down procedures for the declaration of capital movements for administrative or statistical purpose".

19.5 : Chairman's proposal for solving CIS concerns (see general comment in Article 19 of BA-26).

During the discussion in December WG II meeting RUF opposed this proposal as not fully reflecting its concerns. The Sub-Group chaired by RUF and consisting of other CIS republics and some Central and Eastern European countries came up with the suggestion of substituting para (2) with the following:

"Transfers under paragraph (1) above shall be effected without delay and in a Freely Convertible Currency if Investments were made in a Freely Convertible Currency. The above transfers, under mutual agreement of respective Contracting Parties, may be effected in another form, if national currencies of these Contracting Parties are not Freely Convertible."

while deleting the entire current text of para (5). This proposal was strongly opposed by the USA delegation.

19.6 : There are 3 suggestions for a new paragraph dealing with Balance of Payments issue:

a) CDN suggestion:

"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."

b) CH suggestion:

"Notwithstanding the provisions of paragraphs (1) and (2), a Contracting Party may in cases of exceptional balance of payments difficulties as regards the proceeds from the sale or liquidation of all or part of an Investment as referred to in paragraph (1)(f) and where large sums are involved limit the transfer to a minimum of 33 1/3 per cent per year. The Contracting Party taking a measure pursuant to this paragraph shall ensure that such measure is non discriminatory and is no broader in scope or duration than necessary."

c) RO suggestion:

"Without prejudice to the provisions of paragraphs (1) to (3), a Contracting Party may, in exceptional circumstances, exercise such restrictions, in accordance with its laws and regulations, as are strictly necessary, in scope or duration, to regulate the international capital movements."

19.7 : CDN proposes further new paragraph reading:

"Notwithstanding paragraph (1) (b) of this Article, a Contracting Party may restrict the transfer of a return in kind in circumstances where, consistent with the application of Article 5 or Article 41 Bis(2) of this Agreement, the Contracting Party may restrict or prohibit the exportation or the sale for export of the product constituting the return in kind."

(See BA-28, Annex I when seeking for explanation).

Chairman's conclusions

- USA and RUF delegations shall prepare a compromise text reflecting the issue described in footnote 19.5 and notify the Secretariat of their common efforts not later than 15 January 1993.
- H, RUF, CH and EC shall seek to withdraw their particular reserves or suggestions expressed in footnotes 19.1 to 19.4. Their decisions shall be forwarded to the Secretariat by 15 January 1993.
- The Legal Sub-Group is requested to review paragraphs (1) to (4) of this Article and report back on results before the next WG II meeting.
- A Sub-Group will discuss the Balance of Payment proposals on Monday 25 January 1993.
- The consideration of CDN proposal as indicated in footnote 19.7 would have to be postponed until Article 27 is more finalised and until trade experts are available at February WG II meeting.

ARTICLE 20

TAXATION

(1) [GENERAL EXCLUSION]⁽¹⁾

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]⁽¹⁾

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 of this Agreement.

[(3) APPLICATION OF PROVISIONS RELATING TO INVESTMENT]⁽²⁾

Notwithstanding para (1), the provisions imposing national treatment obligations or most favoured nation obligations under Part IV shall apply to taxation measures of the Contracting Parties other than those 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)]⁽³⁾ 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) EXPROPRIATORY AND DISCRIMINATORY TAXATION]⁽²⁾

- 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, 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.]⁽⁴⁾

[(6) DEFINITIONS]⁽²⁾

6.1 [The term "taxation measure" includes:]⁽⁵⁾

- 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 or Ministry of Finance or his or its authorized representatives.

General comments

J and RUF agreed to consider withdrawing their reserves footnoted in 20.2, 20.3 and 20.4 by 15 January 1993 by notifying the Secretariat. In a positive case the paragraph (1) combined with paragraphs (3) to (6) of this Article shall be referred to the Legal Sub-Group. In the negative case there will be a Sub-Group on Monday 25 January 1993 in the afternoon.

Specific comments

20.1 : The Working Group II will review the terms of the general exclusion and the possible coverage of services when the trade provisions and other relevant Articles in Parts III and V are further defined or completed.

20.2 : J scrutiny reserve.

20.3 : RUF reserve subject to expanding it also to 6.1(a).

20.4 : RUF scrutiny reserve.

20.5 : An addition to the definition might be needed subject to substance of Article 27 on the subject of economic unions.

ARTICLE 21

ASSIGNMENT OF RIGHTS

(1) If a Contracting Party, its designated agency [or a]⁽¹⁾ 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 in the Domain of another Contracting Party (the "Host Party") or otherwise acquires the rights and claims to such an Investment⁽²⁾, the Host Party shall recognise

(a) ⁽³⁾ 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].⁽⁴⁾⁽⁵⁾

(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.

(6)

General comment

The Chairman established Sub-Group on this Article chaired by IR and consisting of N, EC, RUF, CDN, USA and RO and open also to any other delegation which so wishes. The Sub-Group is asked to find a solution to the problems raised by delegations during the WG II meeting on 17 December 1992 with the following Terms of Reference:

To consider the outstanding problems in the Article and in particular :

- the issues concerning private sector indemnity which arise from the proposal for an amendment in line 1 of the chapeau of para (1) put forward by RUF, and the implications, if any, for future Investment,
- the elimination of any doubt as to whether the Article as drafted extends to automatic passage of rights outside the field of indemnity or guarantee,
- whether, and if so, how, the Article or the Basic Agreement should contain provisions governing the automatic acquisition of rights arising outside the field of indemnity or guarantee and in which circumstances,

- how the right of an Investor to appeal for ICSID arbitration can explicitly be secured also for cases in which this Investor was indemnified by a state agency and a subrogation took place.

The Sub-Group shall meet in Brussels on 26 January 1993. The venue and confirmation of the date will be communicated by the Secretariat.

Specific comments

21.1: RUF suggests substituting with: ",,".

21.2: EC suggests insertion of: "as the result of the complete or partial default of the Investor."

21.3: A suggests to start subpara (a) with or to insert in a proper place in subpara (a) the following:

"without prejudice to the rights of the Investor under Article 23".

21.4: General scrutiny reserve on the second sentence.

21.5: EC suggests substituting second sentence with:

", provided that a change in ownership arising other than from an indemnity or guarantee covering non-commercial risks shall be subject to approval by the Host Party in the same way as the initial Investment unless such approval was granted by the Host Party at the time of the initial Investment."

21.6: RO asks for adding a new para reading:

"The Host Party shall be entitled to set off taxes and other public charges due and payable by the Investor".

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.

Chairman's note

Negotiations finished with full agreement on substance. Subject to examination by the Legal 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 alleged breach of an obligation of the former under Part IV of this Agreement, relating to an Investment 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 in accordance with paragraph (4).
- (3) An Investor may submit a dispute as referred to in paragraph (1) to international arbitration or conciliation in accordance with paragraph (4) only if:
 - a) the Investor has consented in writing thereto;
 - b) the Investor has waived its right to initiate an action, in relation to the same subject matter, before the courts or tribunals of the Contracting Party concerned or, where an action has already commenced, the Investor has discontinued it before any judgement or award is made; and

- c) not more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the Investor has incurred loss or damage.
- (4) The dispute may, at the election of the Investor concerned, be submitted for settlement by arbitration or conciliation to:
- (a) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington 18 March 1965 (ICSID Convention); or
 - (b) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a) under the rules governing the Additional Facility for the Administration of Proceedings by the secretariat of the Centre (Additional Facility Rules); or
 - (c) an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
 - (d) an arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce; or
 - (e) an international arbitrator or ad hoc arbitration tribunal appointed by a special agreement.

In the event that the dispute is submitted to arbitration pursuant to subparagraph (e) above and the arbitrator or tribunal has not been appointed within the period of time specified by the special agreement, the Investor may submit the dispute to (a), (b), (c) or (d) above.

- (5) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
- (6) (a) The consent given in paragraph (5), together with the consent given under paragraph (3), shall satisfy the requirements for:
- (i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and
 - (ii) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").
- (b) Any arbitration under this Article shall be held in the State that is a party to the New York Convention, and claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention.
- (7) A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
- (8) An Investor other than a natural 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 4(a) above be treated as an Investor of that other Contracting Party.

(9) The awards of arbitration, which may include an award of interest, shall be final and binding and shall be enforceable in the Domain of the Contracting Parties.

(10) Any proceedings initiated under this Article are without prejudice to the rights of Contracting Parties under Article 24.

General comments

A Sub-Group chaired by Mr. Ervik and composed by AUS, CDN, SF, EC, S, USA and N has reviewed this Article. N and S were not present during the final discussion. The current text of Article 23 is Chairman's compromise text.

Deadline for written comments is 10 January 1993.

ARTICLE 24

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Agreement through diplomatic channels.
- (2) If the dispute has not been settled in accordance with paragraph (1) above within a reasonable time, except as otherwise provided for in this Agreement or unless the Contracting Parties otherwise agree in writing, either Contracting Party may, upon 60 days written notice to the other Contracting Party of its intention to do so, submit the matter to an ad hoc arbitral tribunal under this Article.
- (3) 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;
 - (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. 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 (2) 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 Secretary-General of the Permanent Court of International Arbitration (PCIA) 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],⁽¹⁾ the appointments shall be made by the First Secretary of the Bureau. [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 next most senior Deputy who is not a national or citizen of a Contracting Party;]⁽²⁾
- (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) In the absence of an agreement between the Contracting Parties to the contrary, the Arbitration rules of the United Nation Commission on International Trade Law (UNCITRAL) shall govern, except to the extent modified by the Contracting Parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members.
- (g) The tribunal shall decide the dispute in accordance with this Agreement and International Law.
- (h) The arbitral award shall be final and binding upon the Contracting Parties to the dispute.

- (i) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties to the dispute.
 - (j) Unless the Contracting Parties to the dispute agree otherwise, the tribunal shall sit in the Hague, and will use the premises and facilities of the Permanent Court of Arbitration.
 - (k) A copy of the award shall be deposited with the Secretariat who shall make it generally available.
-

General comments

- This revised draft of Article 24 is proposed by a Sub-Group chaired by Mr. Ervik and composed of representatives of CDN, EC, PL, RUF, USA and Mr. Bamberger.
- The new concept of Article 24 comprises Articles 24, 24 BIS and 24 TER and is together with Appendix D (former Article 41 TER) a package to be viewed in totality:
 - a) Dispute settlement for 41 BIS, Appendix D.
 - b) Dispute settlement for the rest of the Basic Agreement - except Article 5 which goes to GATT (Articles 24 and 24 BIS) with the following additional language at the beginning of Article 5 "except as otherwise provided in this Agreement".
 - c) An ad hoc fast track tribunal to deal with questions of authority as to whether Article 24 BIS applies.
- Delegations are invited to submit comments in writing hereto before 17 January 1993.

Specific comments

24.1 : Secretary General and the staff of the International Bureau have always been Dutch nationality.

24.2 : Further research is needed to confirm whether any provision has been made for instances where both the Secretary General and the First Secretary are absent and unable to act.

ARTICLE 24 BIS

A dispute between Contracting Parties concerning the application of provisions of the GATT or a related instrument referred to under Article 5 of this Agreement may be settled in the GATT and shall not be settled under Article 24.

General comments

(See general comments on Article 24).

ARTICLE 24 TER

(1) If a disagreement arises over whether Article 24 BIS applies to a dispute between Contracting Parties it may request that an ad hoc fast track tribunal determine whether Article 24 BIS applies. Such an ad hoc tribunal shall be constituted as follows:

(a) Within 30 days of the request pursuant to paragraph (1) the Contracting Parties in disagreement shall choose a sole arbitrator who may not be a national or citizen of a Contracting Party to the dispute. If, within 30 days of the receipt of the request for arbitration, the Contracting Parties are unable to agree on the appointment of a sole arbitrator, that appointment shall be made, in accordance with sub-paragraph (b) below, at the request of any Contracting Party;

(b) An appointment pursuant to sub-paragraph (a) above shall be made by the Secretary-General of the Permanent Court of International Arbitration (PCIA) 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],⁽¹⁾ the appointment shall be made by the First Secretary of the Bureau. [If the latter, in turn, is prevented from discharging this task or is a national or citizen of a Contracting Party, the appointment shall be made by the next most senior Deputy who is not a national or citizen of a Contracting Party;]⁽²⁾

(c) Appointments made in accordance with sub-paragraphs (a) and (b) above shall have regard to the qualifications and experience, particularly in matters covered by this Agreement, of the arbitrator to be appointed;

- (d) In the absence of an agreement between the Contracting Parties to the dispute to the contrary, the Arbitration rules of the United Nation Commission on International Trade Law (UNCITRAL) shall govern, except to the extent modified by the Contracting Parties to the dispute or by the arbitrator.
- (e) The arbitrator shall decide the dispute in accordance with this Agreement and International Law.
- (f) The arbitral award shall be final and binding upon the Contracting Parties to the dispute.
- (g) The expenses of the arbitrator, including his remuneration, shall be borne in equal shares by the Contracting Parties to the dispute. The arbitrator may, however, at his discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties to the dispute.
- (h) Unless the Contracting Parties to the dispute agree otherwise, the arbitrator shall sit in the Hague, and will use the premises and facilities of the Permanent Court of Arbitration.
- (i) A copy of the award shall be deposited with the Secretariat who shall make it generally available.
- (2) Neither Contracting Party shall initiate or continue dispute settlement proceeding under the GATT or a GATT related instrument pending the results of arbitration pursuant to this Article.

General comments

(See general comments on Article 24).

Specific comments

See specific comments on Article 24.

PART VI

CONTEXTUAL

[ARTICLE 25]⁽¹⁾

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.

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.

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]⁽¹⁾

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 the Domain of a Contracting Party.]⁽²⁾

Specific comments

26.1: USA, CDN, EC and RUF reserve.

26.2: USA can lift its reserve provided that the text of this Article be substituted with the following:

"Each Contracting Party shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including the observance by the regional, provincial and local governments and other governmental authorities within the Domain of a Contracting Party".

The Chairman invited all delegations under footnote 26.1 to consider USA language or come up with a concrete amendment to either option with the goal lifting their reserves at the next WG II meeting when this Article will be on agenda.

[ARTICLE 26A]⁽¹⁾

PROPERTY

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

Specific comment

26.A.1: N proposal.

ARTICLE 27

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.]⁽¹⁾
- (2) The provisions of this Agreement shall not preclude any Contracting Party from adopting or enforcing any measures:
- (a) necessary for the maintenance of public order;
 - (b) necessary to protect human, animal or plant life or health;
 - (c) 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 other Contracting Parties are entitled to an equitable share of the international 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
- provided that such measures shall not constitute disguised restrictions on Investment, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures

shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Agreement to an extent greater than is strictly necessary to the stated end.

(3) 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 international emergency in international relations involving the Contracting Party taking the measure; or
 - (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 such measures shall not constitute a disguised restriction on investment and that any such measure shall be duly motivated.

- (4) If a Contracting Party considers that any measure taken by another Contracting Party pursuant to paragraph (3) constitutes a disguised restriction on Investment or otherwise nullifies or impairs any benefit reasonable 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 consideration 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.
- (5) No Contracting Party may invoke the provisions of this Article to derogate from the requirements to pay compensation pursuant to Articles 17 or 18.
- (6) The provisions of this Agreement shall not be construed so as to oblige any Contracting Party to extend to another Contracting Party the benefit of any treatment, preference or privilege resulting from the former's membership in any existing or future customs union or free trade area.

Chairman's note

The text above is based on a CDN proposal attached to BA-28. The finalisation of it will depend upon the final form of the other Articles of this Agreement.

If any delegation wishes to propose amendments to this text, it should do so in writing to me in English to reach me on or before Sunday 14th February 1993. The contact address:

Sydney W. Fremantle
Department of Trade and Industry
1, Palace Street
London SW 1E 5HE
Tel.: 0044.71 - 238.3501
Fax : 0044.71 - 233.5807

All proposed amendments should be fully reasoned. If the reason is in part or wholly confidential, the delegations should inform me and I shall protect that confidence. If the delegation is willing, subject to the acceptance of others, to accept the text above but wishes to protect its negotiating position in case another delegation proposes amendments, it should again inform me and I shall keep that confidential. Any proposal for an amendment should explain why it is needed in the context of actual provisions in the latest draft of the Basic Agreement and if possible suggest changes in the text of such provisions which could remove the need for an amendment to the text of the above Article.

I shall decide on subsequent procedures in the light of the response, if any, to the invitation above.

Specific comments

27.1 : EC reserve on GATT reference approach.

PART VII

STRUCTURAL AND INSTITUTIONAL

General comment

Current drafting of Part VII is based on not yet finished negotiations of other Articles of the Basic Agreement, therefore this Part will be revisited after all other Articles are finalised.

The Articles under the Part VII are now being referred to the Legal Sub-Group.

[ARTICLE 28]⁽¹⁾

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 a number of Protocols.

(2) The assent of the Charter Conference shall be required for the negotiation of a Protocol. Any Contracting Party may participate in such negotiation. A Protocol shall apply only to the Contracting Parties which consent to be bound by it. [The provisions of Articles 29 and 30 shall apply to the adoption of the text of Protocols.]⁽²⁾

(3)

(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 Signatory to the Charter and a Party to this Agreement.

(4) Subject to paragraph (3) above, final provisions applying to a Protocol shall be defined in that Protocol.⁽⁴⁾

Specific comments

28.1 : General reserve.

28.2 : EC contingency reserve pending the outcome of Article 30.

28.3 : Reminder - this draft of Article 28 departs from the text of BA-26 by omitting para (2) of Article 28.

28.4 : Chairman's proposal after considering detailed text of Part VIII.

[ARTICLE 29]⁽¹⁾

CHARTER CONFERENCE

- (1) The Contracting Parties shall meet periodically in a Conference of the Parties (hereafter called "the Charter Conference") at which each Contracting Party shall have one representative. The first meeting of the Charter Conference shall be convened by the provisional Secretariat designated on an interim basis under Article 31 paragraph (5), not later than ninety days after the closing date for signature of this Agreement as specified in Article 33. Each subsequent ordinary meeting of the Charter Conference shall be held at a time determined by the preceding meeting of the Conference.

- (2) Extraordinary meetings of the Charter Conference may be held at times other than those referred to in paragraph (1) of this Article 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 Charter Conference shall:
 - (a) carry out the duties assigned it by this Agreement and Protocols;

 - (b) keep under review and facilitate the implementation of the principles of the Charter and of the provisions of this Agreement and the Protocols;

 - (c) facilitate in accordance with this Agreement and Protocols the co-ordination of appropriate general measures to carry out the principles of the Charter;

 - (d) consider and adopt programmes of work to be carried out by the Secretariat;

- (e) [in respect of administrative costs and other expenses, consider and approve the annual accounts and budget estimates;]⁽²⁾
- (f) consider and approve the terms of any headquarters agreement, including any privileges and immunities considered necessary for the Charter Conference and the Secretariat to carry out their functions under this Agreement and the Protocols;
- (g) encourage cooperative efforts aimed at facilitating and promoting market oriented reforms and modernisation of energy sectors in the countries of Central and Eastern Europe and the Former Soviet Union;
- (h) initiate negotiation, consider and adopt the text of Protocols;⁽³⁾
- (i) appoint the Secretary General and take all decisions necessary for the establishment and functioning of the Secretariat including the structure, staff levels and standard terms of employment of officials and employees.
- (4) In the performance of its duties, the Charter Conference, through the Secretariat, shall cooperate with and draw as fully as possible, consistently with economy and efficiency, on the services and programmes of other institutions and organisations with established competence in matters related to the objectives of this Agreement.
- (5) The Charter Conference may appoint such subsidiary bodies as it considers appropriate for the performance of its duties or vary the terms of their appointments or terminate them.
- (6) The Charter Conference shall agree upon and adopt rules of procedure and financial rules for itself, for the Secretariat referred to in Article 31 in respect of the staff matters referred to in Article 31(2) and (3) and for any subsidiary bodies it may establish under paragraph (5) of this Article.

(7) In 1999 and thereafter at intervals (which shall not be more than 5 years) to be decided by the Charter Conference, the Charter Conference shall thoroughly review the functions in the light of the extent to which the provisions of this Agreement and Protocols have been implemented. Following each review the Charter Conference may amend or abolish the functions specified in paragraph (3), the rules of procedure and financial rules specified in paragraph (6) and may discharge the Secretariat.

Chairman's note

The accompanying Ministerial statement would request the Secretary General to make immediate contact with other international bodies in order to discover the terms on which they might be willing to undertake tasks arising from the Basic Agreement and the Charter. The Secretary General might report back to the Charter Conference at the meeting required under Article 29(1) not later than ninety days after the closing date of signature.

Specific comments

29.1 : General reserve.

29.2 : EC agreed to reword this subparagraph taking into account its suggestion for amendment raised during the WGII discussion on 16 December and also the possibility of the budget revision during the year and its review against the real costs and expenses. The following wording, which in EC's view meets this goal, should be substituted for the subpara (e):

"In respect of administrative costs and other expenses, adopt annual budget prior to the beginning of each financial year and approve the annual accounts."

29.3 : This will be reconsidered by the Legal Sub-Group in the light of interrelation with other Articles dealing with the whole process of negotiation, consideration and adoption of Protocols.

[ARTICLE 30]⁽¹⁾

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 texts of amendments to this Agreement other than for Articles 29 and 31, [the initiation of negotiations of any Protocol,]⁽²⁾ agreement to accessions under Article 36, and the approval of Association Agreements shall be by consensus.
- (3) Voting provisions for adoption of texts of amendments and for accessions to any Protocol shall be defined in that Protocol.
- (4) Decisions regarding budgetary matters of the Charter Conference and Secretariat including amendments to Annex B referred to in Article 32 (3) of this Agreement, shall, subject to paragraph (1) above, be taken by a qualified majority consisting of that proportion of the Contracting Parties which under Article 32 below together contribute at least three fourths of the mandatory funding to meet the administrative costs of the Charter Conference and the Secretariat.
- (5) In all other cases, unless otherwise stated, decisions shall be taken by a three fourths majority vote of the Contracting Parties present and voting at the meeting of the Charter Conference 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 the positive and expressed support of a majority vote 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.

Specific comments

30.1 : General reserve.

30.2 : Pending advice from the Legal Sub-Group on the resolution of Protocols' procedures.

[ARTICLE 31]⁽¹⁾

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 Charter Conference, initially for a period of maximum 5 years.
- (3) In the performance of its duties under this Agreement the Secretariat shall be responsible to and report to the Charter Conference.
- (4) The Secretariat shall provide the Conference with all necessary assistance for the performance of the duties defined in Article 29(3) and shall carry out the functions assigned to it in this Agreement and in any Protocol and any other functions assigned to it by the Charter Conference.
- (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 Secretariat under this Article.

Specific comments

31.1 : General reserve.

[ARTICLE 32]⁽¹⁾

FUNDING PRINCIPLES

- (1) Each Contracting Party shall meet its own costs of representation at meetings of the Charter Conference and subsidiary bodies.
- (2) Expense of meetings of the Charter Conference and subsidiary bodies shall be regarded as an administrative cost of the Secretariat.
- (3) The administrative costs and other expenses of the Secretariat shall be met by the Contracting Parties by contributions payable in the proportion specified in Annex [B], which may be amended from time to time according to the procedure in Article 30 (4).
- (4) Each Protocol shall contain provisions for meeting any administrative costs and other expenses arising from the provisions of that Protocol.
- (5) The Charter Conference may accept voluntary contributions from one or more Contracting Parties or from other sources.

Specific comments

32.1 : General reserve.

PART VIII
FINAL PROVISIONS

General comment

- General waiting reserve.
- With regard to Chairman's suggestion on new Article 28 (4) the reference to Protocol has been deleted from Articles 34, 36, 37 and 38.
- Articles 33, 34, 35, 36, 37, 38, 39, 43 (except para 3), 44 and 45 (except footnote 45.1) are now being referred to the Legal Sub-Group.

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 shall be subject to ratification, acceptance or approval by [Signatories].⁽¹⁾ Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

Specific comments

34.1 : The Legal Sub-Group recommends introducing a definition of "Signatory". The Chairman of the Legal Sub-Group will incorporate this definition when making the overall legal scrutiny.

[ARTICLE 35]⁽¹⁾

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 Depositary, 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 Depositary 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 Depositary. 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 Depositary.

Specific comment

35.1: EC and N scrutiny reserve.

ARTICLE 36

ACCESSION

This Agreement shall be open for accession by States and Regional Economic Integration Organisations which have signed the Charter from the date on which the Agreement is closed for signature⁽¹⁾. The instruments of accession shall be deposited with the Depositary.

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 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 texts of 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]⁽¹⁾

Where, in order to further the implementation of the objectives and the principles of the Charter or the provisions of this Agreement, it is considered necessary or desirable by the Charter Conference referred to in Article 29 to permit a State, international organisation or Regional Economic Integration Organisation to associate itself with this Agreement, an Association Agreement shall be submitted to the Charter Conference 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 Charter Conference].

Specific comments

38.1 : The Article will be redrafted by the Legal Sub-Group, in particular with relation to Protocols, pursuant to Article 28(4).

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 39 BIS]⁽¹⁾

The provisions of the Basic Agreement do not bind any of the Contracting Parties in relation to any act or fact which took place, or any situation which ceased to exist, before the date of the entry into force of this Agreement.

Specific comments

39 BIS. 1 : RO proposal.

After discussion in WG II on 18 December 1992 Chairman asked RO to forward to the Secretariat written statement indicating its concerns on the need for this Article in the Basic Agreement. The proposal is considered as conditional depending on whether or not the substance is covered by Vienna Convention.

[ARTICLE 40]⁽¹⁾⁽²⁾

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]⁽³⁾.

Specific comments

40.1: N scrutiny reserve.

40.2: CDN reserve. During WG II meeting on 18 December 1992 CDN pointed out that this Article is not complete and raised some questions in relation to other Articles of the BA. To meet its concerns CDN will prepare a new draft of this Article and forward it to the Secretariat before the next WG II meeting.

40.3: J suggests replacing the whole Article with :

"(1) Any Signatory of this Agreement may notify the Depositary 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 Depositary shall inform all Contracting Parties and Signatories of the notification made in accordance with paragraph (1) of this Article."

After discussion of J suggestion in WG II on 18 December 1992 Chairman concluded that J proposal can be revisited if the periods for signature or entry into force after signature will be longer.

[ARTICLE 41]⁽¹⁾⁽²⁾

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.]⁽³⁾

Specific comments

- 41.1: General reserve subject to finalisation of other Articles of this Agreement. Substance should be moved to Article 16 when the negotiations on this Article reach more advanced stage.
- 41.2: N reserve pending in particular the outcome of the Norwegian proposal on reservations in Article 16.
- 41.3: 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]⁽¹⁾

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) ⁽²⁾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]⁽³⁾.
- (3) ⁽⁴⁾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 at the level applied on such date of signature or deposit, on Energy Materials and Products imported into its Domain.
- (4) ⁽⁴⁾⁽⁵⁾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 applied on the date of its signature or deposit as referred to in paragraph (3).
- (5) ⁽⁴⁾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.

(6 bis)⁽⁶⁾ Appendix D to this Agreement shall apply to disputes regarding compliance with provisions applicable to trade under this Article, except that Appendix D shall 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 this Article;
or

(b) establishes a free-trade area or a customs union as described in paragraph 5 of Article XXIV of the GATT.

(7) [The Charter Conference] 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
- XXVIII 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⁾

APPENDIX D

INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT

- (1) (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 about existing or proposed measures or other matters 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 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 Secretariat, 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.

(2) (a) If the Contracting Parties fail to resolve a matter through consultations within 45 days of a request under paragraph (1)(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 of 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 paragraph (2) (a) above shall be promptly notified to the Secretariat, 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 third-party dispute settlement within 30 days of the date of a request for third-party dispute settlement made pursuant to paragraph (2)(a) above, either Contracting Party may deliver to the Secretariat a written request for the establishment of a panel in accordance with paragraph (2) (d)-(f) below. In its request it shall state the substance of the dispute and indicate which provisions of Article 41 BIS and of the GATT and Related Instruments are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.
- (d) Any other Contracting Party which has a substantial interest in the matter shall be entitled to participate as an intervenor in the dispute resolution by delivering to the disputing Contracting Parties, to any other Contracting Party that has joined as an intervenor under this subparagraph, and to the Secretariat, no later than the date of establishment of a panel as determined in accordance with paragraph (2) (e) below, written notice of its intention to participate. An intervenor shall have the right to make submissions to the panel and to participate in the panel proceedings.
- (e) A panel shall be deemed to be established 45 days after the date of receipt of the written request of a Contracting Party by the Secretariat pursuant to paragraph (2)(c) above.
- (f) A panel shall be composed of three members who shall be chosen from the dispute settlement roster described in paragraph (7) below. Within 15 days of establishment of the panel each of the two original disputing Contracting Parties shall choose one member of the panel. The disputing Contracting Parties shall agree on the identity of the third panelist who shall chair the panel. If a Contracting Party

fails to choose a panelist within 15 days, such panelist shall be chosen promptly by the head of the Secretariat from the roster described in paragraph (7) below. 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 head of the Secretariat from the roster described in paragraph (7) below. No panelist chosen shall be a citizen of either of the disputing Contracting Parties or any other Contracting Party which as of the time of selection of the panel has delivered a written notice under paragraph (2)(d) unless both of the disputing Contracting Parties agree otherwise.

- (g) The Secretariat shall promptly notify all Contracting Parties that a panel has been composed.
 - (h) In seeking to resolve matters that are considered by a Contracting Party to affect compliance with Article 41 BIS 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.
- (3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Appendix. The panel shall also have the right to adopt additional rules of procedure not inconsistent with the rules of procedure adopted by the Charter Conference or with this Appendix. In a proceeding before a panel each participating Contracting Party shall have the right to at least one hearing before the panel to provide a written submission and written rebuttal argument. The proceedings of the panel shall be confidential. A panel shall 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 disputing Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by the disputing Contracting Parties, the panel shall base its decision 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 the disputing 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.

- (b) A panel shall be the judge of its own jurisdiction. Any objection by a participating Contracting Party 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.
- (c) In the event of two or more requests for establishment of a panel in relation to disputes that are substantively similar, the head of the Secretariat may with the consent of all the disputing Contracting Parties appoint a single panel.

- (4) (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 disputing 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 disputing 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 disputing 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.

A panel shall issue its final report by providing it promptly to the Secretariat and to the participating Contracting Parties. The Secretariat 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, 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 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.
- (c) Panel reports shall be adopted by the Charter Conference, acting by a three fourths majority vote in accordance with Article 30(5). In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be considered for adoption by the Charter Conference until at least 30 days after it has been provided to all Contracting Parties by the Secretariat. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretariat at least 10 days prior to the date on which the report is to be considered for adoption by the Charter Conference, and the Secretariat shall promptly provide them to all Contracting Parties. Participating Contracting Parties shall have the right to participate fully in the consideration of the panel report on that dispute by the Charter Conference, 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 Charter Conference is essential. A Contracting Party which is subject to a ruling or recommendation of a final panel report that has been adopted by the Charter Conference shall inform the Charter Conference 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 Charter Conference why this is so and shall, in light of this explanation, have a reasonable period of time in which to so comply. The aim of dispute resolution is the modification or removal of inconsistent measures.

(5) (a) 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 Charter Conference, 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.

(b) 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 Charter Conference to suspend obligations owed by it to the noncomplying Contracting Party under Article 41 BIS.

(c) The Charter Conference, 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 equivalent in the circumstances.

(6) (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 paragraph (6) (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 (4)(d) above, to examine the level of obligations that the injured Contracting Party proposes to suspend. The Charter Conference, acting by consensus, may adopt special rules of procedure for panels composed under this subparagraph. If the Charter Conference 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 Secretariat 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 Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than its next meeting following 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 Charter Conference, 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 equivalent in the circumstances, unless prior to the expiration of the 30 days period, the Charter Conference, 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.
- (7) Each Contracting Party may designate two individuals, and the Secretary General may also designate, with the approval of the Charter Conference, acting by consensus, not more than ten individuals, who are willing and able to serve as panelists for purposes of dispute resolution in accordance with paragraphs (2) to (4) above. The Charter Conference may in addition decide, acting by consensus, to designate for the same purposes, up to 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 Appendix, 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 Appendix. 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 designation by the head of the Secretariat being subject to approval of the Charter Conference, acting by consensus.

- (10) Notwithstanding the provisions contained in this Appendix, Contracting Parties are encouraged to consult throughout the pendency of any dispute resolution proceeding with a view to settling their dispute.

General comments

- The new paragraph (6 bis) and Appendix D is proposed by a Sub-Group chaired by Mr Ervik and composed of representatives of CDN, EC, PL, RUF, USA and Mr Bamberger.
- Article 41 TER is deleted and the substance thereof is contained in Appendix D to Article 41 BIS of the Basic Agreement.
- New paragraph (6 bis) and Appendix D create, together with the new concept of Article 24, a package to be viewed in a totality (see general comments on Article 24).
- The references to the Secretariat and Charter Conference are without prejudice to resolution of institutional questions in the final text of the Basic Agreement.
- Delegations are invited to submit to the Secretariat their comments in writing before 17 January 1993.

Specific comments

41 BIS.1 : General scrutiny reserve.

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

41 BIS.3 : During the November WG II meeting 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. To date Secretariat has received responses from CDN, AUS and CH. USA and GB delegations are asked to submit their findings on subsidies and countervailing duties and import licencing procedures respectively to the Secretariat as soon as possible for completion of Annex G.

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

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

41 BIS.6 : RUF stated that it might need to come back to para (6 bis) if there are any changes in Article 41 BIS.

41 BIS.G.1: N reserve.

Article 41 QUAT

By derogation from Article 5 BIS, so long as a Contracting Party is not a member of GATT or 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.

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 41 BIS (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]⁽¹⁾. In exceptional cases the Charter Conference can decide to prolong this period by one year⁽²⁾.
- (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;]⁽³⁾⁽⁴⁾

(c) of any application to the Charter Conference 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);]⁽³⁾⁽⁴⁾

(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 Charter Conference 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)].⁽⁶⁾

General comment

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

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 in its view 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 frequency 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 the appropriate provisions of any Protocol to which the withdrawing Contracting Party is a party, as defined in that 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]⁽¹⁾⁽²⁾.
 - (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 will present a proposal after examination of the Basic Agreement with a purpose of refining this Article indicating provisions from other Articles which should not apply to Article 43.
- 43.2: J will draft a provision on protection of Investments of the withdrawing Contracting Party in the Domain of other Contracting Parties and submit it to the Secretariat by 15 January 1993.

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 and Signatories to the Charter by sending them certified copies, 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;
 - [(a bis) any reservation made under Article 41];⁽¹⁾
 - (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.

Specific comments

44.1: Pending the outcome of deliberation of Article 41.

ARTICLE 45

AUTHENTIC TEXTS

[The original of this Agreement of which the English, French, German, Italian, Russian and Spanish⁽¹⁾ texts are equally authentic, shall be deposited with the Government of the Portuguese Republic.

In witness whereof the undersigned, being duly authorised to that effect, have signed this Agreement.]⁽²⁾

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

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: EC suggests that this part should be substituted with the following language:

"In witness whereof the undersigned, being duly authorised to that effect, have signed texts in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic".