

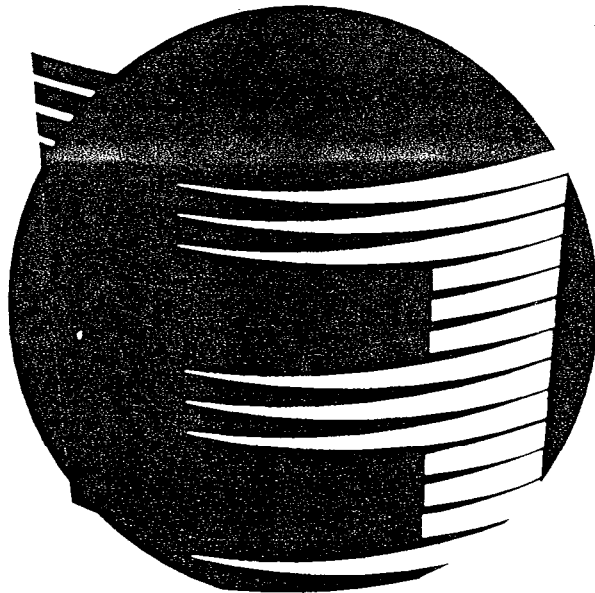
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DRAFT

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TREATY

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Brussels, 20 December 1993

NOTE FROM THE SECRETARIAT

Subject: Draft Energy Charter Treaty – sixth version

1. The annexed draft Treaty with the Ministerial Declaration and all Annexes (except for Annex T) records the position reached after the discussions at the Plenary meeting on 14–17 December 1993. Annex A is no longer applicable.
2. It has not been feasible to footnote in each Article the consequences of the N proposal circulated in Room Document 18 of 17 December 1993. N has been invited to submit this proposal in a form suitable for circulation as a CONF document.
3. For ease of reference, a list of the commitments undertaken by delegations on particular Articles of the Charter Treaty is being circulated together with the new draft Treaty.

DRAFT

ENERGY CHARTER TREATY

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 an Energy Charter Treaty 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;

Whereas Contracting Parties attach the utmost importance to the effective implementation of full National Treatment and this general commitment will be applied with regard to the making of investments according to the provisions of a supplementary Agreement to be negotiated in good faith within three years;

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 necessity of a most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Having regard to the increasing urgency of measures to protect the environment, including the decommissioning of energy installations and waste disposal, and to the need for internationally agreed objectives and criteria for this purpose;

[Recalling the United Nations Framework Convention on Climate Change, the ECE Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects, and recognizing the increasing urgency of measures to protect the environment, including internationally agreed measures;](1)

HAVE AGREED AS FOLLOWS:

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Specific comments

P.1: General scrutiny reserve.

CHAIRMAN'S NOTE

For Articles on which full agreement has been reached, or where there are only one or two remaining reservations which have already been exhaustively discussed, the Charter Treaty text contains the note "Negotiations in the Plenary finished". This does not mean that delegations are prevented from reopening discussion of a particular Article in the final stages of negotiation. It should be recognised however that there are only two legitimate reasons for requesting such a rediscussion:

- a) because the wording agreed for another Article of the Charter Treaty requires, on grounds of logic or law, a consequential change in the text of an Article which had already been agreed; or
- b) because a delegation feels, at the end of the negotiations of the whole Charter Treaty, that the overall balance needs to be adjusted by making a change in the text of an Article which had previously been agreed.

In the other case described above, where there are only one or two remaining reserves or proposed amendments which have already been discussed, the relevant footnotes have been moved to the end of the Charter Treaty on pages 93 to 96. Again the Plenary should only revert to these Articles for the reasons described above. Delegations with footnotes should of course notify the Secretariat if they have decided on their withdrawal.

**PART I**

**DEFINITIONS AND GENERAL PROVISIONS**

**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;
- (3) ["Regional Economic Integration Organisation" means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Agreement, including the authority to take decisions binding on them in respect of those matters.](1)
- (4) "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 items of HS or CN included in Annex EM.
- (5) "Economic Activity in the Energy Sector" means an economic activity in the business of the exploration, extraction, refining, production, storage, transport, transmission, distribution, trade, marketing, or sales of Energy Materials and Products except those included in Annex NI.

(6) "Investment" means every kind of asset, [owned or controlled directly or indirectly by an investor]<sup>(2)</sup> [and includes]<sup>(3)</sup>:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds, and debt of, a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an investment];<sup>(4)</sup>

(d) Intellectual Property;

(e) [any right]<sup>(5)</sup> conferred by law, contract or by virtue of any licences and permits granted pursuant to law.

(6)

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 this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, "Investment" refers to any investment associated with an "Economic Activity in the Energy Sector."



(7) ["Investor" means:

(a) with respect to a Contracting Party

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable laws;

(ii) a company or other organisation organised in accordance with the laws applicable in that Contracting Party

(b) with respect to a "third state", a natural person, company or other organisation which fulfills, mutatis mutandis, the conditions specified in sub-paragraph (a) for a Contracting Party.](7)

(8) ["Make Investments" means establishing a new investment, acquiring all or part of an existing investment [DL] or substantially expanding or altering the type or the objective of an existing investment;](8)

(9) "Returns" means the amounts derived from or associated with an investment, irrespective of the form in which paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees, and payments in kind.

(10) "Area" means with respect to a Contracting Party:

(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea, and

(b) subject to and in accordance with the international law of the sea; the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights [and] jurisdiction.

With respect to a Regional Economic Integration Organisation which is or becomes a Contracting Party to this Agreement, Area means the areas of the member states of such an Organisation, under the provisions laid down in the agreement establishing that Organisation.

(11) ["GATT and Related Instruments" means:

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

(b) agreements, arrangements, decisions, understandings, or other joint action within the framework of the General Agreement on Tariffs and Trade.](9)

(12) "Intellectual Property" includes copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.(10)

(13) "Protocol" means an agreement authorised and adopted by the Charter Conference and entered into by any of the Contracting Parties 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.

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

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Chairman's note

Negotiations in the Plenary finished, except for the question of "Control" and "Intellectual Property".

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Specific comments

1.2 : Sub-Group Chairman advised a transitional measure until RUF has completed required legislation related to the definition of control. (RUF's acceptance of Article 30(7) depends on a satisfactory solution of this question).

J understands that the Sub-Group could not establish a general definition of "controlled", and therefore, interpretation of the meaning of "controlled" will be left to the discretion of each Contracting Party in which the Investment is made and each Contracting party will be able to decide the meaning of "controlled" in accordance with its national legislation. In this regard, J thinks that there should be an explicit record in the Ministerial Declaration to that effect in order to avoid any misunderstanding or confusion in the future.

1.8 : EC scrutiny reserve. USA and CH reserve. CH suggested the following alternative formulation: "...acquiring all or part of an existing investment or moving into a different field of activity."

**ARTICLE 2**

**PURPOSE OF THE AGREEMENT**

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

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Chairman's note

Negotiations in the Plenary finished.

PART II

COMMERCE

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

ACCESS TO ENERGY RESOURCES AND MARKETS

- (1) The Contracting Parties will strongly promote access to local, export and international markets for the acquisition and disposal of Energy Materials and Products on commercial terms and undertake to remove progressively barriers to trade. [DL]
  - (2) They will, accordingly, seek to ensure that price formation shall be based on market principles.
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Specific comments

3.1 : N wants this Article deleted and replaced with two separate Articles reading:

**ACCESS TO ENERGY RESOURCES**

- (1) 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.
- (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 state that is not a Contracting Party, whichever is most favourable.

#### 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 13, 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. In general, price formation shall be based on market principles.

#### [ARTICLE 4](1)

#### TRADE IN ENERGY MATERIALS AND PRODUCTS

[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, as they are applied under GATT rules between particular Contracting Parties which are parties to the GATT].(2)

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Specific comments

4.1: EC reserve.

4.2: In the June Plenary several delegations questioned the wording on the relation of the Charter Treaty to GATT and its Related Instruments. No conclusion could be reached. Chairman proposed that the delegations involved would have informal consultations, with the aim of reaching agreement. In this context it should be noted that the Legal Sub-Group was asked to draft a general provision assuring that the Charter Treaty does not derogate from the GATT. The wording proposed by the Legal Sub-Group is:

"Nothing in this Agreement shall derogate from the provisions of the GATT and Related Instruments, as they are applied from time to time between particular Contracting Parties which are parties to the GATT."

ARTICLE 5

DEVELOPMENTS IN INTERNATIONAL TRADING ARRANGEMENTS

Contracting Parties undertake that in the event of the adoption of agreements within the framework [DL] of the GATT or other significant and relevant developments in the international trading system, [DL] they will consider, within two years of such an adoption or development, appropriate amendments to this Agreement.

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General comment

Redraft of the Article following the instructions of the October Plenary (identical with the document CONF-74).

## ARTICLE 7

### COMPETITION

- (1) The Contracting Parties agree to work to alleviate market distortions and barriers to competition in [Economic Activity in the Energy Sector.](1)
- (2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in [Economic Activity in the Energy Sector.](1)
- (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.
- (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area 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 may inform the other, 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) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy.
- (7) The procedures set forth in paragraph (5) or in Article 31(1) shall be the exclusive means within this Agreement of resolving any disputes that may arise over the implementation or interpretation of this Article.

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Chairman's note

Negotiations in the Plenary finished.

[ARTICLE 8](1)(2)

TRANSIT

- (1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and 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) Contracting Parties shall encourage relevant entities to cooperate in:  
In:



- (a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products;
  - (b) the development and operation of Energy Transport Facilities serving the Area of more than one Contracting Party;
  - (c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products;
  - (d) facilitating the interconnection of Energy Transport Facilities.
- (3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, except if otherwise provided for in an existing International agreement.(3)
- (4) [In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, subject to applicable legislation which is compatible with paragraph (1) of this Article.](4)(5)
- (5) [A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to
- (a) permit the construction or modification of Energy Transport Facilities, or
  - (b) permit new or additional Transit through existing Energy Transport Facilities,

which it [demonstrates]<sup>(6)</sup> to the other Contracting Parties concerned would endanger [the security or efficiency of its energy systems, including the security of supply.]<sup>(7)</sup>

Subject to paragraphs (6) and (7), Contracting Parties shall secure established flows of Energy Materials and Products to, from or between the Area of other Contracting Parties.]<sup>(8)(9)</sup>

(6) A Contracting Party through whose Area Energy Materials and Products Transit shall not in the event of a dispute over any matter arising from that Transit interrupt or reduce, nor permit any entity subject to its control to interrupt or reduce, nor require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products except where this is specifically provided for in a contract or other agreement governing such Transit or where the procedure in paragraph (7) has been completed.

(7) (a) The parties to a dispute relating to paragraph (6) shall exhaust any contractual or other dispute resolution remedies they have previously agreed;

(b) If this fails to resolve the dispute, a party to the dispute may refer it to the Secretary General with a note summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral;

(c) Within 30 days of receipt of such a note, the Secretary General, in consultation with the parties to the dispute and the Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or resident in the Areas through which the Transit occurs, from which the Energy Materials and Products being transported originate or to which the Energy Materials and Products are being supplied;

- (d) The conciliator shall conciliate between the parties to the dispute and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until such resolution;
  - (e) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (7)(d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier;
  - (f) No dispute concerning a Transit which has already been the subject of the conciliation procedures set out in this Article may be referred to the Secretary General under paragraph (7)(b) above unless the previous dispute has been resolved;
  - (g) Standard provisions on conciliator's expenses, location, etc shall be decided by the Charter Conference.
- (8) [This Article shall not derogate from a Contracting Party's rights and obligations under existing bilateral or multilateral agreements [including Articles 4 and 35 of this Agreement.](10)](11)
- (9) This Article shall not be interpreted as to oblige any Contracting Party which does not have a category of Energy Transport Facilities used for Transit to take in relation to that category any measures pursuant to the provisions of this Article. Such Contracting Parties would, however, be obliged to comply with paragraph (4).

(10) (12) For the purpose of this Article:

(a) "Transit" means the [carriage]<sup>(12)</sup> through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of products and materials originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party. [It also means such [carriage]<sup>(12)</sup> through the Area of a Contracting Party of products and materials originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by jointly notifying the Secretary General of that intention who shall notify all other Contracting Parties. The deletion shall take effect four weeks after such former notification without further procedures.]<sup>(13)</sup>

(b) "Energy Transport Facilities" consist of high pressure gas transmission pipelines, high voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.

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General comment

Subject to discussion in Plenary on Article 36, RUF noted that there might be a need for transitional provisions covering Article 8, in relation to transit between CIS countries.

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Specific comments

8.1 : N waiting reserve. N accepts that the new definition of Area in Article 1 is helpful in this context but points out that the issues covered by Article 8 do not fall within the sovereign rights or jurisdiction exercised by coastal states over their Continental Shelf or exclusive economic zones. For the purpose of clarity N therefore suggests using the word "territory" instead of "Area" in the definition of Transit in paragraph (10)(a), and whenever the word is used in this Article.

USA supported by J suggests explicit exclusion of maritime transport from Article 8 (as well as from the Charter Treaty as a whole) - see footnote 8.12.

8.2 : CDN contingency reserve pertaining to paragraphs (5), (6) and (7) pending a solution to the pre-emption of its regulatory authorities' statutory powers to interrupt energy flows.

8.3 : AUS contingency reserve. Removal of reserve depends on AUS concerns about coverage of transport in the Agreement being met through adoption of a legally binding GATT reference approach.

CDN scrutiny reserve.

8.4 : General scrutiny reserve to consider the effect of the new definition of Area on this paragraph.

8.5 : N reserve. Suggests substituting "Making Investment" for concept of establishment, and seeks clarification on coverage of transport Investments by Part III of this Agreement.

8.6 : Chairman asked translators to ensure that Russian language text correctly reflects that there is a distinction between "demonstrate to" and "convince".

8.7 : U proposes replacement with: "the security or efficiency, including reliability of supplies, of its energy systems or the systems of other Contracting Parties."

8.8 : RUF scrutiny reserve.

8.9 : CH contingency reserve pending Article 27, and clarification of relationship between Article 8(5)(a) and (4).

8.10: CDN scrutiny reserve.

8.11: Subject to advice from Legal Sub-Group on implications.  
EC scrutiny reserve.

8.12: See footnote 8.1.

USA reserve. Suggests replacement of "carriage" in Article 8(10)(a) by "movement over land" and explicit exclusion of maritime transport from coverage of Article 8 (as well as from the Charter Treaty as a whole), by the following wording:

"Nothing in this Agreement shall apply to maritime transport (including inland waterways) and related activities, and to air transport (including speciality air services)".

The intention of the phrase "related activities" would be to exclude lightering, fuel bunkering and offshore services. USA also proposes deletion from Ministerial Declaration to Article 1(5) of "for example" and "e.g." in chapeau and third tiset respectively.

USA reserves possibility of further modification of Article 13(6) in the same sense.

N draws attention to its proposal contained in CONF-52 for a separate Article on the material scope of application of the Charter Treaty.

8.13: General scrutiny reserve. In response to concerns expressed, inter alia, by EC and N, the Chairman suggested that if a third party Contracting Party felt it was affected by an Annex N listing, it could raise the matter in the Charter Conference.

[ARTICLE 9]<sup>(1)</sup>

TRANSFER OF TECHNOLOGY

- (1) The Contracting Parties agree to promote 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 [in accordance with their laws and regulations]<sup>(2)</sup>, subject to the protection of the Intellectual Property rights.
- (2) Accordingly to the extent necessary to give effect to paragraph (1), the Contracting Parties shall eliminate existing and create no new obstacles for transfer of technology, in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

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Specific comments

9.1: USA suggests new text for this Article reading:

ACCESS TO AND TRANSFER OF TECHNOLOGY

Subject to the protection of the Intellectual Property rights, to non-proliferation and other international obligations, and to their laws and regulations, the Contracting Parties

- (a) agree to promote access to and transfer of technology and related equipment and services employed in Economic Activity in the Energy Sector on a commercial and non-discriminatory

basis, in order to assist effective trade and Investment and to implement the objectives of the Charter; and

- (b) to give effect to paragraph (1), shall strive both to eliminate existing, and to create no new, obstacles to access to and transfer of technology and related equipment and services employed in Economic Activity in the Energy Sector.

USA proposal received no support. USA was asked to reconsider it.

- 9.2: RUF will reconsider this Chairman's compromise and in case it will not be acceptable will circulate its own redraft in good time before the next Plenary.

#### [ARTICLE 10](1)

#### ACCESS TO CAPITAL

- (1) Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and to finance Investment in the Economic Activity in the Energy Sector of Contracting Parties, particularly those with economies in transition. Accordingly each Contracting Party will endeavour to promote conditions for access to its capital market for its companies and nationals and for companies and nationals of other Contracting Parties for Making or assisting Investment in Economic Activity in the Energy Sector in the Area of other Contracting Parties. [Consistent with](2) existing international agreements, no Contracting Party shall apply terms for access to private sources of finance within its jurisdiction for the purposes of Investment in the Economic Activity in the Energy Sector of another Contracting Party less favourable than those applied in like circumstances for the purposes of Investment by nationals or companies of the Contracting Party in its own energy sector or in that of any other Contracting Party or any third state, whichever is the most favourable.



- (2) A Contracting Party which [has]<sup>(3)</sup> programmes providing for access to public loans [and]<sup>(4)</sup> grants, guarantees [and]<sup>(5)</sup> insurance for facilitating trade or investment abroad shall make such facilities available, consistent with the objectives, constraints and criteria of such programmes, (including but not limited to, on any grounds, objectives, constraints or criteria relating to the place of business of an applicant for any such facility or the place of delivery of goods or services supplied with the support of any such facility) for investments in the Economic Activity in the Energy Sector of other Contracting Parties or for financing trade in the energy sector with other Contracting Parties.
- (3) Contracting Parties shall seek as appropriate to encourage the operations and take advantage of the expertise of relevant international financial institutions in implementing programmes in the Economic Activity in the Energy Sector that endeavour to improve the economic stability and investment climates of the Contracting Parties.
- (4) Nothing in this Article shall prevent financial institutions from applying their own lending/underwriting practices based on market principles and prudential considerations or prevent a Contracting Party from taking measures for prudential reasons including for the protection of investors, consumers, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier or to ensure the integrity and stability of its financial system and capital markets.

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General comment

Only paragraph (1) of this Article was discussed in a Formal Sub-Group in October and December.

Specific comments

10.1 : EC scrutiny reserve.

10.2 : USA proposes substituting with: "Except where a preference to domestic investment or investment in another Contracting Party or a third state is extended under domestic law or".

USA agreed to have a further look at the formulation of this footnote in order to avoid concerns of other delegations (especially RUF) about possible discrimination.

10.3 : USA suggests replacing with: "adopts or maintains".

10.4 : USA proposes deletion and substitution with comma.

10.5 : USA proposes replacing with: "or".

PART III

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 13

PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

- (1) Each Contracting Party shall in accordance with 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 Area. 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.](<sup>1</sup>) [Each Contracting Party shall observe any obligations it may have entered into with regard to Investments of Investors of any other Contracting Party.](<sup>2</sup>)
- (2) [Each Contracting Party shall endeavour to apply the principle(<sup>3</sup>) to permit Investors of other Contracting Parties to Make Investments in its Area on a basis no less favourable than that accorded(<sup>4</sup>) to its own Investors or to Investors of any other Contracting Party or any state that is not a Contracting Party, [whichever is the most favourable](<sup>5</sup>).](<sup>6</sup>)
- (3) A supplementary Agreement shall, [subject to conditions to be laid down therein](<sup>7</sup>) commit each party thereto to permit Investors of other parties to Make Investments in its Area on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any state that is not

a Contracting Party, and to their respective Investments, whichever is the most favourable. This supplementary Agreement shall be open for signature by the states and Regional Economic Integration Organisations which have signed this Agreement. [The signatories to this Agreement shall commence negotiations not later than 1st January 1996 with a view to concluding, within three years from the date this Agreement is open for signature, the supplementary Agreement.](8)(9)

(4) Each Contracting Party shall endeavour:

- to reduce progressively existing restrictions which affect the ability of Investors of other Contracting Parties to Make Investments in its Area,
- to limit to the minimum the exceptions to the treatment described in paragraph (2) in any laws and regulations which are enacted after the date this Agreement is opened for signature and which impose conditions for the Making of Investments. [Such exceptions shall not apply to Investments existing at the time the exception becomes effective.](10)

(5) Until such time as the supplementary Agreement shall have been adopted, each Contracting Party shall periodically submit reports to the Charter Conference for a review of the contents of its laws and regulations as they relate to the ability of Investors of other Contracting Parties to Make Investments in its Area. These reports may include the designation of parts of the energy sector where a Contracting Party accords to Investors of other Contracting Parties the treatment described in paragraph (2).

(6) Until such time as the supplementary Agreement shall have been adopted, a Contracting Party may at any time, voluntarily commit itself to all other Contracting Parties not to enact new laws and regulations providing for exceptions to the treatment described in paragraph (2). Any such voluntary commitment shall be declared to the Charter Conference. That Contracting Party may furthermore declare that this voluntary commitment constitutes an obligation to all other Contracting Parties under this Agreement.

- (7) In addition each Contracting Party shall in its Area accord to Investments of Investors of another Contracting Party, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords<sup>(4)</sup> to Investments of its own Investors or of the Investors of any other Contracting Party or any state that is not a Contracting Party and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable to the Investment.
- (8) [Nothing in this Article shall apply to grants and other financial assistance provided by a Contracting Party for energy technology research and development; or government insurance and loan guarantee programmes for encouraging companies to invest abroad [DL]<sup>(11)</sup>; [or small business development programmes for socially and economically disadvantaged minorities.](<sup>12</sup>)](<sup>13</sup>)
- (9) [Contracting Parties agree that national treatment and/or most favoured nation treatment in relation to the protection of Intellectual Property are exclusively governed by the respective provisions contained in the applicable international agreements for the protection of Intellectual Property rights by which the Contracting Party is bound.](<sup>14</sup>)
- (10) Without prejudice to Article 16, the provisions of this Article shall also apply to Returns.
- (11) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investment, investment agreements, and investment authorisations.

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General comment

- USA has a general reserve on the two-stage approach. Its specific reserves are without prejudice to the general reserve.

- N argues that a clear distinction has to be made between the issue of promotion and protection of investments on the one hand and the issue of access to resources on the other.

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Specific comments

- 13.1 : RUF suggests substitution with: "Investments shall be accorded treatment which in no case shall be inconsistent with the norms and principles of international law."
- 13.2 : N, AUS, CDN reserves.
- 13.3 : Text inserted to avoid problems in paragraphs (4), (5) and (6) when referring back to the principle in paragraph (2).
- 13.4 : USA suggests inserting: "in like situations".
- 13.5 : RUF asked for brackets around these words.
- 13.6 : AUS, CDN, CH, A and J proposed a legally binding MFN-provision:

The present EC draft provides for MFN best endeavours. This has been conditionally supported by the USA.

The Sub-Group Chairman asked all delegations to consider the following compromise proposal for paragraph (2):

"(I) Each Contracting Party shall until 1st July 1997 permit investors of other Contracting Parties to make investments in its area on a basis no less favourable than that accorded to investors of any other Contracting Party or third state;

(II) In addition, each Contracting Party shall endeavour to permit investors of other Contracting Parties to make investments on a basis no less favourable than that accorded to its own investors;

(iii) the treatment accorded to Investors shall be the most favourable of that described in (i) and (ii)."

13.7 : In relation to the first part of paragraph (3) a major question was how to increase certainty that there would be a second stage. USA supported by J suggested commencement of discussions with the aim of finalising a legal text for the supplementary Agreement ready for initialling by the time of signature of stage one. That would leave the country's specific exceptions to NT as the only remaining question of substance. EC would consider a suggestion to state the content of the legal text of the supplementary Agreement in a Ministerial Declaration.

13.8 : It was agreed that the substance of this sentence was to allow a period for the countries in transition and that it might be possible to conclude negotiations earlier.

In the debate RUF indicated the possibility that only two years were needed.

USA also indicated a wish to start negotiations on the supplementary Agreement before the signature of the first Agreement.

13.9 : USA suggests the following additional sentence: "Such negotiations shall also be open to any signatory of the European Energy Charter".

13.10: EC and USA will discuss whether this sentence could be converted to "hard-law".

13.11: AUS, CDN, H, J and USA met on 7 October 1993 to discuss Article 13(8). They agreed to recommend deletion of the phrase "for economic development purposes," as suggested by the USA on the grounds that some government insurance and loan guarantee programmes may not be specifically for economic development purposes. AUS and N scrutiny reserve.

13.12 : USA suggest substituting with: "small business development programs; or programs for socially and economically disadvantaged minorities." Supported by H, CDN and J.

13.13 : EC reserve on this paragraph.

J scrutiny reserve on this paragraph in particular in relation to the word "abroad".

13.14: GB reserve pending consultation with capital.

#### ARTICLE 13 BIS

##### KEY PERSONNEL

- (1) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of a natural person, examine in good faith requests by Investors of another Contracting Party and key personnel who are employed by such Investors, or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services.
- (2) A Contracting Party shall permit Investors of another Contracting Party which have Investments in its Area to employ any key person of the Investors' choice regardless of nationality and citizenship provided that such key person has been permitted to enter, stay and work in the Area of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time-limits of, the permission granted to such key person.

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##### Chairman's note

Negotiations in the Plenary finished.



[ARTICLE 13 TER](1)

TRADE RELATED INVESTMENT MEASURES

- (1) [DL] Further to Articles 4 and 35 of this Agreement and without prejudice to other rights and obligations under those Articles no Contracting Party shall apply any trade related investment measure [DL] that is inconsistent with the provisions of article III or article XI of the GATT.

[DL]

Such measures include any investment measure which is mandatory or enforceable under domestic law or under administrative rulings or compliance with which is necessary to obtain an advantage, and which requires:

- (a) the purchase or use by an Investor of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production;
- (b) that an Investor's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports;

or which restricts:

- (c) the importation by an Investor of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
- (d) the importation by an Investor of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the Investor;

- (e) the exportation or sale for export by an Investor of products whether specified in terms of particular products in terms of volume or value of products or in terms of a proportion of volume or value of its local production.
- (2) Nothing in paragraph (1) shall be construed to prevent a Contracting Party from requiring an Investor or Investment to apply qualification requirements for export promotion, foreign aid, government procurement or preferential tariff or quota programs.
- (3) The provisions of Annex TRM shall apply in relation to notification and transitional arrangements for trade related investment measures.
- [(4) In the event of a dispute between Contracting Parties over the application or interpretation of this Article, it shall be brought under the GATT and Related Instruments if the parties to the dispute so agree. In the absence of such agreement, Annex D of this Agreement shall apply except that Annex 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 Article 35(1); or
  - (b) establishes a free trade area or customs union as described in Article XXIV of the GATT.](2)

#### ANNEX TRM

##### NOTIFICATION AND TRANSITIONAL ARRANGEMENTS (TRIMs)

- (1) Contracting Parties shall notify the [Competent Body] of all TRIMs they are applying that are not in conformity with the provisions of Article 13 TER within

- (a) 90 days after entering into force of this Agreement if the Contracting Party is a party to the GATT; or
- (b) [...] months after entering into force of this Agreement if the Contracting Party is not a party to the GATT.

Such TRIMs of general or specific applications shall be notified along with their principal features.

- (2) In the case of TRIMs applied under discretionary authority each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.
- (3) Each Contracting Party shall eliminate all TRIMs which are notified under paragraph (1) within
  - (a) 2 years from the date of entry into force of this Agreement if the Contracting Party is a party to the GATT; or
  - (b) [...] years from the date of entry into force of this Agreement if the Contracting Party is not a party to the GATT.
- (4) During the periods referred to in paragraph (3) a Contracting Party shall not modify the terms of any TRIM which it notifies under paragraph (1) from those prevailing at the date of entry into force of this Agreement so as to increase the degree of inconsistency with the provisions of Article 13 TER of this Agreement. TRIMs introduced less than 180 days before the signature of this Agreement shall not benefit from the transitional arrangements provided in paragraph (3).
- (5) Notwithstanding the provisions of paragraph (4), a Contracting Party, in order not to disadvantage established enterprises which are subject to a TRIM notified under paragraph (1), may apply during the transition period the same TRIM to a new investment where

- (I) the products or services of such investment are like products or services to those of the established enterprises; and
- (II) necessary to avoid distorting the conditions of competition between the new investment and the established enterprises.

Any TRIM so applied to a new investment shall be notified to the Secretary-General. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

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General comments

The October Plenary noted the following conclusions of the Chairman of the Sub-Group on TRIMs:

- There are two possible directions to approach TRIMs: from the trade side (as presented in CONF-70 and CONF-72) and from the investment side, for which the USA, having the view that trade side is already sufficiently covered, tabled a proposal (see footnote 13.TER.2 in CONF-72). Delegations stated that they needed some time to study the USA proposal; however several delegations warned that negotiations on the USA proposal could take several years.
- Assuming, for the time being, the trade approach, some delegations saw no need for a specific provision, in view of Article 4 and 35, as well as Article 5. In the view of the majority, however, it would be useful to have a TRIMs provision in the Charter Treaty.
- According to the Sub-Group, dispute settlement should follow (in case of the trade approach) the procedures of GATT where both parties considered the dispute could be dealt with under GATT, and Annex D otherwise. The text for dispute settlement is proposed in paragraph (4).

- The Sub-Group Chairman agreed to re-examine the draft text as in CONF-72 in the light of Dunkel text and AUS proposal based on the assumption that TRIMs will be approached from the point of view of their effects on trade rather than on investment and to issue a modified proposal on which written comments would be invited. (see CONF-73).
  - This version contains Sub-Group's Chairman modified text only in paragraph (1) (the same text as in CONF-73) and does not yet take account of the AUS proposal for paragraph (4). Other paragraphs remain the same as in CONF-72.
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Specific comments

13.TER.1: General scrutiny reserve.

13.TER.2: AUS delegation proposes to redraft the text of paragraph (4) as follows:

"A Contracting Party may not invoke Article 31 or Article 33 with respect to a dispute between Contracting Parties over the application or interpretation of this Article that falls within the scope of the GATT and Related Instruments. Article 31 shall be used only if the parties to the dispute agree that the measure in dispute does not fall within the scope of the GATT and Related Instruments. In the absence of such agreement, Article 35(6) shall apply."

ARTICLE 14

COMPENSATION FOR LOSSES

- (1) Except where Article 15 applies, an Investor of any Contracting Party who suffers a loss with respect to any investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, 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 that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any state that is not a Contracting Party.

(2) Without prejudice to paragraph (1), an Investor of a Contracting Party who, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from

(a) requisitioning of its investment or part thereof by the latter's forces or authorities, or

(b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

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

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Chairman's note

Negotiations in the Plenary finished.

**ARTICLE 15**

**EXPROPRIATION**

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") 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; and
- (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 (hereinafter referred to as the "valuation date").

[Such fair market value shall by the election of the investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the valuation date. Compensation shall also include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.](1)

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

[(3) Where a Contracting Party expropriates the assets of a company or enterprise in its Area in which investors of any other Contracting Party have investments, including through shareholding, these provisions shall apply to ensure prompt, adequate and effective compensation for those investors for any impairment or diminishment of the fair market value of such investment resulting from such exploration.](2)

[(4) Reversion of properties and rights to a resource owner pursuant to an investment agreement and laws and regulations in force in a Contracting Party at the time such agreement was concluded and which are otherwise in conformity with the provisions of this

agreement, shall not in itself be regarded, for purposes of this Agreement, as an act of expropriation or nationalisation or as a measure having effect equivalent to nationalisation or expropriation.]<sup>(3)</sup>

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Specific comments

- 15.1: RUF retains the reserve until solution to Article 16(5) is found.
- 15.2: General tendency to delete this paragraph. However, EC wants to keep it, pending the finalisation of the definition of "Investor".
- 15.3: USA and J cannot accept the concept of this paragraph. N wants to maintain this paragraph on the basis of the text in BA-37 (see footnote 15.3 in CONF-72). In the formal Sub-Group in the December Plenary meeting N agreed to put forward - in consultation with USA and J - a new proposal, to be sent to the Secretariat by 15 January 1994 at the latest.

ARTICLE 16

TRANSFER OF PAYMENTS RELATED TO INVESTMENTS

- (1) Each Contracting Party shall with respect to Investments in its Area by Investors of any other Contracting Party guarantee the freedom of transfer related to these Investments into and out of its Area, including the transfer of:
- (a) the initial capital plus any additional capital for the maintenance and development of an investment;
  - (b) Returns;
  - (c) payments under a contract, including amortisation of principal and accrued interest payment pursuant to a loan agreement;



- (d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment;
  - (e) proceeds from the sale or liquidation of all or any part of an investment;
  - (f) payments arising out of the settlement of a dispute; and
  - (g) payments of compensation pursuant to Articles 14 and 15.
- (2) Transfers of payments under paragraph (1) shall be effected without delay and in a Freely Convertible Currency.
- (3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. 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) [A Contracting Party may have laws and regulations requiring reports of currency transfer provided that such laws and regulations shall not be used to defeat the purpose of paragraphs (1) to (3).]<sup>(1)</sup> Notwithstanding the provisions of paragraphs (1) to (3) 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, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.
- (5) The provisions of paragraph (2) regarding the currency of transfers are applied in relations between Contracting Parties which constituted the former USSR insofar as this does not contradict agreements between them, [provided that such agreements shall not lead to treatment of investors of other Contracting Parties that is less favourable than that accorded either to

Investors of the Contracting Parties which have entered into such an agreement or to Investors of any state that is not a Contracting Party]<sup>(2)</sup>. In accordance with Article 36 transitional arrangements may apply in the absence of such agreements, provided that such arrangements accord to Investors of Contracting Parties, not formerly constituting the USSR, treatment that is not less favourable than that accorded either to Investors of the Contracting Party maintaining transitional arrangements or to Investors of any state that is not a Contracting Party.

- (6) [Notwithstanding the provisions of paragraphs (1) and (3), [AUS, MOL and RO]<sup>(3)</sup> may in exceptional balance of payments circumstances exercise such controls as are necessary to regulate international capital movements for balance of payments purposes. Any restrictions under this provision shall be temporary and shall be consistent with their obligations under existing international agreements and, in particular, with the responsibilities of IMF membership. In any case, no restrictions under this provision shall affect the making of payments or transfers for current international transactions nor provide for discriminatory treatment between Contracting Parties. In taking a measure pursuant to this paragraph, [AUS, MOL or RO]<sup>(3)</sup> shall ensure that such measure least infringes the rights of other Contracting Parties and is no broader in scope or duration than necessary.]<sup>(4)</sup>

(5)

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Specific comments

- 16.1: General scrutiny reserve on redraft suggested during the June Plenary meeting.
- 16.2: RUF thinks that the first four lines of 16(5) are sufficient.

USA prefers an alternative text:

"provided that such agreements shall not derogate from the obligations of those Contracting Parties under this Agreement with respect to other Contracting Parties and their Investors".

It was agreed that the effect of the USA proposal is the same as the deletion of paragraph (5).

EC prefers deletion but can accept the language if agreed by all the other delegations.

J reserve.

16.3: Only those countries which have a consistent practice on balance of payments exception clause in their bilateral investment treaties could avail themselves of this paragraph.

16.4: USA and EC reserve.

16.5: CDN proposes the following paragraph:

"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 4 or Article 35(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."

## ARTICLE 17

### SUBROGATION

(1) If a Contracting Party or its designated agency (hereinafter referred to as the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment and Returns [of an Investor (hereinafter referred to as the "Party Indemnified")](1) in the Area of another Contracting Party (hereinafter referred to as the "Host Party"), the Host Party shall recognise:

(a) the assignment to the Indemnifying Party [by law or by legal transaction]<sup>(2)</sup> of all the rights and claims in respect of such Investment; and

(b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.

(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) the same payments due pursuant to those rights and claims;

as the [Party Indemnified]<sup>(1)</sup> was entitled to receive by virtue of this Agreement in respect of the Investment concerned and its related Returns.

(3)

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Chairman's note

Negotiations in the Plenary finished.

[ARTICLE 18]<sup>(1)</sup>

**RELATION 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 III or V of this Agreement, nothing in Part III or V of this Agreement shall be construed to supersede any incompatible provision of such terms of the other agreement, and nothing in such terms of the other agreement shall be construed to supersede any incompatible

provision of Part III or V of this Agreement, where any such incompatible provision is more favourable to the Investor or Investment.

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Chairman's note

Negotiations in the Plenary finished.

ARTICLE 19

NON-APPLICATION OF PART III IN CERTAIN CIRCUMSTANCES

Each Contracting Party reserves the right to deny the advantages of this Part to a legal entity if citizens or nationals of a state that is not a Contracting Party control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised or the denying Contracting Party does not maintain diplomatic relationship with the state that is not a Contracting Party or adopts or maintains measures with respect to the state that is not a Contracting Party that prohibit transactions with the Investor of that state that is not a Contracting Party or that would be violated or circumvented if the advantages in this Part [DL] were accorded to the Investor of that state that is not a Contracting Party or to its Investments.

(1)

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Specific comments

19.1 : N requests one more type of reservation to be incorporated in this Article reading:

"Each Contracting Party reserves the right to deny an Investor to Make an Investment if the Investor has no substantial business activities in the Area of a Contracting Party or if the Investor is effectively controlled by the states that are not Contracting Parties or by nationals of the states that are not Contracting Parties."

PART IV

CONTEXTUAL

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General comment

N reiterates its former proposal on having a separate Article on Property in this Agreement reading:

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

ARTICLE 21

SOVEREIGNTY OVER ENERGY RESOURCES

[The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They recognise that these are exercised in accordance with and subject to the rules of international law.](1)  
Each state accordingly holds in particular the rights to decide the geographical areas within its Area 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 Area.

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Specific comments

21.1 : USA and EC reserve on Chairman's compromise language.

ARTICLE 22

ENVIRONMENTAL ASPECTS

(1) In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful environmental impacts occurring either within or outside its Area from all operations within the energy cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act cost-effectively. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. They agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting investment in the energy cycle or international trade. Contracting Parties shall accordingly:

- (a) take account of environmental considerations throughout the formulation and implementation of their energy policies;
- (b) promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the energy cycle;
- (c) having regard to Article 39(4), encourage cooperation in the [DL]<sup>(1)</sup> attainment of the environmental objectives of the Charter and cooperation in the field of international environmental standards for the energy cycle, taking into account differences in adverse effects and abatement costs between Contracting Parties;
- (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 and technological means that reduce pollution;

- (e) promote the collection and sharing among Contracting parties of information on environmentally sound and economically efficient energy policies and cost-effective practices and technologies;
- (f) promote public awareness of the environmental impacts of energy systems, of the scope for the prevention or abatement of their adverse environmental impacts, and of the costs associated with various prevention or abatement measures;
- (g) promote and cooperate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimise harmful environmental impacts of all aspects of the energy cycle in an economically efficient manner;
- (h) encourage favourable conditions for the transfer and dissemination of such technologies consistent with the adequate and effective protection of intellectual property rights;
- (i) promote the transparent assessment at an early state and prior to decision, and subsequent monitoring, of environmental impacts of environmentally significant energy investment projects;
- (j) promote international awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards;
- (k) participate, upon request, and within their available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties.



(2) [At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.]<sup>(2)</sup>

(3) For the purposes of this Article:

- (a) "energy cycle" means the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimising harmful environmental impacts.
- (b) "environmental impact" means any effect caused by a given 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.
- (c) "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, while reducing the amount of energy required to produce that output.
- (d) "cost-effective" means to achieve a defined objective at the lowest cost or to achieve the greatest benefit at a given cost.

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Chairman's note

Negotiations in the Plenary finished.

[ARTICLE 23](1)

TRANSPARENCY

- (1) In accordance with Articles 4 and 35 laws, regulations, judicial decisions and administrative rulings of general application which affect matters covered by Article 4 shall be subject to the transparency disciplines of the GATT and relevant Related Instruments.
- (2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Agreement shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph 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 any Investor.
- (3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request.

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Chairman's note

Negotiations in the Plenary finished.

The Legal Sub-Group was asked by the Plenary Chairman to revisit the text of paragraph (2) in order to draft a language that only those judicial decisions or administrative rulings be published that have a general effect in the sense that they contain information that is relevant to how the Contracting Party would in the future discharge obligations under the Charter Treaty.

ARTICLE 24

TAXATION

(1) GENERAL EXCLUSION

Except as set out in this Article, nothing in this Agreement shall apply to impose obligations with respect 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

Notwithstanding paragraph (1),

- (a) Articles 4 and 35 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

The provisions imposing national treatment obligations or most favoured nation obligations under Part III shall apply to taxation measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

- (a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions in any convention, agreement or arrangement, described in paragraph (6.1)(b) of this Article [or resulting from membership of any Regional Economic Integration Organisation;]<sup>(1)</sup> or
- (b) any taxation measure concerning 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

- (a) Article 15 shall apply to taxes.
- (b) Whenever an issue arises under Article 15, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:
  - (i) the Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant competent tax authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Articles 30(2)(c) or 31(2) shall make a referral to the relevant competent tax authorities.

(ii) The competent tax authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the competent tax authorities shall apply 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 tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the OECD Model Tax Convention on Income and Capital.

(iii) Bodies called upon to settle disputes pursuant to Articles 30(2)(c) or 31(2) may take into account any conclusions arrived at by the competent tax authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in sub-paragraph (ii) above by the competent tax authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the competent tax authorities after the expiry of the six-month period.

(iv) Under no circumstances shall involvement of the competent tax authorities, beyond the end of the six-month period referred to above, lead to a delay of proceedings under Articles 30 and 31.

**(5) WITHHOLDING TAX**

For greater certainty, Article 16 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

**(6) DEFINITIONS**

(6.1) The term "taxation measure" includes:

(a) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(b) any provision relating to taxes of any convention for the avoidance of double taxation or any other international agreement or arrangement by which the Contracting Party is bound.

(6.2) There shall be regarded as taxes on income or 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 responsible for taxes or his or its authorised representatives.

(6.4) For greater certainty, the terms "tax provisions" and "taxes" do not include customs duties.

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General comments

The Chairman of the Joint Legal and Taxation Sub-Groups meeting noted that paragraph (2) might need redrafting to ensure consistency with Articles 4 and 35 and possibly in relation to Article 13 once those Articles had been finalised.

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Specific comments

24.1 : J reserve.

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

STATE AND PRIVILEGED ENTERPRISES

- [(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Agreement.]<sup>(2)</sup>
- (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Agreement.
- (3) Each Contracting Party shall ensure that if it establishes or maintains a state entity and entrusts such entity with regulatory, administrative or other governmental authority, such entity shall exercise such authority in a manner consistent with the Contracting Party's obligations under this Agreement other than obligations arising under Articles 4 and 35.
- (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Agreement.
- [(5) Any Contracting Party shall be free to participate in Economic Activity in the Energy Sector through, inter alia, direct participation by the government or through state enterprises.]<sup>(3)</sup>
- (6) For the purposes of this Article, entity includes any enterprise, agency or other organisation or individual.

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Chairman's note

Agreement on the substance of this Article has been reached. Next Plenary will revert to the remaining footnotes only.

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Specific comments

25.1 : N contingency reserve on all paragraphs except for paragraph (5).

25.2 : CDN and H scrutiny reserves.

25.3 : EC and USA reserves; seek that this paragraph be deleted.

ARTICLE 26

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

[Each Contracting Party shall take all measures available to it within its constitution to ensure observance of the provisions of this Agreement by the regional and local governments and other governmental authorities within its Area .] <sup>(1)</sup>(2)

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General comments

During the discussion of this Article at the Plenary on 26 May 1993 no agreement was reached on the text. Some delegations expressed the view that the adoption of the legally-binding GATT-reference approach in the Charter Treaty should carry with it the use of the text from the Uruguay Round negotiations dealing with observance by Sub-Federal authorities, extending this also to cover Investment.



USA wants to revert to this Article only after the overall balance of the Charter Treaty is clear, taking also into account the position adopted on a possible exception for REIO's under Article 27.

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Specific comments

26.1: EC suggests to replace the present text of Article 26 by the following, based on the wording considered in the context of the GATT Uruguay round:

"Each Contracting Party is fully responsible under this Agreement for the observance of all provisions of this Agreement and to this end shall take all measures available to it to ensure observance by regional and local governments and other governmental authorities within its Area. The dispute settlement provisions of this Agreement may be invoked in respect of measures affecting its observance taken by regional or local governments or other governmental authorities within the Area of the Contracting Party."

26.2: AUS, CDN and CH prefer the text of BA-37 which read:

"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 Area of a Contracting Party."

**ARTICLE 27**

**EXCEPTIONS**

(1) There shall be no exceptions to Article 4 and 35.

[(2) The provisions of this Agreement other than those referred to in paragraph (1) shall not preclude any Contracting Party from adopting or enforcing any measures:

[(a) necessary to protect human, animal or plant life or health;]<sup>(2)</sup>

(b) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, 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;

(3)

provided that such measures shall not constitute disguised restrictions on Economic Activity in the Energy Sector, 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.]<sup>(1)</sup>

(3) The provisions of this Agreement other than those referred to in paragraph (1) shall not be construed:

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

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in the time of war, armed conflict or other emergency in international relations;

- (b) 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; or
- (c) to prevent any Contracting Party from taking any measure that it considers necessary relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfill its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings;
- (d) to prevent any Contracting Party from taking any measure which it considers necessary for the maintenance of public order. [Such measures should not constitute a disguised restriction on Transit.]<sup>(4)</sup>

[(4) The provisions of this Agreement shall not be construed so as to oblige any Contracting Party member of Regional Economic Integration Organisation (REIO) which aims at liberalising trade and Investment between its members without raising the overall level of barriers to trade and Investment, to extend to another Contracting Party non-member of that REIO the benefit of any treatment or preference resulting from the membership to that REIO.

The same rule will apply to agreements aimed at establishing a customs union or a free-trade area or leading to the accession to a REIO.]<sup>(5)</sup>

(6)

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Specific comments

27.1 : RUF and USA reserves.

27.2 : CH reserve.

27.3 : CDN proposes a new sub-paragraph reading:

"(c) necessary for prudential, fiduciary or consumer protection reasons".

CDN will revisit its position in the light of the outcome on Article 13.

27.4 : USA reserve.

27.5 : At the December Plenary some delegations opposed the REIO clause in the form redrafted by the EC. The Chairman concluded that an Informal Sub-Group of experts should meet during January or February 1994 to come up with a solution for the next Plenary. Any delegation which would wish to participate in the Sub-Group meeting should notify the Secretariat of the name of their expert not later than 14 January 1994. The EC will then arrange the meeting of this Informal Sub-Group.

27.6 : EC wished not to prejudice arrangements and international commitments, both for its Euratom Treaty procedures and for assistance to the coal sector aimed inter alia at reducing social and regional problems.

PART V

DISPUTE SETTLEMENTS

ARTICLE 30

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III (except under Article 13(4)), 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 on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
  - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
  - (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
  - (c) in accordance with the following paragraphs of this Article.
- (3) (a) Subject only to sub-paragraph (b)(i), 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.
  - (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under paragraph (2)(a) or (2)(b).

(ii) For the sake of transparency, Contracting Parties that are listed in Annex ID shall state their policies, practices and conditions in this regard to the Secretariat, as soon as possible and in any case no later than the date of the deposit of their instrument of ratification, acceptance or approval in accordance with Article 44.

(1)

(4) In the event an Investor chooses to submit the dispute for resolution under paragraph (2)(c), the Investor shall further provide his consent in writing for the dispute to be submitted to:

(a)(i) 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) if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention); or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in sub-paragraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the secretariat of the Centre (Additional Facility Rules), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

OR

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

OR

- (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
- (5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall satisfy the requirement for:
  - (i) written consent of the parties to a dispute for purposes of Chapter II 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 Foreign Arbitral Awards, done at New York, 10 June, 1958 ("New York Convention").
- (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. 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.
- (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Agreement and applicable rules and principles of international law.
- (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the written request referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".
- (8) [The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the

dispute. An award of arbitration concerning a measure of a sub-federal government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.]<sup>(2)</sup>

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#### Chairman's note

Except for possible reversion of paragraph (3) pending Annex ID submissions and footnotes 30.1 and 30.2 negotiations in the Plenary are finished.

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#### Specific comments

30.1: The Sub-Group Chairman has suggested the following wording to be placed in the Charter Treaty to solve the N constitutional problem:

"Norway may at the time of ratification or at any subsequent time by notification to the depositary declare that it gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."

The Chairman urged delegations to consider acceptable language to find a solution to this problem, e.g. by inclusion of a Declaration from N indicating the political willingness to make an effort to accept the unconditional consent.

30.2: The Sub-Group Chairman has proposed this text in an effort to address CDN constitutional concerns in relation to final awards but not in relation to interim awards.

EC stated readiness to reflect favourably on the compromise text if CDN would withdraw its proposal related to interim measures reflected above.



ARTICLE 31

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 a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Agreement or agreed in writing by the Contracting Parties, and as concerns the application or interpretation of Article 7 or 22, by written notice submit the matter to an ad hoc 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 and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;
  - (b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2) request that the appointment be made in accordance with paragraph (3)(d) ;
  - (c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in

paragraph (2), the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with paragraph (3)(d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice;

- (d) Appointments requested to be made in accordance with this paragraph 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 the Secretary General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy.
- (e) Appointments made in accordance with paragraphs (3)(a) to (3)(d) shall be made with 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 to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties 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 applicable rules and principles of international law.
- (h) [The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute.]<sup>(1)</sup>
- (i) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties 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 parties to the dispute.

(j) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in the Hague, and use the premises and facilities of the Permanent Court of Arbitration.

(k) A copy of the award shall be deposited with the Secretariat which shall make it generally available.

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Chairman's note

Negotiations in the Plenary finished.

ARTICLE 32

NON-APPLICATION OF ARTICLE 31 TO TRADE DISPUTES

[To the extent that a dispute between Contracting Parties concerns the application of Article 4 or 35 and no other Article of this Agreement, it shall not be settled under Article 31 unless the Contracting Parties parties to the dispute agree otherwise.]<sup>(1)</sup>

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General comment

In the June Plenary Articles 32 and 33 were briefly discussed. No decision could be taken because it became clear that the content of these Articles is strongly dependent on the outcome of the discussion on Article 4.

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Specific comments

32.1 : J requests clarification of wording "To the extent that" and "or 35 and no other Article" which it considers confusing. J suggests that this Article should read:

"Article 31 shall not apply to disputes with respect to GATT and Related Instruments, unless the Contracting Parties parties to the dispute agree otherwise."

[ARTICLE 33]<sup>(1)</sup>

SETTLEMENT OF DISPUTES ON APPLICABILITY OF ARTICLE 31

(1) If a disagreement arises over the application of Article 32 to a dispute a Contracting Party party to the dispute may refer the matter to an ad hoc arbitration under this Article. In the light of the overall balance of rights and obligations in the GATT and Related Instruments and in this Agreement, respectively, the arbitration shall determine the extent to which the dispute should be brought under the GATT and Related Instruments or Annex D of this Agreement and to which it should be brought under Article 31 of this Agreement, or both, if the dispute is to be settled under both GATT and Related Instruments or Annex D of this Agreement and Article 31 of this Agreement, the arbitrator shall also determine which elements of the dispute are to be considered under which procedure and the sequence of such consideration. Only for compelling reasons should issues in a dispute pertaining to obligations under Article 4 or 35 of this Agreement be considered under Article 31 of this Agreement.

(2) Such an arbitration shall be constituted as follows:

(a) Within 30 days of the referral pursuant to paragraph (1), the Contracting Parties parties to the dispute shall choose a sole arbitrator who may not be a national or citizen of a

Contracting Party party to the dispute. If, within 30 days of the receipt of the request for arbitration, the Contracting Parties parties to the dispute are unable to agree on the appointment of a sole arbitrator, that appointment shall be made, in accordance with paragraph (2)(b) below, at the request of any Contracting Party party to the dispute;

- (b) An appointment pursuant to paragraph (2)(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 the appointment shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task the appointment shall be made by the next most senior Deputy;
- (c) Appointments made in accordance with paragraphs (2)(a) and (2)(b) above shall have regard to the qualifications and experience, particularly in matters covered by this Agreement and by the GATT and Related Instruments, of the arbitrator to be appointed;
- (d) In the absence of an agreement between the Contracting Parties parties to the dispute to the contrary, the arbitration rules of the United Nation Commission on International Trade Law (UNCITRAL) shall apply, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrator;
- (e) The decisions of the arbitrator under this Article shall be taken within 60 days of this appointment in accordance with this Agreement and international law and shall take account of the desirability of an orderly and timely resolution of the dispute;
- (f) The arbitrator's award shall be final and binding upon the Contracting Parties parties to the dispute;

- (g) The expenses of the arbitrator, including his remuneration, shall be borne in equal shares by the Contracting Parties 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 parties to the dispute;
- (h) Unless the Contracting Parties 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.
- (3) Neither Contracting Party shall initiate or continue dispute settlement proceedings under the GATT or a GATT Related Instruments or under Article 35, Annex D of this Agreement pending the results of arbitration pursuant to this Article.
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General comment

See General comment under Article 32.

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Specific comments

33.1 : J suggests deletion of this Article for the following reasons:

- a) In an actual dispute settlement procedure, when an accusing Contracting Party submits a dispute to a certain dispute-settlement procedure, it will specify the relevant provisions of this Agreement which, it thinks, are violated by another Contracting Party. Therefore, each dispute will

be treated under the suitable dispute-settlement procedure. It is not unusual that a dispute should contain more than one disputed point and is brought under more than one procedure. It will not make problem in itself.

- b) Article 33 provides that the arbitrator shall determine which elements of the dispute are to be considered under which procedure in case of disagreement with respect to dispute-settlement procedure. This, in other words, means that the arbitrator will make a judgement on the relevancy of GATT, which in itself is the interpretation of GATT, should not be made in fora other than those in the GATT. Otherwise, it will make confusion concerning the interpretation of the GATT.

**PART VI**

**TRANSITIONAL**

**ARTICLE 35**

**INTERIM PROVISIONS ON TRADE RELATED MATTERS**

So long as one or more Contracting Party is not a 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 party to the GATT or a relevant Related Instrument.

- (1) [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 (1) distort the trade of any third Contracting Party.](2)
- (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, as if all such Contracting Parties were members of GATT and applied the Related Instruments except as provided in Annex G. The Charter Conference may amend Annex G.](3)
- (3) Each signatory to this Agreement, and each state or Regional Economic Integration Organisation acceding to this Agreement, shall on the date of its signature or of its deposit of its instrument of accession, deposit with the Secretariat 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 Area.



- (4) [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) Notwithstanding paragraph (4), a Contracting Party may maintain limited exceptions to the obligations of paragraph (4), provided that it deposits with the Secretariat 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.]<sup>(4)</sup>
- (6) Annex D to this Agreement shall apply to disputes regarding compliance with provisions applicable to trade under this Article, except that Annex 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 Article XXIV of the GATT.

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General comment

At the June Plenary countries were invited to send information on their applied tariff rates (see paragraph (3)) to the Secretariat in the short term. To date the Secretariat received no submissions from the following delegations: N, M, IS, S, SF, TR, LIT, LAT, EST and all Republics of the former Soviet Union.

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Specific comments

35.1: AUS suggests to insert: "undermine the rights of other GATT Contracting Parties and signatories to relevant Related Instruments nor".

35.2: At the request of the Chairman to redraft paragraph (1) the USA has proposed the following text for paragraphs (1) and (2):

"(1) 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, as if all such Contracting Parties were members of GATT and applied the Related Instruments except as provided in Annex G. The Charter Conference may amend Annex G.

(2) If trade in Energy Materials and Products is governed by legislation existing as of 1 July 1992, which is inconsistent with the provisions of paragraph (1), the provisions of such legislation shall govern to the extent of the inconsistency."

35.3: EC reserve in light of the solution to be found for Article 4.

35.4: USA, CDN and J prefer deletion of paragraphs (4) and (5).

**ARTICLE 36**

**TRANSITIONAL ARRANGEMENTS**

(1) In recognition of the need for time to adapt to the requirements of a market economy, a Contracting Party listed in Annex T may temporarily suspend full compliance with its obligations under any one or more of the following provisions<sup>(1)</sup> of this Agreement, subject to the conditions in paragraphs (3) to (6):

Article 7, paragraphs (2) and (5)

Article 23, paragraph (3)

[DL]

- (2) Other Contracting Parties shall assist any Contracting Party which has suspended full compliance under paragraph (1) to achieve the conditions under which such suspension can be terminated. [DL] This assistance will be given in whatever form they consider most effective to respond to the needs notified under paragraph (4)(c) including, where appropriate, through bilateral or multilateral arrangements.
- (3) The applicable provisions, the stages towards full implementation of each, the measures to be taken and the date or, exceptionally, contingent event, by which each stage shall be completed and measure taken are listed for each Contracting Party claiming transitional arrangements in Annex T to this Agreement. Each such Contracting Party shall take the measures listed by the date (or dates which may differ for different provisions, and different stages) set out in that Annex. Contracting Parties which have temporarily suspended full compliance under paragraph (1) [DL] undertake to comply fully with the relevant obligations by [1 January 1998]. Should a Contracting Party find it necessary, due to exceptional circumstances, to request that the period of such temporary suspensions be extended or that any further temporary suspensions not previously listed in Annex T be introduced, the decision upon such a request shall be made by the Charter Conference.
- (4) A Contracting Party which has invoked transitional arrangements shall notify the Secretariat at least once in every 12 months:
- (a) of the implementation of any measures listed in its Annex T and of its general progress to full compliance;
  - (b) of the progress it expects to make during the next 12 months towards full compliance with its obligations, of any problems it foresees and of its proposals for dealing with those problems;

- (c) of the need for technical assistance to facilitate completion of the stages set out in Annex T as necessary for the full implementation of this Agreement, or to deal with any problems noted in subparagraph (b) as well as to promote other necessary market oriented reforms and modernisation of its energy sector;
  - (d) [DL] of any possible need to make a request of the kind referred to in paragraph (3).
- (5) The Secretariat shall:
- (a) circulate to all Contracting Parties the notifications referred to in paragraph (4);
  - (b) circulate and actively promote, relying where appropriate on arrangements in other international organisations the matching of needs for and offers of technical assistance referred to in paragraphs (2) and (4)(c);
  - (c) circulate to all Contracting Parties at the end of each six month period a summary of any notifications made under paragraph (4)(a) and of any notifications under paragraph (4)(d).
- (6) The Charter Conference shall annually review the progress by Contracting Parties towards implementation of the provisions of this Article [DL] and the matching of needs and offers of technical assistance referred to in paragraphs (2) and (4)(c). In the course of that review it may decide to take appropriate action. [DL]

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General comment

The Article contains a modified text proposed by the Chairman in CONF-77.

The next Plenary should focus on the following three unresolved points:

- a) Date for maximum duration of the suspension. Proposed at an earlier stage to be 1 January 1998.
- b) Voting rules for extension of the transitional period or any further temporary suspensions. The Article as drafted now automatically provides for three fourth voting procedure on matters subject to decision by the Charter Conference. If, as suggested by EC, the rule of consensus was applied, this could be implemented by introducing in Article 41(1) a new subparagraph reading:  
  
"(h) approve actions under Articles 36(3)".
- c) Provisions eligible for transitional arrangements. The discussion should concentrate on which key Articles might not be candidates for transitional arrangements.

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Specific comments

36.1: It has been agreed that the decision on whether transitional arrangements can be claimed for a particular Article of the Charter Treaty shall be taken after the Plenary has agreed on that Article.

The present list of Articles eligible for transitional arrangements set out in paragraph (1) contains only those provisions which already have been endorsed by the Plenary. All other provisions proposed either originally by the WG II Chairman (without square brackets) or requested by delegations during Annex T review sessions (in square brackets) are listed below. If and when the Plenary decides that a specific provision is eligible for transitional arrangements, it will be added to the list in paragraph (1).

[Article 3]

[Article 4]

Article 8, paragraphs (1) and (3)

[Article 8, paragraphs (2), (4) and (5)]

Article 10

[Article 13, paragraphs (1), (2), (3) and (4)]

Article 13, paragraph (5)

Article 13 TER, paragraph (1)

[Article 15, paragraph (1)]

[Article 16, paragraphs (1) and (3)]

Article 16, paragraph (2), limited to members of former USSR  
with respect of transfers between  
them

Article 24, paragraphs (2) and (3)

[Article 24, paragraphs (1) and (4)(b)]

Taxation Sub-Group recommends that Article 24 should not be  
eligible for transitional arrangements.

PART VII

STRUCTURAL AND INSTITUTIONAL

ARTICLE 38

PROTOCOLS

- (1) The Charter Conference may authorise the negotiation of a number of Protocols in order to pursue the objectives and principles of the Charter.
- (2) Any signatory to the Charter may participate in such negotiation.
- (3) A state or Regional Economic Integration Organisation shall not become a Contracting Party to a Protocol unless it is, or becomes at the same time, a signatory to the Charter and a Contracting Party to this Agreement.
- (4) Subject to paragraph (3) above, final provisions applying to a Protocol shall be defined in that Protocol.
- (5) A Protocol shall apply only to the Contracting Parties which consent to be bound by it, and shall not derogate from the rights and obligations of those Contracting Parties not party to the Protocol.

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Chairman's note

Negotiations in the Plenary finished.

ARTICLE 39

CHARTER CONFERENCE

- (1) The Contracting Parties shall meet periodically in a Conference (hereinafter referred to as "the Charter Conference") at which each Contracting Party shall be entitled to have one representative. Ordinary meetings shall be held at intervals determined by the Charter Conference.
- (2) Extraordinary meetings of the Charter Conference may be held at times other than those referred to in paragraph (1) as may be determined by the Charter Conference, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to them by the Secretariat, it is supported by at least one-third of the Contracting Parties.
- (3) [The Charter Conference shall:]<sup>(1)</sup>
  - (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) consider and approve the annual accounts and budget of the Secretariat;



- (f) consider and approve or adopt the terms of any headquarters or other agreement, including privileges and immunities considered necessary for the Charter Conference and the Secretariat;
  - (g) encourage cooperative efforts aimed at facilitating and promoting market oriented reforms and modernisation of energy sectors in those countries of Central and Eastern Europe and the former Soviet Union undergoing economic transition;
  - (h) authorise negotiation of, approve the terms of reference of such negotiation and consider and adopt the text of Protocols;
  - (i) authorise the negotiation of and consider and approve or adopt Association Agreements;
  - (j) consider and adopt texts of amendments to this Agreement;
  - (k) 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 make as full a use as possible, consistently with economy and efficiency, of 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 establish such subsidiary bodies as it considers appropriate for the performance of its duties.
- (6) The Charter Conference shall consider and adopt rules of procedure and financial rules.

- (7) In 1999 and thereafter at intervals (of not more than 5 years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Agreement in the light of the extent to which the provisions of this Agreement and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat.
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General comments

Chairman noted that agreement on substance of this Article has been reached.

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Specific comments

39.1 : J proposes replacing with: "The functions of the Charter Conference shall be to:".

This proposal was considered by the Legal Sub-Group during the June Plenary (see Room Document 16 of 1 July 1993).

The Legal Sub-Group agrees that some subparagraphs of paragraph(3) describe functions of the Charter Conference which are not "obligations". For that reason, the Legal Sub-Group advised that the Plenary might decide that some amendment to Article 39(3) is warranted. However, the possible alternative formulations likewise have imperfections.

This appears to be a drafting question without legal ramifications, because in its context the word "shall" clearly would not be understood as compelling the Conference to take the actions enumerated in subparagraphs (h), (i) or (j), but rather as making Conference action a sine qua non to the

activities described. Accordingly, despite its drafting imperfection, the Legal Sub-Group does not object to the present text from a legal standpoint. Neither would the Legal Sub-Group object from a legal standpoint to preambular language reading: "The functions of the Charter Treaty shall be to:"

#### ARTICLE 40

#### SECRETARIAT

- (1) In carrying out its duties, the Charter Conference shall have a Secretariat which shall be composed of a Secretary General and such staff as are the minimum consistent with efficient performance.
- (2) The Secretary General shall be appointed by the Charter Conference. The first such appointment shall be for a maximum period of 5 years.
- (3) In the performance of its duties the Secretariat shall be responsible to and report to the Charter Conference.
- (4) The Secretariat shall provide the Charter Conference with all necessary assistance for the performance of its duties and shall carry out the functions assigned to it in this Agreement or in any Protocol and any other functions assigned to it by the Charter Conference.
- (5) The Secretariat may enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions.

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#### Chairman's note

Negotiations in the Plenary finished.

ARTICLE 41

VOTING

- (1) Unanimity of the Contracting Parties present and voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions by the Charter Conference to:
  - (a) adopt amendments to this Agreement other than amendments to Articles 39 and 40;
  - (b) approve accessions to this Agreement under Article 46;
  - (c) authorize the negotiation of and approve or adopt the text of Association Agreements;
  - (d) [approve adjustments to Annex B];<sup>(1)</sup>
  - (e) approve the adoption of and modification to Annexes EM and NI;
  - (f) amend Annex G; and
  - (g) approve the Secretary General's nominations of panelists under Annex D, paragraph (7).

The Contracting Parties shall make every effort to reach agreement by consensus on any other matter requiring their decision under this Agreement. If agreement cannot be reached by consensus, paragraphs (2), (3), (4) and (5) shall apply.

- (2) Decisions on budgetary matters referred to in Article 39(3)(e) shall be taken by a qualified majority of Contracting Parties whose assessed contributions as specified in Annex B represent, in combination, at least three fourths of the total assessed contributions specified therein.

- (3) Decisions on matters referred to in Article 39(7) shall be taken by a three fourths majority of the Contracting Parties.
- (4) Except in cases specified in paragraphs (1)(a) to (1)(g), (2) and (3) and as otherwise specified in this Agreement, decisions provided for in this Agreement shall be taken by a three fourths majority of the Contracting Parties present and voting at the meeting of the Charter Conference at which such matters fall to be decided.
- (5) For purposes of this Article, "Contracting Parties present and voting" means Contracting Parties present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.
- (6) Except as provided in paragraph (2), no decision referred to in this Article shall be valid unless it has the support of a simple majority of the Contracting Parties.
- (7) A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Agreement; provided that such an organisation shall not exercise its right to vote if its member states exercise theirs, and vice versa.
- (8) In the event of persistent arrears in a Contracting Party's discharge of financial obligations under this Agreement, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.

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Chairman's note

Negotiations in the Plenary finished.

ARTICLE 42

FUNDING PRINCIPLES

- (1) Each Contracting Party shall bear its own costs of representation at meetings of the Charter Conference and any subsidiary bodies.
- (2) The cost of meetings of the Charter Conference and any subsidiary bodies shall be regarded as a cost of the Secretariat.
- (3) The costs of the Secretariat shall be met by the Contracting Parties by assessed contributions payable in the proportions specified in Annex B, which may be adjusted from time to time in accordance with Article 41(2).
- (4) Each Protocol may contain provisions to assure that any costs of the Secretariat arising from a Protocol are borne by the Parties thereto.
- (5) The Charter Conference may accept additional, voluntary, contributions from one or more Contracting Parties or from other sources. Costs met from such contributions shall not be considered costs of the Secretariat for the purposes of paragraph (3).

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Chairman's note

Negotiations in the Plenary finished.

PART VIII

FINAL PROVISIONS

ARTICLE 43

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 44

RATIFICATION, ACCEPTANCE OR APPROVAL

This Agreement shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository.

ARTICLE 45

APPLICATION TO OTHER 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 other territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Agreement enters into force for that Contracting Party.
- (2) Any Contracting Party may at a later date, by a declaration addressed to the Depository, extend the application of this Agreement to other territory specified in the declaration. In

respect of such territory the Agreement shall enter into force on the ninetieth day following the receipt by the 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 52(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depositary.

#### ARTICLE 46

##### 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. The instruments of accession shall be deposited with the Depositary.

#### ARTICLE 47

##### 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 [DL] by the Charter Conference 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 48

##### ASSOCIATION AGREEMENTS

- (1) The Charter Conference may authorize the negotiation of association agreements with states or Regional Economic Integration Organizations, or with international organizations, in order to pursue the objectives and principles of the Charter and the provisions of this Agreement or one or more Protocols.
- (2) The relationship established with and the rights enjoyed and obligations incurred by an associating state, Regional Economic Integration Organization, or international organization shall be appropriate to the particular circumstances of the association, and in each case shall be set out in the association agreement.

#### ARTICLE 49

##### 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 or approval [DL], 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 50

### PROVISIONAL APPLICATION

- [(1) 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 Article 47 or 49.](1)
- [(2) Any signatory may terminate its provisional application of this Agreement. Termination of provisional application for any signatory shall take effect upon the expiration of one year from the day on which such signatory's written notice of its intention not to become a Contracting Party to this Agreement is received by the Depositary.
- (3) Notwithstanding that a signatory terminates its provisional application of this Agreement, Article 1 and Parts III and V of this Agreement shall apply, in accordance with paragraph (1), to any investment made in the Area of that signatory by investors of other Contracting Parties or in the Areas of other Contracting Parties by investors of that Contracting Party prior to the effective date of termination of provisional application for a period of [twenty years] from such date.](2)

- (4) Before entry into force of this Agreement the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat designated under paragraph (5) not later than ninety days after the closing date for signature of this Agreement as specified in Article 43.
- (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 49 and the appointment of a Secretariat under Article 40.
- 

#### General comment

In the discussion of this Article in the December Plenary some delegations raised difficulties on paragraphs (1) to (3) and six delegations (CH, A, H, J, N, RO) stated that provisional application was not acceptable to them for different reasons but in most cases for constitutional reasons. Other delegations emphasised the importance of provisional application for the Energy Charter Treaty's objectives.

There was more general support for paragraphs (4) and (5) relating to provisional institutions, leaving open whether these should be included in the Energy Charter Treaty or in a Final Act. In the current draft of the Charter Treaty these have been brought together with the other provisional application aspects of the Energy Charter Treaty on the advice of the Legal Sub-Group.

The Chairman concluded that the Secretariat will circulate a new text before the next Plenary meeting.

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#### Specific comments

50.1 : USA suggests alternative language for this paragraph:

"Each signatory agrees to apply this Agreement provisionally pending its entry into force for such signatory, to the extent that such provisional application is not inconsistent with its national laws or constitutional requirements."

50.2 : USA (supported by some other delegations) also argued that paragraphs (2) and (3) go far beyond the normal concept of the provisional application and that such language should apply only after entry into force.

## ARTICLE 51

### RESERVATIONS

No reservations may be made to this Agreement.

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#### General comment

N proposes the following new Article on Declarations and Statements to be included in the Final Provisions of the Charter Treaty immediately after the Article on Reservations. The purpose of this suggestion is indicated in Room Document 2 of the Plenary Session of 26 April 1993. This structure is stated to be identical to that of the United Nations Convention on the Law of the Sea of 1982 and the substantive content of the draft Article is identical to article 310 of that Convention.

## ARTICLE X

### DECLARATIONS AND STATEMENTS

Article [reservations] does not preclude a state or Regional Economic Integration Organisation, when signing, ratifying or acceding to this Agreement, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and

regulations with the provisions of this Agreement, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that state or Regional Economic Integration Organization.

## ARTICLE 52

### 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 [DL] give written notification to the Depository of its withdrawal from this Agreement.
- (2) Any such withdrawal shall take effect upon expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of [DL] 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 Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that 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.
- (4) [DL] All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Agreement.

ARTICLE 53

DEPOSITARY

The Government of the Portuguese Republic shall be the Depositary of this Agreement.

ARTICLE 54

AUTHENTIC TEXTS

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.

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

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WG II Chairman's note

The decision on the official languages for this Agreement has been referred to Plenary.

REMAINING FOOTNOTES TO ARTICLES  
ON WHICH NEGOTIATIONS HAVE BEEN CONCLUDED IN THE PLENARY.

Article 1

1.1 : J contingency reserve related to Article 27.

1.3 : CDN suggests substituting with: "and consisting of the following". CDN considers that clarity calls for an exclusive rather than an illustrative list. No support from other delegations.

1.4 : CDN proposes replacing with: "and involving the commitment of capital or other resources in the Area of another Contracting Party to economic activity in such Area."

1.5 : N proposes substituting with: "business concessions". Supported by RO.

1.6 : CDN suggests additional language following sub-paragraph (e) reading:

"For greater clarity:

(a) claims to money which arise solely from:

(i) commercial sales contracts of a national or enterprise in the Area of one Contracting Party to an enterprise in the Area 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."

1.7 : N scrutiny reserve.

1.9: J suggests replacing the current definition with 3 separate definitions reading:

- "GATT" means the General Agreement on Tariffs and Trade dated October 30, 1947 as subsequently rectified, amended, supplemented or otherwise modified (hereinafter referred to as "the General Agreement" in this paragraph), including the decisions, understandings or other legal instruments adopted by the contracting parties to the General Agreement pursuant to the relevant provisions of the General Agreement, and/or the successor agreement of the General Agreement, as appropriate.
- "Related Instruments" means agreements, arrangements or other legal instruments concluded under the auspices of the GATT.
- "Contracting Parties to the GATT and Related Instruments" means a government or a Regional Economic Integration Organisation to which the GATT and/or one or more of the Related Instruments are applicable in accordance with the relevant provisions of the GATT and Related Instruments.

1.10: CDN made its acceptance conditional provided that "as defined by national law" will be added to the definition. The CDN suggestion was supported by RUF and RO. The Plenary is prepared to consider the CDN suggestion provided it could help to solve the CDN concern in relation to the expropriation question in Article 15. CDN will consult with capital accordingly and notify the Secretariat of its findings.



Article 7

7.1 : CDN and AUS scrutiny reserve.

Article 17

17.1: USA scrutiny reserve.

17.2: Chairman asked Legal Sub-Group for advice, in time for circulation before next Plenary, on three other possible wordings:

- (i) "by law or under contract";
- (ii) "by law or by transaction";
- (iii) "by law, by contract or by any other legal transaction".

In this context the word "legal" can be ambiguous in English, and there may be a lack of equivalence between English and Russian. Legal Sub-Group is also asked to say what law is referred to.

17.3: N suggests insertion of the following (reintroduction from BA 37):

"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."

N was requested to consider withdrawal in the light of discussion.

Article 18

18.1: N, EC and CDN contingency reserves.

Article 22

22.1 : N scrutiny reserve on deletion of "cost-effective".

22.2 : N maintains its proposal as contained in the Room Document 7 of the Plenary Session of 26 April 1993.

Article 23

23.1 : N contingency reserve.

Article 31

31.1 : CDN contingency reserve.

Article 41

41.1 : EC contingency reserve relating to the content and procedures of Annex B.

**DRAFT**

**ANNEX EM**  
**ENERGY MATERIALS AND PRODUCTS**  
(In accordance with Article 1(4)).

**ANNEX NI**  
**NON-APPLICABLE ENERGY MATERIALS AND PRODUCTS**  
**FOR INVESTMENT PART**  
(In accordance with Article 1(5)).

**ANNEX N**  
**LIST OF CONTRACTING PARTIES REQUIRING AT LEAST 3 SEPARATE**  
**AREAS TO BE INVOLVED IN A TRANSIT**  
(In accordance with Article 8(10)(a)).

**ANNEX ID**  
**LIST OF CONTRACTING PARTIES NOT ALLOWING AN INVESTOR TO RESUBMIT**  
**THE SAME DISPUTE TO INTERNATIONAL ARBITRATION**  
**AT A LATER STAGE UNDER ARTICLE 30**  
(In accordance with Article 30(2)).

**ANNEX G**  
**NON APPLICABLE PROVISIONS OF THE GATT AND**  
**RELATED INSTRUMENTS**  
(In accordance with Article 35(2)).

**ANNEX D**  
**INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT**  
(In accordance with Article 35(6)).

**ANNEX B**  
**FORMULA FOR ALLOCATING CHARTER COSTS**  
(In accordance with Article 42(3)).

**EUROPEAN ENERGY CHARTER**

ANNEX EM

ENERGY MATERIALS AND PRODUCTS

- Nuclear Energy
- 26.12 Uranium or thorium ores and concentrates.
    - 26.12.10 Uranium ores and concentrates.
    - 26.12.20 Thorium ores and concentrates.
  
  - 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.
    - 28.44.30 Uranium depleted in U235 and its compounds; thorium and its compounds.
    - 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 (irradiated) fuel elements (cartridges) of nuclear reactors.
  
  - 28.45.10 Heavy water (deuterium oxide).

Coal, Natural	27.01	Coal, briquettes, ovoids and similar solid
Gas, Petroleum		fuels manufactured from coal.
and Petroleum		
Products,	27.02	Lignite, whether or not agglomerated
El. Energy		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, from lignite or from 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. benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).
	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  
- butanes  
- ethylene, propylene, butylene and butadiene  
(27.11.14)  
- other
- In gaseous state:  
- natural gas  
- other
- 27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.
- 27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites 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.

Other Energy

- 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.

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Chairman's note

Negotiations in the Plenary finished.

ANNEX NI

NON-APPLICABLE ENERGY MATERIALS AND PRODUCTS  
FOR INVESTMENT PART

- 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. benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).
- 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.

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Chairman's note

Negotiations in the Plenary finished.



**ANNEX N**

**LIST OF CONTRACTING PARTIES REQUIRING AT LEAST 3 SEPARATE  
AREAS TO BE INVOLVED IN A TRANSIT**

Canada and United States of America

ANNEX ID

LIST OF CONTRACTING PARTIES NOT ALLOWING AN INVESTOR TO RESUBMIT  
THE SAME DISPUTE TO INTERNATIONAL ARBITRATION  
AT A LATER STAGE UNDER ARTICLE 30

- |                         |   |
|-------------------------|---|
| 1. Australia            | 9. Ireland                                  |
| 2. Canada               | 10. Japan <sup>(1)</sup>                    |
| 3. Croatia              | 11. Poland                                  |
| 4. Czechlands           | 12. Portugal                                |
| 5. Estonia              | 13. Romania                                 |
| 6. European Communities | 14. Spain                                   |
| 7. Greece               | 15. Sweden                                  |
| 8. Hungary              | 16. United States of America <sup>(1)</sup> |

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Specific comments:

ID.1: J and USA prefer this Annex to list Contracting Parties which unconditionally accept resubmission of a dispute to international arbitration.

[ANNEX G] (1)

1. THE FOLLOWING PROVISIONS OF THE GATT AND RELATED INSTRUMENTS SHALL NOT BE APPLICABLE UNDER ARTICLE 35(2)

a) THE GATT

- II Schedules of Concessions
  - IV Special Provisions Relating to Cinematographic Films
  - XV Exchange Arrangements
  - XVIII Governmental Assistance to Economic Development
  - XXII Consultation
  - XXIII Nullification or Impairment
  - XXV Joint Action by the Contracting Parties
  - XXVI Acceptance, Entry into Force and Registration
  - XXVII Withholding or Withdrawal of Concessions
  - XXVIII Modification of Schedules
  - XXVIII bis Tariff Negotiations
  - XXIX The relation of this Agreement to the Havana Charter
  - XXX Amendments
  - XXXI Withdrawal
  - [XXXII Contracting Parties] (2)
  - XXXIII Accession
  - XXXV Non-application of the Agreement between particular Contracting Parties (3)
  - XXXVI-XXXVIII Trade and Development
- Annex H
- All ad articles in Annex I related to above GATT Articles
  - Agreement on Government Procurement
  - Arrangement Regarding Bovine Meat
  - International Dairy Arrangement
  - The Multifiber Arrangement
  - Agreement on Trade in Civil Aircraft
  - Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries
  - Decision on Safeguard Action for Development Purposes
  - [Understandings regarding notification, consultation, dispute settlement and surveillance.] (4)

**b) THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (Standards Code)**

Preamble (tirets 1, 8, 9)

1(3) General Provision

2.6.4 (Preparation, Adoption and Application of Technical Regulations and Standards by Central Government Bodies)

10.6 Information about Technical Regulations, Standards and Certification Systems

11 Technical Assistance

12 Developing Countries

13 Committee on Technical Barriers to Trade

14 Consultation and Dispute Settlement

15 Final Provisions other than 15(5) and 15(13)

Annex 2 Technical Expert Groups

Annex 3 Panels

**c) THE AGREEMENT ON INTERPRETATION AND APPLICATION OF ARTICLES VI, XVI and XXIII (Subsidies and Countervailing Measures)**

(5)

10 Export Subsidies on Certain Primary Products

12 Consultations

13 Conciliation, Dispute Settlement and Authorised Countermeasures

14 Developing Countries

16 Committee on Subsidies and Countervailing Measures

17 Conciliation

18 Dispute Settlement

19(2) Acceptance and Accession

19(4) Entry into Force

19(5)(a) Conformity of National Legislation

19(6) Review by Committee

19(7) Amendments

19(8) Withdrawal

19(9) Non-application of this Agreement between Particular Signatories<sup>(3)</sup>

19(11) Secretariat

19(12) Deposit

19(13) Registration

**d) THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VII (Customs Valuation)**

- 1.2(b)(iv) Transaction Value
- 11(1) Determination of Customs Value
- 14 (second sentence) Application of Annexes
- 18 Committee on Customs Valuation
- 19 Consultation
- 20 Dispute Settlement
- 21 Developing Countries
- 22 Acceptance and Accession
- 24 Entry into Force
- 25.1 Conformity of National Legislation
- 26 Review
- 27 Amendment
- 28 Withdrawal
- 29 Secretariat Services
- 30 Depositary
- 31 Registration

Annex II

Annex III

Protocol to the Agreement (except I.7 and I.8; with necessary conforming introductory language)

**e) THE AGREEMENT ON IMPORT LICENSING PROCEDURES**

- 1(4) last sentence
- 2(2) footnote 2
- 4
- 5 except paragraph (2)

**f) THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI (Antidumping Code)**

- 13 Developing Countries
- 14 Committee on Anti-Dumping Practices
- 15 Consultation, Conciliation and Dispute Settlement
- 16 Final Provisions, except paragraphs (1) and (3).

g) DECLARATION ON TRADE MEASURES TAKEN FOR BALANCE OF PAYMENTS PURPOSES

[chapeau and paragraph (1): reference to less developed Contracting Parties, developing countries and Article 18](6)

4 to 13 inclusive

h) ALL OTHER PROVISIONS IN THE GATT AND RELATED INSTRUMENTS WHICH RELATE TO:

- i) governmental assistance to economic development and the treatment of developing countries;
- ii) the establishment or operation of specialist committee and other subsidiary institutions;
- iii) reconciliation and dispute resolution [mechanism](7);

[i) ALL FINAL PROVISIONS OTHER THAN IN THE GATT AND THE TOKYO ROUND AGREEMENTS](8)

j) ALL AGREEMENTS, ARRANGEMENTS, DECISIONS, UNDERSTANDINGS OR OTHER JOINT ACTION PURSUANT TO THE PROVISIONS LISTED IN (a) to [(i)](8) ABOVE.

2. [So long as one or more Contracting Party is not a party to the GATT Related Instrument, where a provision in such an Instrument requires matters to be notified to or through the GATT, the GATT Secretariat or a Committee, such matters shall be notified in English, French, German, Italian, Russian or Spanish to or through the Secretariat established by Article 40 of this Agreement or such other body subsequently appointed by the Charter Conference.](4)

3. [Each Contracting Party shall ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, the Agreement on the Implementation of Article VII, the Agreement on Import Licensing Procedures, and the Agreement on Implementation of Article VI as those Agreements apply for that Contracting Party.](<sup>9</sup>)

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Specific comments

- G.1 : EC scrutiny reserve pending the study of all GATT material.
- G.2 : USA, J and EC scrutiny reserve.
- G.3 : The Sub-Group suggests inclusion of all provisions related to non-application in the relevant codes. This implies inclusion of art. XXXV under paragraph a) and 19(9) under paragraph c). USA will check whether other references are needed.
- G.4 : In order to avoid duplication with the GATT-notification system, the USA suggests:
- to delete paragraph (2) of Annex G, and
  - to insert the following text as a new paragraph after paragraph (2) in Article 35:
- "With respect to notification, the following rules will apply:
- (a) with respect to Contracting Parties of this Agreement which are also parties to the GATT and Related Instruments, notifications shall continue to be made in accordance with the provisions of the GATT or its Related Instruments as provided in Article 4; and

- (b) with respect to Contracting Parties of this Agreement which are not parties to the GATT or a Related Instrument, notifications or actions covered in paragraph (2) shall be made directly to all other Contracting Parties to this Agreement. The notifications shall be issued in English, French, German, Italian, Russian or Spanish."

The Sub-Group agreed with this approach but wished to address the following issues:

- (a) insertion of the notification provisions in the body of the Charter Treaty

- (b) clarification from the GATT-Secretariat regarding the following questions:

- which non-GATT Charter Treaty-countries are already observers to GATT and its Committees;
- which non-GATT Charter Treaty-countries are actively seeking such observer status and whether they are likely to succeed;
- could the remaining non-GATT Charter Treaty-countries also be candidates for GATT observer status and under what conditions?
- do observers receive all GATT-documentation (on notification).

The Secretariat has taken up these matters with the GATT-Secretariat and received the information, which was circulated in Room Document 10 of 16 December 1993.

- (c) consideration of the question whether sub-paragraph (a) of the USA proposal is suitable for an Article on Interim-provisions like Article 35, or whether sub-paragraphs (a) and (b) should be integrated.
- (d) J reserve on notification languages.



- G.5 : USA suggests insertion of 3(1)-3(3).
- G.6 : Lawyers in capitals might wish to consider whether general reference to the chapeau is sufficient in this case of a declaration, or whether tirted by tirted specification is needed.
- G.7 : Plenary requested advice from the Legal Sub-Group on this point. The Legal Sub Group recommends not to retain this word. (For more explanation see Room Document 2 of 14 December 1993).
- G.8 : Sub-Group seeks deletion, because it is not clear what the content of paragraph (i) can be. Legal Sub-Group was requested by Plenary to check whether this paragraph is needed.

Legal Sub-Group suggests two options how to handle this problem.

- a) to rewrite sub-paragraph (1) as follows:

"All other provisions on signature, accession, entry into force, withdrawal, deposit and registration in the GATT and Related Instruments."

- b) to add a new clause (iv) in sub-paragraph (h) reading:

"(iv) signature, accession, entry into force, withdrawal deposit and registration."

Regardless of the approach adopted, there would be no need to refer to sub-paragraph (1) in sub-paragraph (1)(j).

(For more explanation see Room Document 2 of 14 December 1993).

- G.9 : This paragraph is intended to replace GATT Codes Article 19(5)(a) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, Article 11(1) and Article 25(1) of the Agreement on the Implementation of Article VII, Article 5(4)a of the Agreement on Import Licensing Procedures, and Article 16(6)(a) of the Agreement on the Implementation of Article VI.

In discussing these paragraphs, the Sub-Group should address the following points:

- (a) It is not clear whether this paragraph is needed in Annex G. The requirement for conformity of the laws of a Contracting Party might as easily be stated by deleting this paragraph while at the same time deleting from Annex G the references to the articles of codes mentioned above (Article 15(5)(a) of the Agreement on Interpretation ... etc.).
- (b) If it is decided to keep paragraph (3) as formulated in Annex G, it should be considered to ask the Legal Sub-Group to check that references to all relevant articles are included in this Annex.
- (c) Separately, it could be considered whether a text on conformity of laws should be included in the main body of the Treaty (i.e. Article 35) instead of in Annex G. (The advice from the Legal Sub-Group on this issue was also requested by the Plenary).

Legal Sub-Group's view on issues in (b) and (c) is the following:

"There is no ideal solution to this problem. Among the options the Legal Sub-group recommends that paragraph (3) of Annex G be deleted, while retaining the existing paragraph (1) exclusions of comparable Code provisions, and without including a text on conformity of laws elsewhere in the Charter Treaty, because it is well recognised as a matter of international law that a party to a treaty can not maintain or enact legislation that is contrary to it. If, however, it is decided to include a conformity statement in the Charter Treaty, it should apply to the Treaty in its entirety and not be limited to Article 35; otherwise, a negative inference might be drawn with respect to Contracting Parties' obligations to conform their laws with other parts of the Treaty."

(For more explanation see Room Document 2 of 14 December 1993).

ANNEX D

INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT

- (1) (a) In their relations with one another, Contracting Parties shall make every effort through co-operation and consultations to arrive at a mutually satisfactory resolution of any difference of views about existing measures that might materially affect compliance with the provisions applicable to trade under Article 35.
- (b) A Contracting Party may make a written request to any other Contracting Party for consultations regarding any existing measure of the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 35. A Contracting Party which requests consultations shall to the fullest extent possible indicate the measure complained of and specify the provisions of Article 35 and of the GATT and Related Instruments that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretariat, which 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 in which it is treated by the Contracting Party providing the information.
- (d) In seeking to resolve matters considered by a Contracting Party to affect compliance with provisions applicable to trade under Article 35 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.

- (2) (a) If, within 60 days from the receipt of the request for consultation referred to in paragraph (1)(b), the Contracting Parties have not resolved their dispute or agreed to resolve it by conciliation, mediation, arbitration or other method, either Contracting Party may deliver to the Secretariat a written request for the establishment of a panel in accordance with paragraphs (2)(b) to (f). In its request the requesting Contracting Party shall state the substance of the dispute and indicate which provisions of Article 35 and of the GATT and Related Instruments are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.
- (b) The interests of other Contracting Parties shall be taken into account during the resolution of a dispute. Any other Contracting Party having a substantial interest (as defined in the GATT and Related Instruments) in a matter shall have the right to be heard by the panel and to make written submissions to it, provided that both the disputing Contracting Parties and the Secretariat have received written notice of its interest no later than the date of establishment of the panel, as determined in accordance with paragraph (2)(c).
- (c) A panel shall be deemed to be established 45 days after the receipt of the written request of a Contracting Party by the Secretariat pursuant to paragraph (2)(a).
- (d) A panel shall be composed of three members who shall be chosen by the Secretary-General from the roster described in paragraph (7). Except where the disputing Contracting Parties agree otherwise, the members of a panel shall not be citizens of Contracting Parties which either are party to the dispute or have notified their interest in accordance with paragraph (2)(b), or citizens of States members of a Regional Economic Integration Organisation which either is party to the dispute or has notified its interest in accordance with paragraph (2)(b).

- (e) The disputing Contracting Parties shall respond within ten working days to the nominations of panel members and shall not oppose nominations except for compelling reasons.
  - (f) Panel members shall serve in their individual capacities and shall neither seek nor take instruction from any government or other body. Each Contracting Party undertakes to respect these principles and not to seek to influence panel members in the performance of their tasks. Panel members shall be selected with a view to ensuring their independence, and that a sufficient diversity of backgrounds and breadth of experience are reflected in a panel.
  - (g) The Secretariat shall promptly notify all Contracting Parties that a panel has been constituted.
- (3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Annex. Rules of procedure shall be as close as possible to those of the GATT and Related Instruments. A 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 Annex. In a proceeding before a panel each disputing Contracting Party and any other Contracting Party which has notified its interest in accordance with paragraph (2)(b), shall have the right to at least one hearing before the panel and to provide a written submission. Disputing Contracting Parties shall also have the right to provide a written rebuttal. A Panel may grant a request by any other Contracting Party which has notified its interest in accordance with paragraph (2)(b) for access to any written submission made to the panel, with the consent of the Contracting Party which has made it.

The proceedings of a 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 to trade

under Article 35. In exercising its functions, a panel shall consult 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, a panel shall base its decision on the arguments and submissions of the disputing Contracting Parties. Panels shall be guided by the interpretations given to the GATT and Related Instruments within the framework of the GATT.

Unless otherwise agreed by the disputing Contracting Parties, all procedures involving a 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 determine its jurisdiction; its decision shall be final and binding. Any objection by a disputing Contracting Party 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 Secretary-General 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 disputing 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 disputing Contracting Parties. The disputing 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 may, in its discretion, meet with the disputing Contracting Parties to consider the issues raised in such a request.

The final report shall include descriptive sections (including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties), the panel's findings and conclusions, and a discussion of arguments made on specific aspects of the interim report at the stage of its review. The final report shall deal with every substantial issue raised before the panel and necessary to the resolution of the dispute 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 disputing Contracting Parties. The Secretariat shall at the earliest practicable opportunity distribute the final report, together with any written views that a disputing 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 35 or with a provision of the GATT and Related Instruments that applies under Article 35, 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 that provision.
- (c) Panel reports shall be adopted by the Charter Conference. In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be adopted 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. The disputing Contracting Parties and Contracting Parties which notified their interest in accordance with paragraph (2)(b) 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 regarding compliance with such ruling or recommendation. In the event that immediate compliance is impracticable, the Contracting Party concerned shall explain its reasons for non-compliance to the Charter Conference and, in light of this explanation, shall have a reasonable period of time to effect compliance. 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 to the dispute injured by such non-compliance may deliver to the non-complying Contracting Party a written request that the non-complying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the non-complying Contracting Party shall promptly enter into such negotiations.
- (b) If the non-complying 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 non-complying Contracting Party under Article 35.

- (c) The Charter Conference may authorise the injured Contracting Party to suspend such of its obligations to the non-complying Contracting Party, under provisions of Article 35 or under provisions of the GATT and Related Instruments that apply under Article 35, as the injured Contracting Party considers equivalent in the circumstances.
  - (d) The suspension of obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with Article 35 has been removed, or until a mutually satisfactory solution is reached.
- (6) (a) Before suspending such obligations the injured Contracting Party shall inform the non-complying Contracting Party of the nature and level of its proposed suspension. If the non-complying 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. The proposed 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).
- (b) The Secretary-General shall establish an arbitral panel in accordance with paragraphs (2)(d) to (f), which if practicable shall be the same panel which made the ruling or recommendation referred to in paragraph (4)(d), to examine the level of obligations that the injured Contracting Party proposes to suspend. Unless the Charter Conference decides otherwise the rules of procedure for panel proceedings shall be adopted in accordance with paragraph (3)(a).

- (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 this is inseparable from the determination of the level of suspended obligations.
  - (d) The arbitral panel shall deliver its written determination to the injured and the non-complying Contracting Parties and to the Secretariat within 60 days of the establishment of the panel or within such other period as may be agreed by the injured and the non-complying Contracting Parties. The Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference 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 decides otherwise.
  - (f) In suspending any obligations to a non-complying Contracting Party, an injured Contracting Party shall make every effort not to affect adversely the trade of any other Contracting Party.
- (7) Each Contracting Party may designate two individuals who shall, in the case of Contracting Parties which are also party to the GATT, if they are willing and able to serve as panellists under this Article, be panellists currently nominated for the purpose of GATT dispute panels. The Secretary-General may also designate, with the approval of the Charter conference, not more than ten individuals,

who are willing and able to serve as panellists for purposes of dispute resolution in accordance with paragraphs (2) to (4). The Charter Conference may in addition decide 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 panellists. 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 35. In fulfilling any function under this Annex, 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 Annex. 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 Secretary-General being subject to approval of the Charter Conference.

- (8) Notwithstanding the provisions contained in this Annex, Contracting Parties are encouraged to consult throughout the dispute resolution proceeding with a view to settling their dispute.
- (9) The Charter Conference may appoint or designate other bodies or fora to perform any of the functions delegated in this Annex to the Secretariat and the Secretary-General.

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Chairman's note

Negotiations in the Plenary finished.

**ANNEX B**

**FORMULA FOR ALLOCATING CHARTER COSTS**

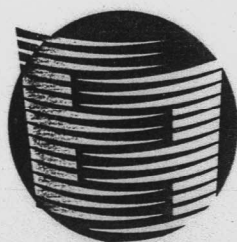
To be elaborated at a later stage.

ENERGY CHARTER TREATY

DRAFT

MINISTERIAL DECLARATION

To the Energy Charter Treaty



EUROPEAN ENERGY CHARTER

**Version 6**

**20 December 1993**

## MINISTERIAL DECLARATION

In signing the Energy Charter Treaty Ministers or their plenipotentiaries declare that the following understanding has been reached.

### 1. To the Energy Charter Treaty as a whole

It is the common understanding that the provisions of the Energy Charter Treaty do not oblige any Contracting Party to introduce mandatory Third Party Access or to prevent the charging of identical prices or tariffs to customers in different locations who are in similar circumstances apart from location.

### 2. To Article 1(5)

Economic activity in the Energy Sector includes, for example:

- the prospecting and exploration for, and extraction of, e.g. oil, gas, coal and uranium;
- the construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
- the transportation, distribution, storage and supply of Energy Materials and Products, e.g. by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
- removal and disposal of wastes from energy related facilities such as power stations, including of radioactive wastes from nuclear power stations;
- decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
- the marketing, and sale of, and trade in Energy Materials and Products, e.g. retail sales of gasoline;
- research, consulting, planning, management and design activities, related to the activities mentioned above, including those aimed at improving energy efficiency.

3. To Article 1(12)

[Contracting Parties recognise the necessity for an adequate and effective protection of Intellectual Property rights according to the highest internationally accepted standards.](1)(2)

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Specific comments

1(12).1 : USA general reserve; prefers to move it to the Preamble.

1(12).2 : Except for CDN all delegations are in favour of having the Ministerial Declaration linked to Article 1(12). CDN prefers the Ministerial Declaration linked to the Charter Treaty as a whole. Subject to consultations with capitals.

4. To Article 4

The Charter Conference will consider how to apply the Energy Charter Treaty to energy related services and address the matter of procurement after the negotiations in the Uruguay Round are concluded.

5. To Article 7

Interpretative understandings:

The unilateral and concerted anti-competitive conduct referred to in paragraph (2) is to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.

["Enforcement" or "Enforces" include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further laws granting or continuing an authorisation.](1)

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Specific comments

7.1 : AUS scrutiny reserve.

6. To Article 8(4)

Such applicable legislation would include provisions on environmental protection, land use, safety, technical standards.

7. To Article 17

Arrangements that might be made between an Investor and [a Contracting Party or its designated agency]<sup>(1)</sup> as to the pursuit of rights and claims shall not be affected by the provisions of Article 17.

Furthermore, where an Investor retains rights and claims [even]<sup>(2)</sup> in cases where subrogation has taken place<sup>(3)</sup> in relation to [other]<sup>(4)</sup> rights and claims in regard to the same investment, that Investor shall have access to all dispute settlement provisions of Article 30.

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Specific comments

17.1: CDN suggests replacing with: "the Indemnifying Party" to remove ambiguity since it is not clear it is meant to refer solely to the government of the Investor's country or to the Host country.

17.2: CDN suggests deletion.

17.3: CDN suggests insertion of comma.

17.4: CDN suggests replacing with "such".



8. To Article 22(1)(i)

It is for each Contracting Party to decide the extent to which the assessment and monitoring of environmental impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed.

9. To Article 27

In their mutual relations, Contracting Parties which are Members of the European Communities shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned.

10. To Article 27(3)(a), (b) and (c)

[The provisions of Article 27(3)(a), (b) and (c) should not constitute a disguised restriction on Transit.](1)(2)(3)

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Specific comments

27(3).1 : USA reserve.

27(3).2 : EC scrutiny reserve.

27(3).3 : H proposes alternative wording:

"Contracting Parties should do their utmost to refrain from measures hindering Transit, and by no means should the provisions of Article 27(3)(a), (b) and (c) constitute a disguised restriction on Transit.

11. To Article 30(2)(a)

Article 30(2)(a) shall not in itself be interpreted to require a Contracting Party to enact Part III of this Agreement into its domestic law.

12. To Article 35(2), Annex G

The Charter Conference will develop notification procedures under this provision which will ensure increased transparency while minimising administrative costs.

13. To Article 39

The Secretary General shall 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 Energy Charter Treaty and the Charter. The Secretary General might report back to the Charter Conference at the meeting required under Article 39(1) not later than ninety days after the closing date of signature.

The Charter Conference shall adopt the annual budget before the beginning of the financial year and approve the annual accounts.

14. To Annex D

Parties to the GATT shall appoint the same panellists for the Energy Charter Treaty roster.

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General comment

All Ministerial Declarations would be subject to N proposal for a new Article on Declarations and Statements to be incorporated in Part VIII - Final Provisions of the Charter Treaty.