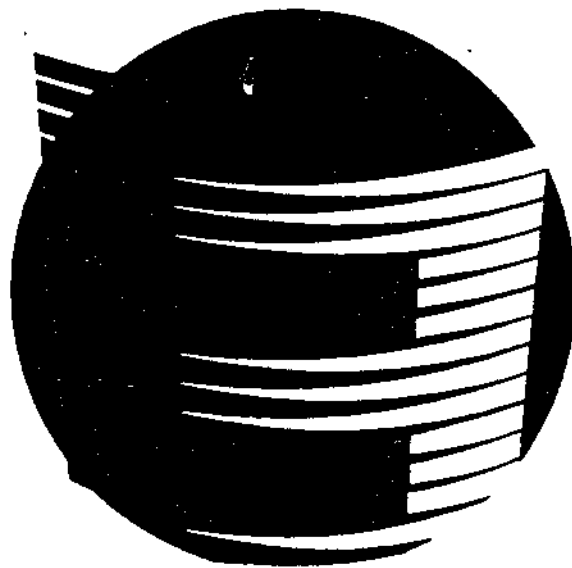


17/94
CONF 96

DRAFT

TREATY



Version 7

17 March 1994

Brussels, 17 March 1994

NOTE FROM THE SECRETARIAT

Subject: Draft Energy Charter Treaty – seventh version

1. The attached draft Treaty with all Annexes and the Ministerial Declaration records the position reached after the discussions at the Plenary meeting of 7-11 March 1994.
2. To facilitate a Chairman's compromise proposal delegations are invited to notify to the Secretariat on or before 12 April 1994 if they would wish to:
 - a) withdraw reserves;
 - b) revise their Annex T entries in accordance with the list of Articles eligible for transitional arrangements in Article 36(1) and the guidelines in Room Document 51 of 11 March 1994;
 - c) propose entries in the new Annexes.

CHAIRMAN'S NOTE TO CONF 96

For Articles on which full agreement has been reached, or where there are only a few remaining footnotes 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 case described above, any remaining footnotes have been moved to the end of the Charter Treaty (pages 91 to 94). The same practice has now been followed for a number of footnotes on other Articles recording scrutiny or contingency reserves or similar points which have existed for some time. Delegations with footnotes should of course notify the Secretariat if they have decided on their withdrawal.

DRAFT

ENERGY CHARTER TREATY

PREAMBLE

The Contracting Parties to this Treaty,

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 liberalization 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 Treaty;

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:

Specific comments

P.1: General scrutiny reserve.

PART I

DEFINITIONS AND GENERAL PROVISIONS

ARTICLE 1

DEFINITIONS

For the purposes of this Treaty 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 Organization which has consented to be bound by the Treaty and for which the Treaty is in force;
- (3) ["Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.](¹)
- (4) "Energy Materials and Products", based on the Harmonized 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](²), transmission, distribution, trade, marketing, or sales of Energy Materials and Products except those included in Annex NI or in the distribution of heat to multiple premises.
- (6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor [and includes](³):

- (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];⁽⁴⁾
 - (d) Intellectual Property;
 - (e) [any right]⁽⁵⁾ 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 Treaty 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 Treaty shall only apply to matters affecting such investments after the effective date.

For the purposes of this Treaty, "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter Efficiency Projects", and so notified to the Secretariat.

(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 organization organized 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 or moving into a different field of activity.](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.](9)

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

- (11) [(a) "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 General Agreement on Tariffs and Trade 1994 annexed to the Agreement establishing the World Trade Organization as appropriate.

(b) "Related Instruments" means agreements, arrangements or other legal instruments concluded under the auspices of the GATT.]⁽¹⁰⁾

(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.

(13) "Protocol" means an agreement authorized 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 Treaty to specific sectors or categories of activity comprised within the scope of this Treaty, 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.

Chairman's note

Negotiations in the Plenary finished, except for the definition of the GATT and Related Instruments and the exclusion of maritime transport.

Specific comments

1.2 : USA supported by J proposes explicit exclusion of maritime transport from coverage of the Treaty, for instance by the following wording:

"Nothing in this Treaty 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.

This proposal would include replacement of "carriage" in Article 8(10)(a) by "movement over land".

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

1.10: General reserve. This definition cannot be finalized until after the results of the Marrakesh Conference on the Uruguay Round. The Secretariat will also give attention to adequate wording to distinguish between GATT 1947 and GATT/UR 1994.

ARTICLE 2

PURPOSE OF THE TREATY

This Treaty 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.

Chairman's note

Negotiations in the Plenary finished.

PART II

COMMERCE

[ARTICLE 3]⁽¹⁾

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.
 - (2) They will, accordingly, seek to ensure that price formation shall be based on market principles.
-

General comments

- At the beginning of the March Plenary there was a discussion of both the present text of Article 3 and the N proposal, recorded in CONF 82, to replace this with two separate Articles. No agreement was reached on either approach. Several delegations took the view that the relevant issues were dealt with satisfactorily elsewhere in the Treaty, and that any attempt to cover them in Article 3 would create overlap and legal uncertainty.
- N argued that Access to Resources should be treated separately from Investment. Following this discussion N proposed a new version of its suggested Article on Access to Energy Resources, which is now recorded in footnote 3.1.
- This revised proposal was also briefly discussed. AUS and KAZ conveyed their support; in the case of AUS with preference for MFN treatment in paragraph (2). USA, J and EC maintained reserves on the N proposal for the reasons summarized above.

Specific comments

3.1 : N proposes that this Article should be deleted and replaced with two separate Articles reading:

***ACCESS TO ENERGY RESOURCES**

- (1) The Contracting Parties undertake to facilitate access to energy resources inter alia by allocating on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.
- (2) In the application of such criteria each Contracting Party shall, without prejudice to Article 25(5), treat entities from other Contracting Parties no less favourably than (its own entities or) entities of any other Contracting Party or any state that is not a Contracting Party.

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 Treaty 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

[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 between particular Contracting Parties which are parties to the GATT [or as they are set out in Article 35.]⁽²⁾]⁽³⁾]⁽⁴⁾

General comments

- The March Plenary agreed that - in relation to those laws and practices of GATT parties which may not be fully compatible with the provisions of GATT but have not been tested through the dispute resolution procedures of GATT - the objectives of the Article are as follows:
 - a) the Article should not limit the rights of GATT members to take them to dispute resolution. However, non-GATT members should not be able to challenge them under the provisions of Article 35 in case that might upset the balance of understanding within the GATT;
 - b) the political message of this Article should be kept, taking account of any legal changes necessary.

- In CDN's view consideration needs to be given to whether to exclude government procurement from the scope of Article 13 for the following reasons:
 - a) The GATT Agreement on Government Procurement already prohibits, in Article 11:2(a), discrimination among locally established suppliers on the basis of degree of foreign affiliation or ownership;
 - b) The delegations have accepted the objectives set out in footnote 4.4; and
 - c) Article 35 excludes the Government Procurement Agreement in Annex G.

- See also general comments under Article 35.

Specific comments

- 4.1 : General reserve pending results of discussion on Article 35 and advice from the Legal Sub-Group (footnote 4.4).
- 4.2 : USA reserve. USA was asked to withdraw its reserve, unless it could be demonstrated that these words are really harmful.
- 4.3 : EC reserve. EC wants a reference to GATT and Related Instruments with wording along the lines of Article 35(1). EC was asked to discuss this with AUS, CDN and USA and propose a solution which leaves the objective of Article 4 intact.
- 4.4 : The Legal Sub-Group should be asked to look at this Article again and recommend an approach for the whole Treaty to ensure that:
- this Article states clearly that trade in the long and permanent term will be governed by GATT rules and Related Instruments;
 - nothing derogates from rights and obligations under GATT.

[ARTICLE 6]⁽¹⁾

TRADE RELATED INVESTMENT MEASURES

- (1) Further to Articles 4 and 35 of this Treaty and without prejudice to other rights and obligations under those Articles no Contracting Party shall apply any trade related investment measure that is inconsistent with the provisions of article III or article XI of the GATT.
- (2) 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]⁽²⁾⁽³⁾ 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.
- (3) Nothing in paragraph (1) shall be construed to prevent a Contracting Party applying qualification requirements for export promotion, foreign aid, government procurement or preferential tariff or quota programmes.
- (4) Notwithstanding paragraph (1), Contracting Parties may temporarily maintain trade related investment measures which were in effect more than 180 days before signature of this Treaty subject to the notification and phase-out provisions set out in Annex TRM.

General comments

- There can be no guarantee that the TRIMs provision of the Uruguay Round will be reproduced exactly in the Treaty through the negotiations envisaged by Article 35 BIS. However, no evidence has been adduced that there are significant legal risks that

divergence would introduce legal difficulties. If a country has serious doubts about this, it is invited quickly to put this in writing in order to get an opinion from the Legal Sub-Group.

- With respect to investor-state disputes three options could be discerned:

- (a) no provision in Part III;
- (b) a right for an investor to the dispute mechanism of Article 30 via insertion in Part III;
- (c) a compromise proposal which limits the rights under (b) to TRIMs applied to an investment after it has been made. If this alternative was chosen, the text (to be inserted as a new paragraph in Article 13) would read:

"No Contracting Party shall apply any trade related investment measure as listed in Article 6(2) to investment, made before that application, of investor of another Contracting Party, subject to the provisions of Article 6(3) and Article 6(4)".

The Legal Sub-Group should check to make sure that this text does not invalidate the provisions of Article 6.

- Subject to scrutiny a significant majority of delegations in the March Plenary were in favour of alternative (a). Two delegations preferred alternative (b). All delegations except one indicated that alternative (c) would probably be acceptable, though not preferred.

Specific comments

6.1: USA states that, as one of the largest sources of foreign direct investment, it strongly supports a much more comprehensive set of disciplines on the use of performance requirements than the Uruguay Round TRIMs text. For example, the USA believes it is important to include prohibitions on mandated export performance requirements and local research and development. The USA believes it is also important to prohibit mandates on the transfer

of a technology, a production process or other proprietary knowledge. Moreover, such prohibitions should be handled in Part III of the Treaty since performance requirements directly affect the making and operation of investments. Creating disciplines on performance requirements in Part III would also create the right of an investor to pursue investor-state dispute settlement on matters relating to the measures disciplined. Thus, the USA is unable to support the proposal contained in CONF 92 and the current text. Instead, the USA has proposed the alternative as contained in Room Document 8 to further strengthen investment protection.

The USA was isolated in its wishes to include TRIMs in Part III and go beyond the TRIMs list of the Uruguay Round. However, in the interest of compromise USA expressed willingness to study the current text.

- 6.2: It was agreed - subject to RUF scrutiny reserve - that Article 6 should cover both domestic and foreign investment. The Legal Sub-Group should check whether the word "Investor" covers this and that there is no substantial difference from the wording used in the Dunkel text.
- 6.3: USA proposed replacing with: "Investment of an Investor". It was concluded that this question arose in several places in Part III of the Treaty; the term used would be decided in the light of the final text of that Part.

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 Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article.
-

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:
- (a) modernizing 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](3) 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.

(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 to the other Contracting Parties concerned would endanger [the security or efficiency of its energy systems, including the security of supply.](6)

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.](7)(8)

(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 Treaty.](9)

(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) For the purpose of this Article:

(a) "Transit" means the carriage 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 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.](10)

(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.

Specific comments

- 8.2 : CDN reserve on paragraphs (5), (6) and (7) pending a solution to the pre-emption of its regulatory authorities' statutory powers to interrupt energy flows.
- 8.6 : U proposes replacement with: "the security or efficiency, including reliability of supplies, of its energy systems or the systems of other Contracting Parties."
- 8.9 : Advice from Legal Sub-Group requested. In the meantime EC and CDN scrutiny reserves.

ARTICLE 9

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]⁽²⁾, subject to⁽¹⁾ the protection of the Intellectual Property rights.
- (2) Accordingly to the extent necessary to give effect to paragraph (1), the Contracting Parties shall⁽³⁾ 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.

Specific comments

- 9.1: USA suggests replacing with: "subject to their laws and regulations and".

9.2: RUF reserve; to be withdrawn if present text of paragraph (2) is agreed.

9.3: USA suggests insertion of "strive to".

ARTICLE 10

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 shall 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]⁽¹⁾ existing international agreements, no Contracting Party shall require terms for access to [commercially available]⁽²⁾ sources of finance within its jurisdiction which render generally unavailable such access for the purpose of investment in the Economic Activity in the Energy Sector of another Contracting Party on terms no less favourable than those required in like circumstances for the purpose 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 state that is not a Contracting Party, whichever is the most favourable.

(2) A Contracting Party which adopts and maintains programmes providing for access to public loans, grants, guarantees or 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 Energy Materials and Products 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.]⁽²⁾

Specific comments

10.1 : USA proposes substituting with: "Except where a preference to domestic investment or investment in another Contracting Party or a state which is not a Contracting Party is extended under domestic law or".

Additionally USA wants to revert to wording of the third sentence as in CONF 85.

RUF cannot accept these USA proposals.

10.2 : RUF scrutiny reserve.

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 Treaty, 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 favourable than that required by international law (1)].(2) [Each Contracting Party shall observe any obligations it has entered into concerning an Investment of an Investor of any other Contracting Party.](3)
- (2) [Each Contracting Party shall endeavour to permit Investors of other Contracting Parties to Make Investments in its Area on the basis of [the following standard of treatment](4): treatment no less favourable than that accorded to(5) 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.](6)
- (7)
- (3) [A supplementary agreement shall, subject to conditions laid down therein, 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(5) 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. This

supplementary agreement shall be open for signature by the states and Regional Economic Integration Organizations which have signed this Treaty. [Negotiations towards the supplementary agreement shall commence not later than [1 January 1995], with a view to concluding such an agreement by [1 January 1997].](8)](9)

- (4) Each Contracting Party shall endeavour:
- to limit to the minimum the exceptions to the [standard of treatment described in paragraph (2)];
 - to reduce progressively existing restrictions which affect the ability of investors of other Contracting Parties to Make Investments in its Area.
- (5) [Should a Contracting Party adopt laws, regulations or other measures that would create new exceptions to [the standard of treatment described in paragraph (2)](4), that Contracting Party shall [endeavour] not [to] apply such exceptions to investments of investors of other Contracting Parties existing at the time the exception became effective, [and may not require the divestment on the basis of nationality in whole or in part, of investments of investors of any other Contracting Parties that exist at the time such an exception becomes effective]](10).
- (6) Summaries of any laws, regulations or other measures relevant to exceptions to [the standard of treatment described in paragraph (2)](4) shall be included in a report to be submitted to the Secretariat on the date of the opening for signature of this Treaty. The report 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)](4). A Contracting Party shall keep its report up to date by promptly notifying amendments to the Secretariat. The Charter Conference shall periodically review these reports.
- (7) A Contracting Party may at any time voluntarily declare to the Charter Conference and all other Contracting Parties that it will not introduce new exceptions to [the standard of treatment described in paragraph (2)](4).

Furthermore a Contracting Party may, at any time, voluntarily make a commitment that Investors of other Contracting Parties shall be permitted to Make Investments in some or all Economic Activities in the Energy Sector in its Area in accordance with [the standard of treatment described in paragraph (2)].⁽⁴⁾

Such commitments shall be notified to the Secretariat and listed in Annex VC and, once made, shall be binding under this Treaty.

(8) 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 [in like situations]⁽⁵⁾ 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.

(9) Nothing in paragraph (8) shall apply to:

- (a) grants or other financial assistance provided, or contracts entered into, by a Contracting Party for energy technology research and development;
- (b) government insurance, grants, loans and loan guarantee programmes, for encouraging Investments abroad;
- (c) government programmes for socially and economically disadvantaged individuals or groups; or
- (d) requirements for legislative approval for leases of federal property;

which the Contracting Party has identified in its Annex PE.

(10) [Nothing in paragraph (8) shall apply to subsidies listed in Annex PE which, as of 1 July 1995, are provided by any Contracting Party which was a member of the former Union of Soviet Socialist Republics to Investments owned or controlled by nationals of that Contracting Party. Each such Contracting Party acknowledges the transitional nature of such discriminatory subsidies and shall strive to ensure that such subsidies will be reduced to a minimum.

Each such Contracting Party shall not give such subsidies for the purpose of, and shall strive to ensure that the subsidies do not have the effect of, adversely affecting conditions of competition or discouraging or prohibiting Investments by Investors of other Contracting Parties.(11)](12)(13)

(11) [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.](14)

(12) [Without prejudice to Article 16, the provisions of this Article shall also apply to Returns.](15)

(13) 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 authorizations.

General comments

- 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. (See also General comments under Article 3).
- Paragraphs (9) and (10) have been redrafted to narrow the types of possible exception with full agreement (subject only to footnote 13.11) that they now contain an exhaustive list. Annex PE will show for each country which, if any, of the exceptions listed in paragraph (9) apply.
- The question of maritime transport will be considered in the context of the Treaty as a whole (see also footnote 1.2).

Specific comments

- 13.1 : EC wants to reinsert "including that Contracting Party's international obligations".
- 13.2 : RUF scrutiny reserve. This delegation has previously suggested substitution with: "Investments shall be accorded treatment which in no case shall be inconsistent with the norms and principles of international law."
- 13.3 : N, AUS and CDN reserves.
To meet the concerns of the three delegations the Sub-Group Chairman suggests language along the following lines:
"The Contracting Parties listed in Annex DL (Domestic Law), while affirming their intent to observe in good faith obligations they may have entered into with regard to Investments of Investors of any other Contracting Party, do not consent to the settlement of disputes concerning the last sentence of Article 13(1) under the provisions of this Treaty."
- 13.4 : Legal Sub-Group advice is asked to ensure that the reference in other paragraphs to "the standard of treatment described in paragraph (2)" only captures the non-discrimination obligations (NT or MFN, whichever is the most favourable).
- 13.5 : The Sub-Group Chairman identified three options for dealing with USA proposal to refer to "in like situations":
- a) Insert (or substitute) "like Investments of";
 - b) Insert "in like situations" after the word "accorded";
 - c) retain the present text, which contains "in like situations" only in paragraph (8) post-investment and is accompanied by a Ministerial Declaration.

The Plenary Chairman asked delegations to reflect on option (c), which seemed to be a reasonable compromise solution. EC reserve.

13.6 : AUS, CDN, CH, and A have proposed a legally binding MFN-provision.

AUS suggested a new text for paragraph (2):

"Each Contracting Party shall permit Investors of other Contracting Parties to Make Investments in its Area on the basis of treatment no less favourable than that accorded to Investors of any other Contracting Party or any state that is not a Contracting Party and shall endeavour to permit Investors of other Contracting Parties to Make Investments in its Area on the basis of treatment no less favourable than that accorded to its own Investors.";

and a new paragraph (3bis):

"Contracting Parties that are signatories to the supplementary agreement referred to in paragraph 13(3) shall have the right to unilaterally withdraw, at any time after the signature of that agreement, their commitments under paragraph 13(2) with respect to signatories of this Treaty that are not also signatories of the supplementary agreement.

Such withdrawal would be effected by giving notice in writing to the Secretariat, and would have effect from the date of receipt by the Secretariat of such notification.

In the event that any Contracting Party exercises this right, such Contracting Party will nevertheless endeavour to permit Investors of other Contracting Parties to Make Investments in its Area on the basis of treatment 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; whichever is the most favourable."

13.7 : CH suggested a new paragraph (2 bis):

"Until the negotiation of the supplementary agreement begins, no Contracting Party shall seek to obtain from any other Contracting Party a preferential standard for Making Investments by its Investors in the Area of the latter Contracting Party."

13.8 : USA has suggested substitution with the following text :
"Negotiators shall seek to conclude the supplementary agreement within 1 year from the date this Treaty is open for signature."

At an earlier 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.

EC would consider a suggestion to state the content of the legal text of the supplementary agreement in a Ministerial Declaration, provided it would in no way delay signature of the first Treaty.

13.9 : N contingency reserve.

13.10: The Sub-Group Chairman noted three possible options for paragraph (5):

- a) EC proposal to delete "endeavour" and "to"; to insert the word "retroactively" after the word "apply"; and to delete the rest of the paragraph after "and may not require...". EC also volunteered to redraft the text to clarify the intention to cover only pre-investment/establishment;
- b) the present text;
- c) the deletion of the rest of the paragraph after "and may not require ...".

13.11: RUF is reviewing whether there is any need to add other exceptions.

13.12: USA believes that this should be subject to the disciplines applied to transitional arrangements.

13.13: EC objects to post-investment exceptions.

13.14: USA reserve.

13.15: RUF sees no need for this paragraph. EC considers that there is a need for this paragraph, but that it might be better placed elsewhere.

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, and investments of such investors, to employ any key person of the investors' or the investments' 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.

Chairman's note

Negotiations in the Plenary finished.

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.

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 nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization 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) [For the avoidance of doubt, expropriation shall include situations 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 the ownership of shares, and those investors shall be entitled to the provisions of this Article.]⁽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 Treaty, shall not in itself be regarded, for purposes of this Treaty, as an act of expropriation or as a measure having effect equivalent to expropriation.]⁽³⁾
-

Specific comments

15.1: RUF retains the reserve until solution to Article 16(5) is found.

15.2: N scrutiny reserve.

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).

ARTICLE 16

TRANSFERS 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 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]⁽¹⁾ of paragraphs (1) to (3). 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) [With respect to the provisions of paragraph (2), Contracting Parties which constituted the former Union of Soviet Socialist Republics may enter into agreements that would permit transfers between them to be made instead in the currencies of such Contracting Parties provided such agreements:
- (a) shall not treat investments of investors of other Contracting Parties resident in their Areas less favourably than either investments of investors of the Contracting Parties that have entered into such agreements or investments of investors of any state that is not a Contracting Party; and

(b) [shall be consistent with any obligations of those Contracting Parties to the IMF].(2)](3)

(6) [Notwithstanding the provisions of paragraphs (1) and (3), Australia and Romania 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, Australia or Romania shall ensure that such measure least infringes the rights of other Contracting Parties and is no broader in scope or duration than necessary.](4)

(7) [Notwithstanding paragraph (1)(b) of this Article, a Contracting Party may restrict the transfer of a Return in kind in circumstances where the Contracting Party is permitted under Article 4 or Article 35(1) of this Treaty to restrict or prohibit the exportation or the sale for export of the product constituting the Return in kind; provided however that a Contracting Party shall permit Returns in kind to be made as authorized or specified in an investment agreement, investment authorization, or other written agreement between the Contracting Party and either an investor of another Contracting Party or its investment.](5)

Specific comments

16.1: CH, USA, CDN, J and A suggest replacing with: "do not derogate from the obligations".

16.2: Alternative USA proposal: "receive the prior approval of the International Monetary Fund, where one or both of the Contracting Parties concerned are members of the Fund."
RUF prefers deletion.

16.3: EC scrutiny reserve.

RUF prefers text contained in CONF 82.

16.4: USA and EC reserve.

16.5: This paragraph is agreed in principle and intended to be consistent with GATT.

EC scrutiny reserve to confirm this.

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 recognize:

- (a) the assignment to the Indemnifying Party 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)

(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]⁽¹⁾ was entitled to receive by virtue of this Treaty in respect of the Investment concerned and its related Returns.

(3)

(4)

Specific comments

17.2: A (supported by EC) proposes a proviso to be added after subparagraph (b) reading:

"all without prejudice to the right under Article 30 of the Investor that was given the benefit of the indemnity or guarantee to exercise such rights and enforce such claims on behalf of and as authorized by the Indemnifying Party."

or alternatively

"In relation to disputes governed by Article 30, the Indemnifying Party may request and authorize the Investor to act on the Indemnifying Party's behalf."

See CONF-87 for explanatory comments.

17.4: USA proposes a new paragraph in relation to A concerns in footnote 17.2 reading:

"In any proceeding under Article 30 of this Treaty involving an investment dispute, a Contracting Party shall not assert, as a defense, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract."

[ARTICLE 18]⁽¹⁾⁽²⁾

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 Treaty, nothing in Part III or V of this Treaty 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 Treaty, where any such incompatible provision is more favourable to the Investor or Investment.

Specific comments

18.1: USA reserve.

18.2: N, EC and CDN contingency reserves.

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 organized 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 were accorded to the Investor of that state that is not a Contracting Party or to its Investments.]⁽¹⁾

(2)

Specific comments

19.1 : EC reserve.

19.2 : 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 states that are not Contracting Parties or by nationals of states that are not Contracting Parties."

PART IV

CONTEXTUAL

General comment

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

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

ARTICLE 21

SOVEREIGNTY OVER ENERGY RESOURCES

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

Specific comments

21.1 : USA proposes substitution with: "In particular, each state holds, in accordance with and subject to the rules of international law,".

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]⁽¹⁾ 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.]⁽²⁾

(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.

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 Treaty 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.

Chairman's note

Negotiations in the Plenary finished.

Legal Sub-Group advises that present wording of first sentence of paragraph (2) is satisfactory (see CONF 82).

ARTICLE 24

TAXATION

(1) GENERAL EXCLUSION

Except as set out in this Article, nothing in this Treaty 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 Treaty, 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 Treaty 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 Treaty.

(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 Organization;]⁽¹⁾ 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 Treaty.

(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 authorized representatives.

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

Chairman's note

Negotiations in the Plenary finished subject to ensuring consistency of paragraphs (2) and (3) with Articles 4 and 35 and in relation to Article 13 once those Articles are finalised.

[ARTICLE 25](1)(2)

STATE AND PRIVILEGED ENTERPRISES

- (1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes⁽²⁾ 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 Treaty.
- (2) No Contracting Party shall encourage or require such a state enterprise⁽²⁾ to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.
- (3) Each Contracting Party shall ensure that if it [establishes or maintains a state entity and entrusts such entity]⁽²⁾ 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 Treaty.
- (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 Treaty.]⁽²⁾
- (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.]⁽³⁾
- (6) [For the purposes of this Article, obligations under this Treaty do not include those under Articles 4 and 35.]⁽⁴⁾
- (7) For the purposes of this Article, entity includes any enterprise, agency or other organization or individual.

Specific comments

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

25.2 : H reserve on paragraphs (1) to (4). H suggests the following amendments for these paragraphs:

- a) in paragraphs (1) and (2) insertion of: "and any entity to which exclusive or special privileges are granted";
- b) in paragraph (3) substitution with: "entrusts any entity";
and
- c) deletion of paragraph (4).

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

25.4 : USA scrutiny reserve.

[ARTICLE 26]⁽¹⁾

OBSERVANCE BY SUB-NATIONAL AUTHORITIES

(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of this Treaty, and [shall take such reasonable measures as may be]⁽²⁾ available to it to ensure such observance by regional and local governments and authorities within its Area.

(2) The dispute settlement provisions of this Treaty may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the Area of the Contracting Party.

General comments

- Text based on part of the agreed GATT text of the "Understanding on the Interpretation of Article XXIV".
 - USA wishes to revert to this Article when the overall balance of the Treaty is clear, taking also into account the outcome on Articles 27(4) and 28.
-

Specific comments

26.1 : CDN reserve on this Article.

CDN has suggested that the remaining part of the GATT text referred to above, concerning disputes, should also be reflected in this Article and in Article 31. The Chairman stated that in view of the technical difficulties involved in following that approach it would be preferable to negotiate a country specific solution for CDN's constitutional problems. This solution should also cover CDN's concerns recorded in footnote 30.2 of CONF 82.

26.2 : EC proposes substituting with: "to this end shall take all measures".

ARTICLE 27

EXCEPTIONS

- (1) There shall be no exceptions to Article 4 and 35.
- (2) The provisions of this Treaty other than
 - (a) those referred to in paragraph (1); and
 - (b) with respect to sub-paragraph (i), Part III of this Treaty

shall not preclude any Contracting Party from adopting or enforcing any measure:

- (i) necessary to protect human, animal or plant life or health;
or
- (ii) 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 Treaty shall be discontinued as soon as the conditions giving rise to them have ceased to exist;

(1)

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.

(3) The provisions of this Treaty 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.
- (4) [The provisions of this Treaty to accord most favoured nation treatment shall not be construed so as to oblige any one Contracting Party to extend to the Investors of any other Contracting Party preferences or privileges resulting from:
- (a) its membership in a Regional Economic Integration Organization, free trade area, customs or economic union;
 - (b) bilateral or multilateral agreements in the field of economic cooperation between the states that constituted the former Union of Soviet Socialist Republics.]⁽²⁾
-

General comment

Chairman of Legal Sub-Group will consider question raised by RUF on whether the provisions of this Article could affect the obligations of Articles 14 and 15.

Specific comments

27.1 : 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.

27.2 : Chairman's proposal. EC suggests deletion of REIO from sub-paragraph (a) in the light of its proposal for Article 28 below. General scrutiny reserve on sub-paragraph (b) although no objections of principle expressed.

[ARTICLE 28]⁽¹⁾

ECONOMIC INTEGRATION AGREEMENTS

- (1) The provisions of this Treaty shall not be construed as requiring a Contracting Party which is a party to an Economic Integration Agreement (EIA) to extend to another Contracting Party which is not a party to that EIA any preferential treatment resulting from that EIA, applicable between the parties to the EIA.
- (2) For the purpose of this Article, "EIA" means an agreement aiming at liberalising or harmonising the legislation applicable between the parties to the EIA in the fields covered by this Treaty without raising the [overall level of barriers]⁽²⁾ in these fields compared with the level existing upon signature of this Treaty.

Specific comments

28.1 : New text proposed by EC following earlier Chairman's proposal for this Article. EC suggests that their text could be accompanied by a Ministerial Declaration referring to article 58 of the EC Treaty and explaining further the scope and purpose of the exception.

USA and J reserves. USA believes that only MFN exception would be justifiable which might be more appropriate for the second stage.

28.2 : J suggests replacing with: "level of barriers with respect to non-member parties to the EIA".

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 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 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 Treaty 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-national 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.

Chairman's note

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

Specific comments

30.1: The Sub-Group Chairman has suggested the following wording to be placed in the 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.

ARTICLE 31

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty 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 Treaty or agreed in writing by the Contracting Parties, and as concerns the application or interpretation of Article 7 or Article 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 Treaty, 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 Treaty 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.]⁽¹⁾
- (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.

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, [6]⁽¹⁾ or 35 and no other Article of this Treaty, it shall not be settled under Article 31 unless the Contracting Parties parties to the dispute agree otherwise.](2)

(3)

General comment

At the March Plenary it was noted that further discussion on Articles 32 and 33 would have to await progress on Articles 4 and 35.

Specific comments

32.1 : USA and AUS reserve contingent on treatment of Articles 32 and 33.

32.2 : 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."

32.3 : N suggests that a new Article 32 BIS "OTHER CASES OF NON-APPLICATION OF ARTICLE 31" be inserted after Article 32 and reading:

"If, in accordance with article 36, paragraph (2) of the Statute of the International Court of Justice, a Contracting Party has declared that it recognizes as compulsory the jurisdiction of the Court, proceedings under Article 31 of this Treaty may not be initiated against that Contracting Party unless the parties to the dispute so agree."

[ARTICLE 33]⁽¹⁾

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 Treaty, 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 Treaty and to which it should be brought under Article 31 of this Treaty, or both, if the dispute is to be settled under both GATT and Related Instruments or Annex D of this Treaty and Article 31 of this Treaty, 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 Treaty be considered under Article 31 of this Treaty.

(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 Treaty 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 Treaty 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 Treaty pending the results of arbitration pursuant to this Article.
-

General comment

At the March Plenary It was noted that further discussion on Articles 32 and 33 would have to await progress on Articles 4 and 35.

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 Treaty 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) [Trade in Energy Materials and Products shall be governed by the provisions of the GATT and Related Instruments, as given effect on 1 March 1994 by the legislation and practice of parties to the GATT in respect of trade with other parties to the GATT, as if all Contracting Parties were parties to the GATT and applied the Related Instruments, except as provided in Annex G (which may be amended by the Charter Conference).
- (2) Notwithstanding paragraph (1), if such trade is governed by an [existing] bilateral agreement between two or more Contracting Parties, that agreement shall apply between them. Such agreement shall be notified to all other Contracting Parties by the Contracting Parties concerned.](1)
- (3) [Each signatory to this Treaty, and each state or Regional Economic Integration Organization acceding to this Treaty, shall on the date of its signature or of its deposit of its instrument of accession, deposit with the Secretariat a list of all tariff rates and other charges levied at the time of importation [or exportation](3) at the level applied on such date of signature or deposit, on Energy Materials and Products.
- (4) Each Contracting Party undertakes not to increase any such tariff rates or other charges on any Energy Material or Product above the level applied on the date of its signature or deposit unless either

a) such Contracting Party is a party to the GATT and such Energy Material or Product has not been included as relating to that Contracting Party in part I of the schedule annexed to the GATT; or

[b) any such increase is consistent with the provisions of GATT and Related Instrument other than those listed in Annex G.](4)(5)](2)

(6)

(5) Annex D to this Treaty shall apply to disputes regarding compliance with provisions applicable to trade under this Article [and under Article 6 unless all Contracting Parties to the dispute agree otherwise]⁽⁷⁾, 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.

General comments

- Informal consultations took place among EC, RUF and USA during the March Plenary but did not lead to agreement on the substantial conditions which this Article should observe.
- The discussion in the March Plenary was limited to paragraphs (3) to (5).
- As to paragraphs (3) and (4) the point of departure constitutes willingness to provide for a tariff standstill. There are significant technical problems in doing so in relation to the GATT provisions. There is a determination to restrict tariff negotiations to GATT and not hold them in the context of the Treaty. As a result it is not possible to achieve a 100% technical solution to this problem. The current text is a pragmatic solution. However, the USA expressed serious doubts that any

provision on standstill could be drafted without that provision being regarded as a tariff negotiation and thus circumscribing the GATT parties' rights under GATT. As a consequence the USA was not in favour of a standstill provision.

- It has been also recognized that there is an interrelation between paragraphs (1) and (2) and the other paragraphs of Article 35. Final acceptance of paragraphs (3) and (4) therefore depends on the outcome with respect to paragraphs (1) and (2).
 - Several GATT articles, not listed in Annex G, appear to put responsibilities on parties to the GATT, acting collectively. In relation to matters covered by Article 35, the parties to the GATT cannot take action. Such action could be taken only by the Charter Conference but would impose a heavy burden thereon. The March Plenary noted this problem (Room Document 35 of 10 March 1994) and requested the Sub-Group Chairman to examine more carefully GATT and Related Instruments to see on which provisions there is need for such a treatment.
-

Specific comments

- 35.1 : Not discussed at March Plenary (see General comments).
- 35.2 : General reserve on paragraphs (3) and (4) pending the outcome with respect to Article 35(1) and (2).
- 35.3 : RUF reserve on standstill for export tariffs called up by paragraph (4). As long as RUF maintains this reserve, there is a general contingency reserve on the standstill for import tariffs.
- 35.4 : J reserve. J has legal and technical problems with paragraph (4)(b) and prefers its own proposal (recorded in Room Document 24 of 9 March 1994). If this text goes beyond GATT, then J believes there should be no standstill. As a possible solution J suggested return to an earlier draft in which exceptions would be allowed. RO supports this idea.

35.5 : H reserve. H can agree to a standstill if the scope of the Treaty remains limited to Energy Materials and Products.

35.6 : In the Sub-Group on Trade the following text was discussed :

"In the case of an increase in a tariff pursuant to paragraph (4)(b), Contracting Parties other than that applying the increase may take any compensatory measures that are not inconsistent with provisions of paragraphs (1) and (2) of this Article as they would apply to that particular case".

Further reflection is needed to see whether inclusion of this paragraph would add sufficiently to the overall balance of advantages and avoid any risk of seriously damaging the structure of GATT.

35.7 : USA reserve contingent on Article 33 and consultation with capital.

ARTICLE 35 BIS

DEVELOPMENTS IN INTERNATIONAL TRADING ARRANGEMENTS

Contracting Parties undertake that in the light of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations they will commence consideration not later than 1 July 1995 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference.

General comment

As to the degree of commitment embodied, the Legal Sub-Group is requested to confirm that the Article does not commit non-GATT-members to sign up automatically to the results of the Uruguay Round in the context of the Treaty.

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 of this Treaty, subject to the conditions in paragraphs (3) to (6):

Article 7, paragraphs (2) and (5)

Article 8, paragraphs (1) and (4)

Article 10, paragraph (1)

Article 16, paragraph (1)(d) - related only to transfer of unspent earnings

Article 23, paragraph (3)

Article 25, paragraphs (1), (2), (3) and (4)

Article 13, paragraph (8) - specific transitional exceptions

- (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. 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 Treaty. 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) undertake to comply fully with the relevant obligations by

1 July 2001. 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 Treaty, 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) 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 organizations 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 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.

Chairman's note

Negotiations in the Plenary finished subject to acceptance by the Plenary of any additional provisions in the list in paragraph (1) for Treaty Articles not yet finalized.

PART VII

STRUCTURAL AND INSTITUTIONAL

ARTICLE 38

PROTOCOLS

- (1) The Charter Conference may authorize 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 Organization 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 Treaty.
- (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.

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 functions of the Charter Conference shall be to:
 - (a) carry out the duties assigned it by this Treaty and Protocols;
 - (b) keep under review and facilitate the implementation of the principles of the Charter and of the provisions of this Treaty and the Protocols;
 - (c) facilitate in accordance with this Treaty 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) authorize negotiation of, approve the terms of reference of such negotiation and consider and adopt the text of Protocols;
 - (i) authorize the negotiation of and consider and approve or adopt association agreements;
 - (j) consider and adopt texts of amendments to this Treaty;
 - (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 organizations with established competence in matters related to the objectives of this Treaty.
- (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 Treaty in the light of the extent to which the provisions of this Treaty 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.
-

Chairman's note

Negotiations in the Plenary finished.

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 Treaty 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.
-

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 Treaty other than amendments to Articles 39 and 40;
- (b) approve accessions to this Treaty under Article 46 by states or Regional Economic Integration Organizations which were not signatories to the Charter as of [closing date for Treaty signature];
- (c) authorize the negotiation of and approve or adopt the text of association agreements;
- (d) approve the adoption of and modification to Annexes EM and NI;
- (e) amend Annex G; and
- (f) 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 Treaty. 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)(f), (2) and (3) and as otherwise specified in this Treaty, decisions provided for in this Treaty 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 Treaty; 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 Treaty, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.
-

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 assessed according to their capacity to pay, determined as specified in Annex B, the provisions of which may be revised 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).
-

Chairman's note

Negotiations in the Plenary finished.

PART VIII

FINAL PROVISIONS

ARTICLE 43

SIGNATURE

This Treaty shall be open for signature at Lisbon from [] to [] by the states and Regional Economic Integration Organizations whose representatives signed the Charter.

Chairman's note

Negotiations in the Plenary finished subject to J and USA reserve on the provisionally agreed signature period of 3 months.

ARTICLE 44

RATIFICATION, ACCEPTANCE OR APPROVAL

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

Chairman's note

Texts agreed, subject to the following point:

J expressed concern, in relation to Articles 44 and 46 of this Treaty, about the competence and obligations of a REIO and its members (see J proposals in Room Documents 12 and 19 of 8 March).

N mentioned in this context a procedure used in the United Nations Convention on the Law of the Sea (Annex IX).

[ARTICLE 45]⁽¹⁾

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 Treaty 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 Treaty enters into force for that Contracting Party.](2)

- (2) Any Contracting Party may at a later date, by a declaration addressed to the Depositary, extend the application of this Treaty to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depositary of such declaration.](3)

- (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.

Chairman's note

Negotiations in the Plenary finished.

The Chairman invited all delegations having scrutiny reserves on this Article to let the Secretariat know of withdrawals of their reserves or any proposed amendments before the end of March 1994.

ARTICLE 46

ACCESSION

This Treaty shall be open for accession by states and Regional Economic Integration Organizations which have signed the Charter from the date on which the Treaty is closed for signature. Decisions on accession shall be taken in accordance with Article 41. The instruments of accession shall be deposited with the Depositary.

Chairman's note

See Chairman's note under Article 44.

ARTICLE 47

AMENDMENT

- (1) Any Contracting Party may propose amendments to this Treaty.
- (2) The text of any proposed amendment to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the meeting at which it is proposed for adoption by the Charter Conference.
- (3) Amendments to this Treaty texts of which have been adopted 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 Treaty shall be notified to the Depositary 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 Depositary 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.

Chairman's note

Negotiations in the Plenary finished subject to Legal Sub-Group scrutiny on whether additional wording on procedures is necessary.

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 Treaty 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.

Chairman's note

Negotiations in the Plenary finished.

ARTICLE 49

ENTRY INTO FORCE

- (1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto by a state or Regional Economic Integration Organization which was a signatory to the Charter as of [closing date for Treaty signature].
 - (2) For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization 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 Organization shall not be counted as additional to those deposited by member states of such organization.
-

Chairman's note

Negotiations in the Plenary finished subject to EC reserve on whether to propose that expiry of the Treaty should be provided for.

[ARTICLE 50]⁽¹⁾

PROVISIONAL APPLICATION

- (1) [Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 49, to the extent that such provisional application is not inconsistent with its laws, regulations or constitutional requirements.]⁽²⁾

- (2) (a) [Notwithstanding paragraph (1) any signatory may on signature, make a declaration that it is not able to accept provisional application]⁽³⁾. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notice to the Depository.
- (b) A signatory which makes a declaration in accordance with paragraph (2)(a) may not claim the benefits of provisional application under paragraph (1).
- (c) Notwithstanding paragraph (2)(a), any signatory making a declaration referred to in paragraph (2)(a) shall apply Part VII of this Treaty provisionally pending the entry into force of the Treaty in accordance with Article 49, to the extent that such provisional application is not inconsistent with its laws or regulations.
- (3) (a) Any signatory may terminate its provisional application of this Treaty by written notice to the Depository of its intention not to become a Contracting Party to this Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of sixty days from the day on which such signatory's written notice is received by the Depository.
- (b) In the event that a signatory terminates provisional application under paragraph (3)(a), the obligation of the signatory under paragraph (1) to apply [Parts III and V]⁽⁴⁾ with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with the respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in paragraph (3)(c).
- (c) Paragraph (3)(b) shall not apply to any signatory listed in Annex PA. A signatory shall be delisted from Annex PA effective upon its deposit with the Depository of a request therefor.

- (4) Pending the entry into force of this Treaty 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 180 days after the opening date for signature of this Treaty 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 Treaty pursuant to Article 49 and the appointment of a Secretariat under Article 40.
- (6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or (4) as appropriate, meet the costs of the provisional Secretariat by contributions assessed as if the signatories were Contracting Parties under Article 42(3). Any revisions made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.
-

General comment

It was agreed that there should be a strong commitment to Provisional Application of the Treaty (subject to constitutions, laws etc) but that a way should be found to allow a few countries (possibly J, N, H, CH) to exempt themselves from that commitment. The March Plenary decided in favour of achieving this by means of a Provisional Application Article in the Treaty. Only N indicated its preference for a parallel instrument on this subject.

Specific comments

50.1 : RUF scrutiny reserve.

50.2 : EC scrutiny reserve to ensure that this language is not different in substance from its proposal for this paragraph in Room Document 32 of 9 March.

50.3 : EC proposes replacing with:

"Those signatories whose laws, regulations and constitutional requirements do not so permit shall, on signature, make a declaration that they are not able to accept provisional application".

Several delegations entered reserves on this EC proposal.

50.4 : The Legal Sub-Group was asked to advise whether a reference to Part I (Definitions) should be added to Parts III and V whenever they appear in the Treaty text.

ARTICLE 51

RESERVATIONS

No reservations may be made to this Treaty.

General comment

N proposed an Article on "Declarations and Statements" reading:

"Article 51 does not preclude a state or Regional Economic Integration Organization, when signing, ratifying or acceding to this Treaty, 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 Treaty, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Treaty in their application to that state or Regional Economic Integration Organization."

No support expressed at this stage for this proposal although some delegations asked for more time to consider this suggestion.

N stated that if its proposal was not adopted it would have to review its approach in relation to the Ministerial Declaration.

ARTICLE 52

WITHDRAWAL

- (1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from this Treaty.
 - (2) Any such withdrawal shall take effect upon expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.
 - (3) The provisions of this Treaty 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 Treaty takes effect for a period of [twenty years]⁽¹⁾ from such date.
 - (4) 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 Treaty.
-

Chairman's note

Negotiations in the Plenary finished subject to adjustment of the wording in paragraph (3) according to the text adopted for Article 13 (Investors and their Investments etc).

ARTICLE 53

DEPOSITARY

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

Chairman's note

Negotiations in the Plenary finished subject to the Legal Sub-Group review to make sure that all functions of the Depositary as described in Article 44 of BA 37 are covered by the Vienna Convention.

The Article will be revisited after agreement on Article 51 (Reservations) is reached.

ARTICLE 54

AUTHENTIC TEXTS

In witness whereof the undersigned, being duly authorised to that effect, have signed this Treaty 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 [].

Chairman's note

Negotiations in the Plenary finished.

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

Article 1

- 1.1 : Wording dependent on Articles 27 and 28. J contingency reserve.
- 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 sub-paragraphs (a) through (d) above shall not be considered investments."

1.7 : N scrutiny reserve.

1.8 : J scrutiny reserve.

1.9 : J proposes that this paragraph be replaced with the following wording:

"the sea, the sea-bed and its subsoil with regard to which that Contracting Party exercises, in accordance with the international law of the sea, jurisdiction and sovereign rights in respect of energy resources".

This proposal aims to provide explicitly that "jurisdiction and sovereign rights" referred to in this paragraph indicate those in respect of energy resources.

Article 7

7.1 : CDN and AUS scrutiny reserve.

Article 8

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.

8.3 : AUS contingency reserve. Removal of reserve depends on AUS concerns about coverage of transport in the Treaty 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 Treaty.

8.7 : RUF scrutiny reserve.

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

8.10: 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 17

17.1: USA scrutiny reserve.

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 Treaty, or consistent with its obligation under this Treaty, 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 22

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

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

Article 23

23.1 : N contingency reserve.

Article 24

24.1 : J reserve.

Article 31

31.1 : CDN contingency reserve.

Article 45

45.1 : N scrutiny reserve.

45.2 : EC scrutiny reserve.

45.3 : USA scrutiny reserve.

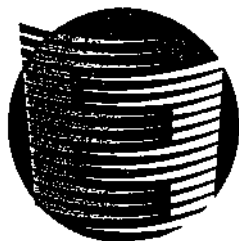
Article 52

52.1 : N scrutiny reserve.

ENERGY CHARTER TREATY

DRAFT

ANNEXES TO THE ENERGY CHARTER TREATY



EUROPEAN ENERGY CHARTER

Version 7

17 March 1994

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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.

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.
-

Chairman's note

Negotiations in the Plenary finished.

ANNEX TRM

NOTIFICATION AND PHASE-OUT (TRIMs)

(1) Contracting Parties shall notify to the Secretariat all trade related investment measures they are applying that are not in conformity with the provisions of Article 6 within:

(a) 90 days after entering into force of this Treaty if the Contracting Party is a party to the GATT; or

(b) 12 months after entering into force of this Treaty if the Contracting Party is not a party to the GATT.

Such trade related investment measures of general or specific application shall be notified along with their principal features.

(2) In the case of trade related investment measures 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 trade related investment measures which are notified under paragraph (1) within

(a) 2 years from the date of entry into force of this Treaty if the Contracting Party is a party to the GATT; or

(b) [3]⁽¹⁾ years from the date of entry into force of this Treaty 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 trade related investment measure which it notifies under paragraph (1) from those prevailing at the date of entry into force of this Treaty so as to increase the degree of inconsistency with the provisions of Article 6 of this Treaty.

(5) Notwithstanding the provisions of paragraph (4), a Contracting Party, in order not to disadvantage established enterprises which are subject to a trade related investment measure notified under paragraph (1), may apply during the phase-out period the same trade related investment measure to a new investment where

(i) the products of such investment are like products to those of the established enterprises; and

(ii) such application is necessary to avoid distorting the conditions of competition between the new investment and the established enterprises.

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

Specific comments

TRM.1 : RUF scrutiny reserve.

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 VC
LIST OF CONTRACTING PARTIES WHICH HAVE MADE VOLUNTARY
BINDING COMMITMENTS IN RESPECT OF ARTICLE 13(2)

ANNEX PE
LIST OF POST-INVESTMENT EXCEPTIONS REQUIRED BY
PARTICULAR CONTRACTING PARTIES

ANNEX 10

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 | 11. Greece |
| 2. Azerbaijan | 12. Hungary |
| 3. Bulgaria | 13. Ireland |
| 4. Canada | 14. Japan ⁽¹⁾ |
| 5. Croatia | 15. Poland |
| 6. Cyprus | 16. Portugal |
| 7. Czechlands | 17. Romania |
| 8. Estonia | 18. Spain |
| 9. European Communities | 29. Sweden |
| 10. Finland | 20. United States of America ⁽¹⁾ |

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(1)

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
- XXXIII Accession
- XXXV Non-application of the Agreement between particular Contracting Parties⁽²⁾

XXXVI-XXXVIII Trade and Development

Annex H

All notes and supplementary provisions 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.

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

- Preamble (titles 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)

- (3)
- 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⁽²⁾
- 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 1.7 and 1.8; 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

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

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

(2) [Contracting Parties shall apply the provisions of the "Declaration on Trade Measures taken for Balance-of-Payment Purposes" to measures taken by those Contracting Parties which are not parties to the GATT to the extent that that is practicable in the context of the other provisions of this Treaty.]⁽⁴⁾

(3) With respect to notification, the following rules will apply:

(a) with respect to Contracting Parties of this Treaty 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 Treaty which are not parties to the GATT or a Related Instrument, notifications or actions covered in paragraph (2) shall be made to the Secretariat. The Secretariat shall circulate copies of the

notification to all Contracting Parties. Notification to the Secretariat shall be in one of the authentic languages of this Treaty. The accompanying documents may be solely in the language of the Contracting Party.

General comments

- The discussion relating to this Annex at the March Plenary was based on the assumption that there will be a mandatory reference to GATT in the Treaty, and a "standstill on tariffs" provision in Article 35.

 - In relation to paragraph (3) it was agreed that the question of whether to move this paragraph into the text of Article 35 would be decided according to the advice from RUF on where best to place this provision from the perspective of the non-GATT parties.
-

Specific comments

- G.1 : EC scrutiny reserve pending the study of all GATT material.

- G.2 : All provisions related to non-application in the relevant codes should be included in Annex G. This implies inclusion of art. XXXV under paragraph a) and 19(9) under paragraph c). USA on behalf of all delegations undertook to investigate before 17 March 1994 whether there were references to non-application in other codes which needed to be listed.

- G.3 : USA scrutiny reserve on treatment of 3(1) to 3(3).

- G.4 : RUF scrutiny reserve.

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 Organization 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 authorization of the Charter Conference to suspend obligations owed by it to the non-complying Contracting Party under Article 35.

- (c) The Charter Conference may authorize 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.

Chairman's note

Negotiations in the Plenary finished.

ANNEX B

FORMULA FOR ALLOCATING CHARTER COSTS

- (1) Contributions payable by Contracting Parties shall be determined by the Secretariat annually on the basis of their percentage contributions required under the latest available United Nations Regular Budget Scale of Assessment (supplemented by information on theoretical contributions for any Contracting Parties which are not UN members).
- (2) The contributions shall be adjusted as necessary to ensure that the take of all Contracting Parties' contributions is 100%.

ANNEX PA
LIST OF SIGNATORIES WHICH WILL NOT APPLY THE
PROVISIONAL APPLICATION REQUIREMENTS
OF ARTICLE 50(3)(b)

ANNEX T

LIST OF CONTRACTING PARTIES' TRANSITIONAL MEASURES

<u>Provision</u>	<u>Page</u>	<u>Provision</u>	<u>Page</u>
Article 7(2)	30	Article 10(1)	44
Article 7(5)	36	Article 16(1)(d)	46
Article 8(1)	41	Article 23(3)	47
Article 8(4)	42	Article 13(8)	51

List of Contracting Parties entitled to transitional arrangements

Albania	* Latvia
Armenia	* Lithuania
Azerbaijan	Moldova
Belarus	* Poland
* Bulgaria	Romania
* Croatia	Russia
* Czechlands	Slovakia
* Estonia	* Slovenia
Georgia	Tadjikistan
Hungary	Ukraine
Kazakhstan	Uzbekistan
Kyrgyzstan	

* No requirements

ARTICLE 7(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."

COUNTRY : ALBANIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

High degree of state monopoly in the extraction, transportation and processing of oil and gas, electric power production and distribution, requires to prepare laws in the field of antimonopoly activities.

PHASE-OUT

1 January 1998.

COUNTRY : ARMENIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

At present state monopoly exists in Armenia in most energy sectors. There is no Law on protection of competition, thus the rules of competition are not yet being implemented. There are no laws on energy. The draft laws on energy are planned to be submitted to the Parliament in 1994. The laws are envisaged to include provisions on anti-competitive behaviour, which are harmonized with the EC legislation on competition.

PHASE-OUT

31 December 1997.

COUNTRY : AZERBAIJAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The law "On Antimonopoly Activities" has been adopted in the Republic of Azerbaijan. The establishment of an appropriate management structure is required.

PHASE OUT

1 January 1998.

COUNTRY : BELARUS

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

State monopoly exists in the Republic of Belarus in such areas of the fuel and energy complex as:

- extraction, transportation and processing of oil;
- transport of gas;
- electric power production and transmission;
- design, construction and assembly of fuel and energy complex projects.

Antimonopoly legislation is at the stage of elaboration. After the adoption of anti-monopoly legislation a part of the above functions will be de-monopolized in the coming years.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : GEORGIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Laws on demonopolization are at present at the stage of elaboration in the Republic and that is why the State has so far the monopoly practically for all energy sources and energy resources, which restricts the possibility of competition in the energy and fuel complex.

PHASE-OUT

1 January 1999.

COUNTRY : KAZAKHSTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Currently the relevant legislation is at the stage of elaboration.

PHASE-OUT

1 January 1998.

COUNTRY : MOLDOVA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The Law of the Republic of Moldova "On Restriction of monopolistic activities and development of competition" of 29 January 1992 provides for organizational and legal basis for development of competition, measures to prevent, limit and restrict monopolistic activities and it is oriented towards implementing market economy activity conditions. This Law, however, does not provide for concrete measures of anti-competitive conduct in energy sector, neither it covers completely the requirements of Article 7.

In 1994 drafts on Law "On competition" and State Programme of demonopolization of economy will be submitted to the Parliament.

PHASE-OUT

31 December 1997.

COUNTRY : ROMANIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The rules of competition are not yet implemented in Romania. The draft Law for Protection of Competition will be submitted to the Parliament of Romania by the end of 1993 and the Law is scheduled to be adopted during 1994.

The draft contains provisions with respect to anticompetitive behaviour, harmonized with the EC Competition Law.

PHASE OUT

31 December 1996.

COUNTRY : RUSSIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

The Federation.

DESCRIPTION

A comprehensive framework of anti-monopoly legislation has been created in the Russian Federation but the structure of the energy sectors inherited from the past still retains a high degree of monopolization, which limits accordingly competition possibilities. According to existing assessments, demonopolization processes in the energy sectors will take a long time.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : TADJIKISTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

In 1993 the Republic of Tadjikistan passed the Law on Demonopolization and Competition. The complicated economic situation in Tadjikistan limits the possibilities and terms of demonopolization of the economy, yet even now mass privatization and the flotation of the state enterprises is under way.

PHASE-OUT

31 December 1997.

COUNTRY : UKRAINE

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The Supreme Soviet of Ukraine adopted on 18.02.92 the Law "On Control of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities". Also the Anti-Monopoly Committee has been created. Further improvement of legislation is required. Technical assistance is required.

PHASE-OUT

1 January 1997.

COUNTRY : UZBEKISTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The Law of the Republic of Uzbekistan "On Restricting Monopoly Activities" has been adopted in the Republic of Uzbekistan and is now in force since July 1992. However, the effect of the law (as it is specified in Article 1, paragraph 3) does not extend to relations connected with the activities of the enterprises of the energy sector.

PHASE-OUT

No later than July 2001.

ARTICLE 7(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."

COUNTRY : ALBANIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

High degree of state monopoly in the extraction, transportation and processing of oil and gas, electric power production and distribution, requires to prepare laws in the field of antimonopoly activities.

PHASE-OUT

1 January 1998.

COUNTRY : ARMENIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Institutions to enforce the provisions of this paragraph have not been established in Armenia.

The laws on energy and protection of competition are planned to include provisions to establish such institutions.

PHASE-OUT

31 December 1997.

COUNTRY : BELARUS

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

State monopoly exists in the Republic of Belarus in such areas of the fuel and energy complex as:

- extraction, transportation and processing of oil;
- transport of gas;
- electric power production and transmission;
- design, construction and assembly of fuel and energy complex projects.

Antimonopoly legislation is at the stage of elaboration. After the adoption of anti-monopoly legislation a part of the above functions will be de-monopolized in the coming years.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : GEORGIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Laws on demonopolization are at present at the stage of elaboration in the Republic and that is why the State has so far the monopoly practically for all energy sources and energy resources, which restricts the possibility of competition in the energy and fuel complex.

PHASE-OUT

1 January 1999.

COUNTRY : KAZAKHSTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Currently the relevant legislation is at the stage of elaboration.

PHASE-OUT

1 January 1998.

COUNTRY : MOLDOVA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The Law of the Republic of Moldova "On Restriction of monopolistic activities and development of competition" of 29 January 1992 provides for organizational and legal basis for development of competition, measures to prevent, limit and restrict monopolistic activities and it is oriented towards implementing market economy activity conditions. This Law, however, does not provide for concrete measures of anti-competitive conduct in energy sector including their enforcement, neither it provides for establishing institutions to enforce the provisions of this paragraph.

In 1994 drafts on Law "On competition" and State Programme of demonopolization of economy will be submitted to the Parliament.

PHASE-OUT

31 December 1997.

COUNTRY : ROMANIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Institutions to enforce the provisions of this paragraph have not been established in Romania.

The Institutions encharged with the enforcement of competition rules are provided in the draft Law on the Protection of Competition which is scheduled to be adopted during 1994.

The draft also provides a period of nine months for enforcement, starting with the day of its publication.

According to the Association Agreement between Romania and the European Communities, Romania was granted a period of five years for implementing competition rules.

PHASE OUT

1 January 1998.

COUNTRY : UZBEKISTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The Law of the Republic of Uzbekistan "On Restricting Monopoly Activities" has been adopted in the Republic of Uzbekistan and is now in force since July 1992. However, the effect of the law (as it is specified in Article 1, paragraph 3) does not extend to relations connected with the activities of the enterprises of the energy sector.

PHASE-OUT

No later than 1 July 2001.

ARTICLE 8(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."

COUNTRY : ALBANIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Legislation regulating the transit of energy materials through Albania's territory until now is not prepared. It is necessary to modernize infrastructure during transition period with the aim to bring its level to the requirements of the market economy.

PHASE-OUT

1 January 1998.

COUNTRY : SLOVAKIA

SECTOR

Electricity Industry /high-voltage electricity transmission grids/.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Exception refers to transit of power energy - Slovak transmission system still do not satisfy conditions of UCPTE. Slovakia makes technical arrangements for direct interconnection with Austria by 400 dv transmission line. Construction should be terminated within the period to the year 1996.

PHASE-OUT

1 January 1997.

ARTICLE 8(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."

COUNTRY : AZERBAIJAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National and Ministries.

DESCRIPTION

It is necessary to adopt a set of laws on energy, on licensing procedures regulating the questions of transit. During a transition period it is envisaged to build and modernize power transmission lines, as well as generating capacities with the aim of bringing their technical level to the world requirements and adjusting to conditions of a market economy.

PHASE OUT

31 December 1999.

COUNTRY : BELARUS

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Laws on energy, land and others are being worked out at present, and before their final adoption uncertainty remains as to the conditions for establishing new transport capacities for energy carriers in the territory of the Republic.

PHASE-OUT

1 January 1996.

COUNTRY : GEORGIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

It is necessary to prepare a set of laws on the matter. At present there are substantially different conditions for the transport and transit of various energy sources in the Republic of Georgia (electric power, natural gas, oil products, coal).

To ensure the compliance with the provisions of the Article large volume energy construction is required.

PHASE-OUT

1 January 1999.

COUNTRY : HUNGARY

SECTOR

Electricity industry.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

According to the current legislation establishment and operation of high-voltage transmission lines is a state monopoly.

The creation of the new legal and regulatory framework for establishment, operation and ownership of high-voltage transmission lines is under preparation.

The Ministry of Industry and Trade has already initiated the creation of the new Act on Electricity Power, that will have its impact also on the Civil Code and on the Act on Concession. The compliance can be achieved after entering in force of the new electricity law and related regulatory decrees.

PHASE-OUT

31 December 1996.

ARTICLE 10(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 shall 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 require terms for access to [commercially available](2) sources of finance within its jurisdiction which render generally unavailable such access for the purpose of Investment in the Economic Activity in the Energy Sector of another Contracting Party on terms no less favourable than those required in like circumstances for the purpose 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 state that is not a Contracting Party, whichever is the most favourable."

COUNTRY : GEORGIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The law on foreign investments is at present at the stage of preparation.

PHASE-OUT

1 January 1997.

COUNTRY : KAZAKHSTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Relevant legislation is currently under preparation.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : MOLDOVA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

The existing legislation does not provide specific provision ensuring a guaranteed access to state loans, subsidies, guarantees and insurance. However, the Law "On foreign investment" (Chapter VI "State Guarantees" Article 44) provides that state institutions can within their competence provide to foreign investors additional guarantees which are not envisaged in the above-mentioned Law.

PHASE-OUT

31 December 1997.

Note: Requirement relates to Article 10(2).

ARTICLE 16(1)(d)

"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:

unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment;"

COUNTRY : HUNGARY

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

According to the Act on Investments of Foreigners in Hungary, article 33, the foreign top managers, executive managers, members of the Supervisory Board and the foreign employees may transfer their savings up to 50% of their aftertax earnings through the bank of their company.

The phase out of this particular restriction depends on the progress the Hungary is able to make in the implementation of the foreign exchange liberalization programme whose final target is the full convertibility of the Forint. Since this restriction does not create any barrier to the foreign investors, there is no need to set a special deadline for the phasing out.

PHASE-OUT

No later than 1 July 2001.

ARTICLE 23(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."

COUNTRY : ARMENIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

In the Republic of Armenia there are no official enquiry points yet to which requests for information about the relevant laws and other regulations could be addressed. There is no information centre either. There is a plan to establish such centre in 1994-1995. Technical assistance is required.

PHASE-OUT

31 December 1996.

COUNTRY : AZERBAIJAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

There are no official enquiry points so far in the Republic of Azerbaijan to which requests for information about relevant laws and other regulatory acts could be addressed. At present such information is concentrated in various organizations.

PHASE OUT

31 December 1995.

COUNTRY : BELARUS

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Official enquiry offices which could give information on laws, regulations, judicial decisions and administrative rulings do not exist yet in the Republic of Belarus.

PHASE-OUT

31 December 1996.

COUNTRY : MOLDOVA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National, the Ministry of Justice.

DESCRIPTION

It is necessary to create the enquiry points.

PHASE-OUT

31 December 1995.

COUNTRY : RUSSIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

The Federation and the Republics constituting Federation.

DESCRIPTION

- 1) There is no provision in the Russian Federation for obligatory publication of judicial decisions and administrative rulings since they are not considered to be the sources of the Law. Changes of the existing legal system in the matter are not expected.
- 2) No official enquiry points exist in the Russian Federation as of now to which requests for information about relevant laws and other regulation acts could be addressed.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : TADJIKISTAN

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

There are no enquiry points yet in the Republic of Tadjikistan to which requests for information about relevant laws and other regulations could be addressed. It is only a question of having available funding.

PHASE-OUT

31 December 1997.

COUNTRY : UKRAINE

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Improvement of the present transparency of laws up to the level of international practice is required. Ukraine will have to create enquiry points providing information about laws, regulations, judicial decisions and administrative rulings and standards of general application.

PHASE-OUT

1 January 1997.

ARTICLE 13(8) - SPECIFIC TRANSITIONAL EXCEPTIONS

COUNTRY : HUNGARY

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Article 50 of the Europe Agreement establishing an association between Hungary and the EC stipulates that Hungary may introduce measures which derogate from the application of national treatment in the pre-investment stage if certain industries

- are undergoing restructuring, or
- are facing serious difficulties, particularly where these entail serious social problems in Hungary, or
- face the elimination or a drastic reduction of the total market share held by Hungarian companies or nationals in a given sector or industry in Hungary, or
- are newly emerging industries in Hungary.

PHASE-OUT

No later than 1 July 2001.

COUNTRY : RUSSIA

SECTOR

All energy sectors.

LEVEL OF GOVERNMENT

National.

DESCRIPTION

Registered companies with foreign participation may be subject to differential tariffs on telecommunication services.

PHASE-OUT

No later than 1 July 2001.

ENERGY CHARTER TREATY

DRAFT

MINISTERIAL DECLARATION

To the Energy Charter Treaty



EUROPEAN ENERGY CHARTER

Version 7

17 March 1994

MINISTERIAL DECLARATION

In signing the Energy Charter Treaty (hereinafter referred to as the Treaty) Ministers or their plenipotentiaries declare that the following understanding has been reached.

1. To the Treaty as a whole

- a) [In view of the importance of energy equipment for the efficiency of energy activities, the signatories will enter into negotiations to explore the possibility of extending the trade provisions of the Treaty to cover an agreed list of energy related equipment.](1)
- b) It is the common understanding that the provisions of the 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.

Specific comments

1.1 : CH and S reserves. CH is of the view that the language in the Ministerial Declaration is not sufficient and suggests the following approach:

- (a) Definition of Energy Related Equipment to be included in the Treaty reading:

"Energy Related Equipment", based on the Harmonized 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 RE.

- (b) Addition to Article 41(1)(d): "and Annex RE".

- (c) Addition to Articles 4 and 35(1) after "Energy Materials and Products": "and Energy Related Equipment."

(d) Addition to Article 39 (3):

- (1) resume, as from its first meeting, negotiations aimed at finalising Annex RE.

2. To Article 1(5)

Economic Activity in the Energy Sector includes, [for example:](¹)

- 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.](¹) 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.

Specific comments

1(5).1 : USA suggests deletion. See also footnote 1.2 in the Treaty text.

3. To Article 1(6)

For greater clarity as to whether an investment is controlled, directly or indirectly, by an investor, control of an investment means control in fact, determined after an examination of the factual circumstances in each situation. In any such examination, all relevant factors should be considered, including the investor's (1) financial interest, including equity interest, in the investment; (2) ability to exercise substantial influence over the management and operations of the investment, and (3) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.

Where there is doubt as to whether an investor controls, directly or indirectly, an investment, the investor shall be responsible for demonstrating that such control exists.

4. To Article 1(8)

Consistent with the Australian Foreign Acquisitions and Takeovers Act 1975 (as amended), the substantial addition of capital to an existing investment in Australia would constitute the making of a new investment.

5. 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)

Specific comments

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

1(12).2 : CDN made the acceptance of the definition conditional provided that "as defined by national law" will be added to its end. 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 Treaty as a whole. Subject to consultation with capital.

6. 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 authorization.](1)

Specific comments

7.1 : AUS scrutiny reserve.

7. To Article 8(4)

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

8. To Article 13(8)

[The meaning of the term "in like situations" in Article 13(8) shall not derogate from Contracting Parties' obligations in that paragraph to provide the treatment described therein to investors of other Contracting Parties. Furthermore, this term shall be used to determine comparability for application of the treatment standards set forth in Article 13(8), and in order to ensure that investors of other Contracting Parties are not placed at a disadvantage with their competitors from a Contracting Party or any state that is not a Contracting Party.](1)

Specific comments

13(8).1 : EC reserve on this Ministerial Declaration, as well as on the whole concept of incorporating "in like situations" in Article 13.

9. To Article 13(9)

[The supplementary agreement, referred to in Article 13(3) shall specify conditions for applying the [standard of treatment] described in Article 13(2).

Those conditions will inter alia include provisions relating to the selling of state assets (privatisation) and/or the dismantling of monopolies (demonopolisation). However, until the supplementary agreement enters into force Article 13(8) of this Treaty shall not be deemed to prevent any Contracting Party from taking measures otherwise consistent with the provisions of Part III to ensure the maintenance of specific levels of ownership of a privatised asset or entity by nationals of that Contracting Party].(1)

Specific comments

13(9).1 : General scrutiny reserve.

10. To Article 17

Arrangements that might be made between an investor and the indemnifying party 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, in cases where subrogation has taken place in relation to other rights and claims in regard to the same investment, that investor shall have access to all dispute settlement provisions of Article 30.

11. To Article 22(1)(1)

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.

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

Measures taken under Article 27(3)(a), (b) and (c) should not constitute a disguised restriction on Transit.

13. 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 Treaty into its domestic law.

14. 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 Treaty and the Charter. The Secretary General might report back to the provisional Charter Conference at the meeting required under Article 50(7) not later than 180 days after the opening date of signature.

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

15. To Article 41

In view of the participation of the Former Soviet Union in the Charter negotiations, and the signature of the Charter by the Interstate Economic Committee, the Republic of Turkmenistan will, if it seeks to accede to the Treaty (and sign the Charter), be regarded for that purpose as if it had been a signatory to the Charter as of the closing date for Treaty signature.

17. To Annex D

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

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 Treaty.