

EUROPEAN ENERGY CHARTER
CONFERENCE SECRETARIAT

4/92

BA 6

RESTRICTED

Brussels, 21 January 1992

NOTE FROM THE SECRETARIAT

Subject: Basic Agreement

1. At the last meetings of Working Group II on 11-14 and 19 November 1991, delegations discussed in detail the previous draft text of the Basic Agreement (doc 21/91, BA 4). In the light of these discussions and subsequent contacts the Chairman has now produced a revised draft of the Agreement, which is annexed to this note (Annex I).
2. Delegations should note that the sequence of Articles in the draft Agreement has changed to reflect the overall approach of the new text. For ease of reference, Annex II lists the Articles in the former BA 4 text and the corresponding provisions in the present BA 6 version.
3. The revised text contains a number of new Articles (2, 3, 9, 12 to 14 and 35) and other Articles which have been substantially rewritten (e.g. 5, 11, 16, 31). These changes are summarised in notes following each text. For clarity, the practice of underlining new or revised wording has not been followed in these cases, although it is still used elsewhere in the text. Where appropriate, footnotes have been retained.

- 2 -

A few Articles from the preceding text have been deleted altogether, although in some cases their content has been dealt with in other provisions.

Article 8 (Access to Markets) is still the subject of consultations and is therefore missing from the new text. This will be circulated to delegations as soon as possible.

4. The relationship between GATT and the Basic Agreement gave rise to considerable debate in the WG II meetings last year. The revised text is based on the conclusions drawn by Mr Michael Johnson of the British Department of Trade and Industry following a meeting with the GATT Secretariat last December (Annex III).
5. The revised text on the promotion, protection and treatment of investments in Article 16 is based on the concept of recognising the pre-existence of laws in a number of participating countries which would conflict with a requirement for national treatment. To date, however, responses to the Secretariat's questionnaire on this subject (doc 25/91, BA 5) have only been received from a few countries.

EUROPEAN ENERGY CHARTER
CONFERENCE SECRETARIAT

4/92

ANNEX 1

BA 6

RESTRICTED

DRAFT

20 January 1992

BASIC AGREEMENT FOR THE EUROPEAN ENERGY CHARTER

PREAMBLE

The Parties to this Agreement,

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

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

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

- 2 -

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

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade,

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;

- 3 -

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

HAVE AGREED AS FOLLOWS:

Note

New text suggested by Chairman on basis of AUS proposal.

- 4 -

PART I

DEFINITIONS AND PRINCIPLES

ARTICLE 1

DEFINITIONS

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

- (1) "Charter" means the European Energy Charter;
- (2) "Contracting Party" means a party to this Agreement;
- (3) "Energy Materials and Products" - [Ref. ANNEX II of BA 4]
- (4) "Investment" means every kind of asset⁽¹⁾, which are used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement. In particular, though not exclusively, includes any of the following:
 - (a) [movable and immovable]⁽²⁾ property and any other related property rights such as mortgages liens or pledges;
 - (b) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
 - (c) claims to money, and claims to performance under contract having a financial value;
 - (d) intellectual⁽³⁾ property rights, goodwill, technical processes, know-how and any other benefit or advantage attached to a business;

- 5 -

(e) [rights]⁽⁴⁾, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;⁽⁵⁾

(f) goods which under a leasing agreement are placed at the disposal of a lessee in the Territory of one Contracting Party in conformity with its laws and regulations;

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 date of entry into force of this Agreement (hereinafter referred to as the "effective date") provided that this Agreement shall only be applicable to investments made before the effective date and which continue after the effective date with respect to matters affecting such investments after the effective date.

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

(a) natural persons having the citizenship or [nationality of that Contracting Party in accordance with its laws]⁽⁶⁾;

[(b) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party;]⁽⁷⁾⁽⁸⁾

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party to make investments in the Territory of another Contracting Party in connection with [Energy Materials and Products], or to trade in [Energy Materials and Products] or equipment or services related to the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products] in or to the Territory of another Contracting Party.

- (6) (9) "Returns" means the amounts yielded by an Investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;
- (7) "Territory" means in respect of a Contracting Party the territory under its sovereignty, and the sea and submarine areas over which that Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights or jurisdiction. With respect to a regional economic integration organisation which is or becomes a Party to this Agreement the term Territory shall be construed as meaning the respective territories of those member states of such organisation which are also Parties to this Agreement, to the extent of that organisation's competence in the matters the subject of this Agreement in those territories.
- (8) "GATT-related instrument" means an agreement, arrangement, decision, understanding, declaration, or other joint action pursuant to the General Agreement on Tariffs and Trade.
- (9) "Protocol" means an agreement⁽¹⁰⁾ entered into by any of the Contracting Parties in order to confirm, supplement, extend or amplify the provisions of this Agreement to specific sectors or categories of activity comprised within the scope of this Agreement, including areas of cooperation referred to in Title III of the Charter.
- (10) "Intellectual property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967.

(11)

Note

Former Article 4 "Protocols" has been moved to Article 1 (9).

Specific comments

1.1 (AUS): Insert "owned or controlled by Investors of one Contracting Party and admitted by one of the other Contracting Parties subject to its laws and investment policies".

1.2 (AUS): Replace by "tangible and intangible".

1.3 (AUS): Insert "and industrial".

1.4 (AUS): Replace by "business concessions and other rights required to conduct economic activity and having economic value".

1.5 (AUS): Add a new wording: "and to manufacture, use and sell products; and

(g) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange."

1.6 (AUS): Replace by "or whose residence in that Contracting Party is not limited as to time under its laws";

1.7 (CH) : Replace the subpara (b) with :
"any corporations, companies, firms, enterprises, organisations and associations controlled by nationals of that Contracting Party or by corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party"

- 8 -

1.8 (US) : Adding after Party following wording :
"whether or not organised for pecuniary gain or privately
or governmentally owned or controlled."

1.9 : Many delegations stressed the need for a better definition
of Returns, in particular in relation to Article 19.
Specific comments of delegations on Article 19 have now
been transferred to Article 1 with the aim of utilizing
them as the basis for a new definition. They are listed
below.

The Secretariat will propose such a definition at the next
WG II meeting.

EC: "... of payments in connection with an investment,
in particular

- a) of the returns;
- b) in repayment of loans;
- c) of the proceeds from the liquidation or the sale of
the whole or any part of the investment."

US : "returns in kind"

CH : "other payment related to an investment"

AUS : "such funds include the following :

- a) the initial capital plus any additional capital
used to maintain or expand the investment;
- b) returns;
- c) proceeds from the sale or partial sale or
liquidation of the investment ;
- d) payments made pursuant to a loan agreement or for
losses referred to in Article 17;

- 9 -

- e) unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment".

1.10 (CAN): Suggests insertion of "or instrument whether or not legally binding"

1.11 (USSR): Argues necessity to define "transport" and "transit"

General comments

(US): - the term "non-discrimination" appears often in the text. Some type of definition would be useful, preferably one that includes both national and MFN treatment.

- an alternative approach to the problem of definition might be similar to the form used in Chapter Nine of the US-Canada Free Trade Agreement.

- 10 -

ARTICLE 2**OBJECTIVE OF THE AGREEMENT**

- (1) The objective of this Agreement is to promote overall cooperation and develop the benefits and complementarities in the energy field in Europe and globally between Contracting Parties, based on mutual interest and confidence, in accordance with the principles expressed in the Charter.

- (2) This Agreement shall realize this objective by establishing in the energy sector the principles for the development and implementation of an economic and legal framework based on market principles and state sovereignty over energy resources, so as to encourage investment and joint actions which contribute to the development of trade and security of supply, ensure optimum management and more efficient use of energy resources, protecting the environment and enhancing safety.

Note

New Article suggested by Chairman following EC recommendation.

- 11 -

ARTICLE 3

PRINCIPLES

- (1) Each Contracting Party recognises that its policies concerning matters subject to this Agreement are linked by interest common to all Contracting Parties, and shall assist each other to develop energy policies, laws and regulations which implement these principles.
- (2) Each Contracting Party desires to improve security of energy supply.
- (3) The Contracting Parties shall facilitate access to and development of energy resources by Investors. In particular they shall avoid imposing discriminatory rules on Investors and permit Investors to dispose freely of the resources which they have developed.
- (4) The Contracting Parties shall facilitate the transit through their Territory of [Energy Materials and Products] without distinction as to the origin, destination or ownership.
- (5) The Contracting Parties shall ensure that non-discriminatory access to local and international markets for disposal of [Energy Materials and Products] can be attained on commercial terms. Such access should be provided through the operation of market forces and through elimination of barriers to trade.
- (6) In order to promote efficiency in production, distribution and consumption of [Energy Materials and Products], Contracting Parties agree to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission and distribution) or supply of [Energy Materials and Products] in relevant markets. In particular all prices should be determined by market competition.

- 12 -

- (7) Each Contracting Party shall grant investors of another Contracting Party non-discriminatory access to capital markets for energy investments and shall support the operations and expertise of relevant international institutions in mobilising private investments.
 - (8) The Contracting Parties shall promote transfer of technology by eliminating any administrative or legal obstacles for such transfer, subject to protection of intellectual property rights.
 - (9) The Contracting Parties shall develop energy policies designed to minimize negative environmental consequences in a cost-effective way, in particular through market-oriented energy prices which more fully reflect environmental cost and benefits.
 - (10) The Contracting Parties recognize the specific circumstances facing some states of Eastern Europe and the Commonwealth of Independent States and accept the possibility of a stage by stage transition in those countries for the implementation of those provisions of this Agreement which they are unable to implement immediately and in full.
-

Note

New Article replacing and expanding former Article 6 para (1) and the chapeau of para (1) and its subpara (a) of former Article 7, as well as reflecting the requirements of some delegations on transitional provisions.

- 13 -

ARTICLE 4

[SOVEREIGNTY OVER ENERGY RESOURCES](1)

[The Contracting Parties recognise State Sovereignty and sovereign rights over energy resources](1). [In accordance with and subject to its international legal rights and obligations each State, in particular holds the rights to decide within its Territory the areas to be made available for exploration and exploitation of its natural resources and the optimisation of their recovery, the rate at which they shall 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 exploitation within its Territory](2).

Specific comments

4.1 : US reserved its position.

4.2 : Scrutiny reservation by some delegations.

- 14 -

PART II

MARKETS

ARTICLE 5

LIBERALISATION AND NON-DISCRIMINATION

- (1) Contracting Parties shall progressively eliminate the custom duties and other charges or quantitative restrictions and measures having similar effect on imports and exports of [Energy Materials and Products] and related equipment and services so as to achieve the greatest possible degree of liberalisation in the market.
- (2) In particular, Contracting Parties undertake in relation to [Energy Materials and Products] and related equipment and services:
- (a) not to increase custom duties and other charges nor to introduce new quantitative restrictions or measures having similar effect on imports or exports as from the date of entry into force of this Agreement;
 - (b) not to apply any customs duties, charges or other regulations relating to importation or exportation in a discriminatory manner as between other Contracting Parties, provided that Contracting Parties may take action according to established international criteria against unfair trading practices;
 - (c) not to apply internal laws, taxes, charges, standards or other regulations in such a manner as to treat domestic products or services more favourably than those of other Contracting Parties.

Note

Substantially redrafted former Article 10.

- 15 -

In relation to unfair trading practices, Contracting Parties may wish to note in an accompanying document their intention to observe the GATT anti-dumping code if they are parties to it, or to apply the code's rules and procedures as closely as possible they are not parties to it.

- 16 -

ARTICLE 6 (1)

PROCUREMENT POLICIES

- (1) [Each Contracting Party shall ensure that non-governmental entities with exclusive rights and Government entities (hereinafter referred to as "Awarding Bodies") responsible for the award of contracts for the supply of works, equipment [or services] with respect to any matter the subject of this Agreement with the exception for energy delivered to energy entities apply criteria in awarding such contracts which are objective and transparent [and do not discriminate on grounds of nationality]⁽²⁾. In particular, the conditions regarding eligibility or invitations to tender for contracts for the supply of works above five million ECU in value and of equipment above 400,000 ECU in value shall not be such as to place suppliers or contractors of one Contracting Party at a disadvantage when compared to suppliers or contractors from any other Contracting Party [including the Contracting Party in whose Territory the contract is to be performed]⁽²⁾. Except in circumstances which are objectively justifiable, such contracts shall be awarded on the basis of open competition, to which end each such Awarding Body shall give effective publicity to, and allow such time as is reasonable in the circumstances for the submission of tenders for, such contracts by suppliers or contractors from the other Contracting Parties]⁽³⁾.
- (2) Contracting Parties shall not permit the relevant entities to circumvent this Article by splitting contracts or using special methods of calculating the value of contracts.

Note

Former para (2) dealing with GATT dropped.

Specific comments

- 6.1: CAN, US, JPN, AUS reserved position on whole Article
- 6.2: USSR reserved position.
- 6.3: Should be left for later discussion as the procurement policies are still under negotiation at the GATT.
-

General comments

- (US, JPN, EC): clarification of first sentence needed, in particular "non-governmental entity".
- (CH): If services are included a more evolutive clause should be adopted.
- (US): the reference to circumstances which are "objectively justifiable" introduces elements of judgement into this Article which should be eliminated. All contracts shall be awarded on the basis of open competition. GATT Government Procurement Code may apply to parastatals.

ARTICLE 7

INTELLECTUAL PROPERTY

- (1) Each Contracting Party shall, subject to paragraphs (2) and (3) below, afford protection under its domestic laws [no less favourable than](1) the protection it applies to its own nationals or to the nationals of any Contracting Party with respect to [Intellectual property](2) entailed in or created as a result of all activities carried out pursuant to this Agreement in its Territory by Investors of other Contracting Parties.
- (2) Without prejudice to paragraph (3), Contracting Parties who are not parties to the Paris Convention on the Protection of Industrial Property (1967 Stockholm revision) ("the Paris Convention") or the Berne Convention on the Protection of Literary and Artistic Works (1971 Paris revision) ("the Berne Convention") agree to apply protection equivalent to at least the minimum required by those Conventions to the matters subject of this Agreement.
- (3) [In the event of the adoption of an agreement, within the framework of the Uruguay Round of the General Agreement on Tariffs and Trade, on the Trade Related Aspects of Intellectual Property (hereinafter referred to as the "TRIPS Agreement"), the level of protection to be afforded under paragraphs (1) and (2) above shall in the case of Contracting Parties who are signatories of the TRIPS Agreement equal at least the minimum level provided for by this where the TRIPS Agreement provides for a higher minimum level of protection than that afforded under the Paris and Berne Conventions under paragraphs (1) and (2) above. In the case of Contracting Parties not party to the TRIPS Agreement, proposals shall, in the event of its adoption, be considered for ensuring an equivalent level of protection for Intellectual property covered by the terms of this Article in the Territories of such Contracting Parties.](3)

- 19 -

(4) Without prejudice to paragraphs (1) to (3) above, in relation to any information of industrial or commercial value, which is secret information, and in respect of which reasonable steps have been taken to maintain such secrecy, each Contracting Party shall ensure that its domestic laws provides means for the natural and legal persons lawfully in control of such information to prevent its disclosure, acquisition or use without their consent in a manner contrary to honest commercial practices.

Note

Para (4) redrafted. Previous para (5) dropped.

Specific comments

7.1 : AUS reserve.

7.2 : JPN reserve depending on the definition in Article 1.

7.3 : In view of last WG II meeting the discussion on para (3) was deferred. Chairman suggests that the substance might be moved to an accompanying document which could be negotiated by Contracting Parties.

- 20 -

ARTICLE 8

ACCESS TO MARKETS

Will be sent at a later date.

- 21 -

ARTICLE 9

MONOPOLIES

The Contracting Parties undertake to minimize the scope and powers of monopoly or dominant enterprises except to the extent that that would obstruct the economic and secure transmission and distribution of energy.

Note

New Article. Former Article on Standards deleted but substance incorporated into new Articles 5 and 15.

- 22 -

ARTICLE 10

STATE AID

- 1) State aid shall not be granted [to energy industries or through the prices of [Energy Materials and Products] with the object of distorting competition in trade between the Contracting Parties]⁽¹⁾. Aid granted for other purposes should be granted in a manner which minimizes such distortion.
- 2) The Contracting Parties shall ensure transparency in the area of public aid, inter alia by reporting annually on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes.
- 3) [The provision of capital financing by a Contracting Party to enterprises owned in whole or in part by the Government of that Contracting Party shall not constitute subsidisation to the extent that the finance is provided on terms (including return on funds) substantially equivalent to the terms on which the enterprise might reasonably expect to receive capital financing if it were in the private sector].

Note

Para (3) has been taken from the former Article 14 on "Unfair Trade and Subsidisation".

Specific comments

10.1: N suggests replacing with "when preventing the use of environmentally more benign energy sources".

- 23 -

PART III

OTHER PRESCRIPTIVE

ARTICLE 11

TRANSPORT AND TRANSIT

- (1) Each Contracting Party undertakes to facilitate the transit through its Territory of [Energy Materials and Products] between two or more Contracting Parties, 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 distinction, and without imposing any unreasonable delays, restrictions or charges.
- (2) Contracting Parties shall cooperate in or, as appropriate, encourage relevant entities to cooperate in:
 - (a) minimising the cost of transit and related operations necessary to the supply of [Energy Materials and Products] through existing pipelines and transmission lines;
 - (b) the development and operation of transport infrastructure serving the Territory of more than one Contracting Party to minimize the costs of that infrastructure;
 - (c) measures to mitigate the effects of the interruption in the supply of [Energy Materials and Products].

Protocols may include binding provisions to achieve these objectives.

- 24 -

- (3) Each Contracting Party undertakes that its provisions relative to transport of [Energy Materials and Products] by rail, inland waterway or sea, shall not be less favourable in their direct or indirect effect on carriers of other states as compared with carriers who are nationals of another Contracting Party or as compared with carriers who are nationals of that state or less favourable for [Energy Materials or Products] originating in or destined for the Territory of another Contracting Party compared with such [Energy Materials and Products] originating in or destined for its own Territory.
- (4) In the case of transport within its Territory each Contracting Party shall prohibit discrimination which takes the form of carriers or other providers of transportation services or harbour facilities charging discriminatory rates and imposing different conditions in respect of the same [Energy Materials and Products] over the same transport links on grounds of the country of origin or of destination of the goods in question.
- (5) Each Contracting Party undertakes that its provisions relative to the construction and use of pipelines or high voltage transmission lines shall not be less favourable in their direct or indirect effect on builders and operators of pipelines or transmission lines of other states as compared with those who are nationals of another Contracting Party or as compared with those who are nationals of that state or less favourable for [Energy Materials and Products] wholly or partly originating in or destined for the Territory of another Contracting Party compared with such [Energy Materials and Products] wholly originating in or destined for its own Territory.
- (6) In the event that access to existing pipelines or transmission lines within a Contracting Party cannot be obtained on acceptable terms for transit of [Energy Materials and Products] from another Contracting Party to a third Contracting Party, the Contracting Party shall permit new capacity to be established in accordance with its applicable legislation inter alia on safety, environmental protection and land use.

- 25 -

- (7) In the event of a dispute over the terms and conditions of transit of [Energy Materials and Products] through pipelines or transmission lines in the Territory of a Contracting Party to the Territory of another Contracting Party or to or from port facilities for loading or unloading, a Contracting Party through which the [Energy Materials and Products] transit shall not interrupt nor permit any entity subject to its jurisdiction to interrupt the flow of [Energy Materials and Products] until after the dispute has been referred to the Governing Council and the Governing Council has had adequate time to seek conciliation between the parties in dispute.
- (8) The provisions of this Article shall not require a Contracting Party to take action which substantially reduces its security of energy supply or impedes the optimisation of local electricity grids and gas pipelines.

Note

Completely rewritten former Article 11 on "Freedom of Movement".

- 26 -

ARTICLE 12

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 activities and to implement the objectives of the Charter.

 - (2) Accordingly the Contracting Parties shall eliminate existing and create no new administrative or legal obstacles for transfer of technology, and related [Energy Materials and Products], equipment and services between investors subject to the recognition and protection of intellectual property rights.
-

Note

New Article based on USSR suggestion.

- 27 -

[ARTICLE 13]

ACCESS TO CAPITAL

- (1) Each Contracting Party shall accord to Investors of another Contracting Party treatment no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the purchase, insurance, and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products].
- (2) Each Contracting Party shall provide the fullest possible access consistent with this Agreement to official credit, guarantee or insurance agreement to Investors, in connection with extraction, production, conversion, treatment, carriage and supply of [Energy Materials and Products].
- (3) The Contracting Parties shall seek to the greatest extent possible to take advantage of and to support the operations and expertise of relevant international financial institutions in mobilising private Investments in connection with the subject matter of this Agreement.

Note

New Article based on USSR suggestions.

The Chairman had previously asked delegations to send proposals on this subject to the Secretariat by 15 December 1991. No responses were received. The Chairman is concerned to ensure that the current wording of this Article does not jeopardize national provisions to protect private Investors or hamper the ability of lenders to demand appropriate security for loans.

General comments

Scrutiny reserve by many delegations.

[ARTICLE 14]**ENVIRONMENTAL ASPECTS**

- (1) The Contracting Parties shall strive to minimise harmful effects on the environment of energy production, transportation, transport and use in an economically and environmentally sustainable manner. To this end they shall :
- (a) ensure consistency between their energy policies and international environmental agreements to which they are parties;
 - (b) take account of impacts on the environment in the formulation and implementation of their energy policies;
 - (c) promote awareness among citizens of the effects on the environment of their behaviour in relation to energy consumption and their choice of fuels, consult each other on how most effectively to promote such awareness and seek to harmonise labelling schemes for informing the public about the comparative environmental benefits of consumer appliances;
 - (d) encourage markets which facilitate the internalisation in the prices of different forms of energy of environmental costs and benefits;
 - (e) promote in energy industries the use of best available technologies not entailing excessive costs;

- 29 -

(f) encourage favourable conditions for the transfer of technology which will reduce harmful environmental impacts from the production, transformation, transport and use of energy;

(g) co-ordinate their legal and administrative requirements for assessing the environmental impact of new energy installations.

Note

New Article redrafted by Chairman on basis of CH suggestion.

General comments

Scrutiny reserve by all delegations. The substance and need for such an Article supported by A, NL, US.

- 30 -

ARTICLE 15

TRANSPARENCY

- (1) Each Contracting Party undertakes that laws, regulations, judicial decisions and administrative rulings and standards of general application which are made effective by any Contracting Party and which relate to the production, import, export, conversion, distribution or use of [Energy Materials and Products] shall be published promptly in such a manner as to enable other Contracting Parties and Investors to become acquainted with them. Agreements made between governments or governmental agencies of two or more Contracting Parties which affect international trade in [Energy Materials and Products] between Contracting Parties shall also be published.
- (2) [The provisions of paragraph (1) above shall not require any Contracting Party to disclose confidential information in such a way as to impede law enforcement or otherwise be contrary to the public interest or to law, or to prejudice the legitimate commercial interests of particular public or private enterprises]⁽¹⁾.
- (3) Each Contracting Party undertakes to nominate and publish details concerning a central enquiry point to which requests for information about relevant laws, regulations, judicial decisions and administrative rulings may be addressed and to communicate these details to the Secretariat established under Article 31, for provision by the Secretariat to any investor on request.

Note

Former paragraph (4) deleted.

Specific comments

15.1 : CAN would prefer wording closer to GATT provisions if possible.

General comments

US asks provisionally for including a commitment to provide an opportunity for investors to comment before the adoption of additional regulations having general effect.

- 32 -

PART IV

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 16

PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

- (1) Each Contracting Party shall in accordance with the principles of the Charter and the provisions of this Agreement encourage and create stable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Territory. Such conditions shall include a commitment to accord at all times to Investments [and Returns]⁽¹⁾ of Investors of any Contracting Party fair and equitable treatment. Such Investments [and Returns]⁽¹⁾ [shall also enjoy full protection and security]⁽²⁾ 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 [and Returns]⁽¹⁾ be accorded treatment less than that required by international law, including relevant international obligations.
- (2) Each Contracting Party shall permit Investors of other Contracting Parties to make Investments in its Territory on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable subject to the provisions of paragraphs (3) to (6) below.
- (3) Existing laws and regulations of Contracting Parties governing the admittance of the Investments of other Contracting Parties to their Territories are not affected by the provisions of paragraph (2) above. Contracting Parties may accordingly maintain limited exceptions to the obligations of paragraph (2) which correspond to their domestic legislation in force on the date of signature of this Agreement, provided :

- 33 -

(a) any exception shall not be a greater departure from the obligations of paragraph (2) than that required by or specified in the relevant law or regulation ;

(b) details of the relevant law or regulation are available publicly in line with Contracting Parties' obligations under Article 15 of this Agreement and are provided in summary form in Annex [A] hereto attached.

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

(4) For the avoidance of doubt, the provisions of this Article do not affect the application of a Contracting Party's existing laws and regulations concerning the participation of investors of another Contracting Party in any particular activity or possible investment under the terms of this Agreement, whether or not such investors have already made other investment in the Territory of that Contracting Party.

(5) The Contracting Parties agree not to introduce any changes to measures notified under Annex [A] which would have the effect of adding to any discrimination thereby maintained between the right and ability of their own investors and investors of any other Contracting Party or third state, whichever is the most favourable, to make investments in their Territory after their signature of this Agreement. Contracting Parties may, however, add any relevant measures to Annex [A] which may result from the ending of any monopolies maintained by them in the field of activities covered by this Agreement after its entry into force. Once notified, any such measures shall also be subject to the other provisions of this paragraph.

- 34 -

- (6) The Contracting Parties agree to make every effort to eliminate existing restrictions listed at Annex [A] to this Agreement which affect the ability of Investors of other Contracting Parties to make Investments in their Territory. The Governing Council shall review progress in this direction periodically and, in the first instance, no later than 3 years following the entry into force of this Agreement.
- (7) In addition each Contracting Party shall in its Territory accord to permitted Investments [and their Returns]⁽¹⁾ of Investors of another Contracting Party treatment no less favourable than that which it accords to Investments [or Returns]⁽¹⁾ of [its own Investors or]⁽³⁾ the Investors of any other Contracting Party or any third state, whichever is the most favourable.
- (8) The treatment required by paragraph (7) above shall enable Investors of another Contracting Party at least to manage, control, operate, maintain and dispose of their Investments [and Returns]⁽¹⁾ on a basis no less favourable than that accorded to [its own Investors or]⁽³⁾ the Investors of any other Contracting Party or any third state, whichever is the most favourable.
- (9) A Contracting Party shall, subject to its laws and regulations :
- (a) permit Investors of another Contracting Party who have made Investments in the Territory of the first Contracting Party to employ within its Territory key personnel of their choice regardless of nationality;
 - (b) favourably examine requests made by natural persons who are employed by Investors of another Contracting Party to enter and remain in its Territory for the purpose of engaging in activities connected with relevant Investments.

Note

New redraft of previous Articles 20 and 21 based on US and CAN suggestions.

Specific comments

16.1 : Subject to later discussion with respect to Definitions.

16.2 : N reserve.

16.3 : Still to be discussed.

- 36 -

ARTICLE 17 (1)

COMPENSATION FOR LOSSES

(1) Investors of any Contracting Party whose Investments in the Territory of another Contracting Party suffer losses owing to any armed conflict, [including war, a state of national emergency or civil disturbances or natural disasters](2) in the Territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, [no less favourable than](3) that which the latter Contracting Party accords to [its own Investors or](4) the Investors of any other Contracting Party or any third State. [Resulting payments shall be made without delay in a freely convertible currency and be freely transferable](5).

(2) Without prejudice to paragraph (1) above Investors of a Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the Territory of another Contracting Party resulting from

(a) [requisitioning of their property by the latter's forces or authorities, or](6)

(b) destruction of their property by the latter's forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution and prompt, adequate and effective compensation. [Resulting payments shall be made without delay in freely convertible currency and be freely transferable](5).

Specific comments

17.1 : US reserved position on whole Article.

17.2 : Reserved positions by AUS, USSR, JPN.

17.3 : B replace with "as at least equal as".
Chairman : adopting 17.3 reduces flexibility.

17.4 : AUS delete.

17.5 : USSR reserved position.

17.6 : A reserved position.

General comment

N pointed out that the provisions do not cover a conflict situation in which the Investment in the Territory of the aggrieved Contracting Party belongs to the aggressor Contracting Party.

- 38 -

ARTICLE 18

EXPROPRIATION

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

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

Such compensation shall amount to the [market] ⁽²⁾ value of the Investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, (hereinafter referred to as "the expropriation date") whichever is the earlier. [Where that [market] ⁽²⁾ value cannot be readily ascertained, the compensation shall be determined [in accordance with generally recognised principles of valuation] ⁽³⁾ and equity] ⁽⁴⁾ taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors]⁽⁵⁾. In addition such compensation shall include interest at a [normal]⁽⁶⁾ commercial rate from the expropriation date until the date of payment [and such payment shall be made without delay in a freely convertible currency and be freely transferable]⁽⁷⁾.

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

- 39 -

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

Specific comments

18.1 : Subject to later discussion with respect to Definitions.

18.2 : USSR replacing with "local".

18.3 : CH after "valuation" full stop and remaining sentence delete.

18.4 : USSR reserved position on "in accordance ... and equity".

18.5 : A delete whole sentence.

18.6 : A, USSR replacing with "local".

18.7 : USSR reserved position.

ARTICLE 19

REPATRIATION OF INVESTMENTS AND RETURNS

- (1) Each Contracting Party shall in respect of Investments made in its Territory by Investors of any other Contracting Party⁽¹⁾ guarantee to such Investors⁽²⁾ the unrestricted transfer [without delay]⁽³⁾ beyond its Territory of their Investments [and Returns].
- (2) Transfers under paragraph (1) above shall be effected without delay in freely convertible currency in which the capital was originally invested or in any other convertible currency agreed by the Investor and the Contracting Party concerned. Unless otherwise agreed by the Investor with the Contracting Party concerned transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange laws and regulations in force of the Contracting Party in whose Territory the Investment was made.

Specific comments

- 19.1 : AUS asks for insertion of "and subject to its right in exceptional balance of payments difficulties to exercise equitably and in good faith powers conferred by its laws".
- 19.2 : RO suggests adding after word Investors "subject to its laws and regulations".
- 19.3 : USSR reserved its position.

- 41 -

ARTICLE 20

TAXATION

The provisions of Part IV of this Agreement shall not be construed so as to oblige any one Contracting Party to extend to the Investors of any other Contracting Party the benefit of any treatment, preference or privilege resulting from [any international agreement of arrangement or any domestic legislation relating wholly or mainly to taxation].⁽¹⁾

Note

Chapeau and subpara (b) of former Article 25 left here. Para (a) of former Article 25 moved to Article 27.

Specific comments

20.1 : JPN will prepare a new draft for next meeting.

- 42 -

[ARTICLE 21]⁽¹⁾

ASSIGNMENT OF RIGHTS

- (1) If a Contracting Party, its designated agency or a company or enterprise incorporated in a Contracting Party other than an Investor (the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment in the Territory of another Contracting Party, (the "Host Party") or otherwise acquires the rights and claims to such an Investment, the Host Party shall recognise
- (a) the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims arising from such an Investment, and
 - (b) (2) that the Indemnifying Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original Investor provided that where initial Investment approval is required any change of ownership of rights held by a foreign Investor shall be approved by the Host Party in the same way as the initial Investment.
- (2) The Indemnifying Party shall be entitled in all circumstances to
- (a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1) above, and
 - (b) any payments received in pursuance of those rights and claims, as the original Investor was entitled to receive by virtue of this Agreement in respect of the Investment concerned and its related Returns.
- (3) Any payments received in non-convertible currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the Territory of the Host Party.

Note

New text in, subpara (1b) suggested by Chairman to meet GR and N concerns.

Specific comments

21.1 : Scrutiny of whole Article required at the next meeting.

21.2 : USSR asks for wording incorporating "subrogation of damage from non-commercial risk"; otherwise reserves position.

- 44 -

ARTICLE 22

RELATIONSHIP TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part IV of this Agreement, these terms shall prevail to the extent that they are more favourable to the Investor.

Note

Para (2) of former Article 3 deleted. Remaining substance dealt with in Article 24, para (3).

- 45 -

PART V

DISPUTE SETTLEMENTS

[ARTICLE 23](1)

DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

- (1) [Disputes between an Investor of one Contracting Party and any other Contracting Party concerning an obligation of the latter under Part IV of this Agreement in relation to an Investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to International arbitration or conciliation at the request of the Investor concerned.](2)
- (2) Any such disputes which have not been amicably settled may, after a period of three months from written notification of a claim, be submitted to the Secretariat by either party to the dispute. The Secretariat shall use its good offices to attempt a conciliated resolution of the dispute within a further period of three months. If at the end of the latter period no solution has been found then paragraph (1) above shall apply.
- (3) Where the dispute is referred to international arbitration, it may at the choice of the Investor be referred either to :
- (a) the International Centre for the Settlement of Investment Disputes (the "Center") (having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 15 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings)(the "Additional Facility"); or

- 46 -

- (b) where neither the Center nor the Additional Facility are available to hear the dispute an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.
- (4) A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by investors of another Contracting Party shall for the purpose of article 25 (2)(b) of the Convention referred to in paragraph 3(a) above be treated as an investor of another Contracting Party.
- (5) Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article.
-

Note

New wording suggested by Chairman on basis of Dutch draft.

Specific comments

23.1 : Discussion will be deferred to next meeting. US and AUS are asked to send to the Secretariat proposed amendments or suggestions to facilitate that discussion.

23.2 : N reserve on para(1).

ARTICLE 24

DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through diplomatic channels.
- (2) [Subject to paragraph (3) below, if a dispute between Contracting Parties cannot thus be settled, it shall upon the request of any Contracting Party to the dispute be submitted to an arbitral tribunal constituted in accordance with The Hague Convention for the Pacific Settlement of International Disputes (1899) as revised by The Hague Convention of 1907. The decision of the tribunal shall be final and binding on the parties to the dispute]⁽¹⁾.
- (3) [In the event of a dispute between Contracting Parties who are also parties to the GATT or a GATT-related instrument, which could also be brought under the provision of the GATT or the GATT-related instrument concerned, the parties to the dispute shall, without prejudice to the initial application of paragraph (1) above, settle the dispute according to the procedures provided for in the GATT or the GATT-related instrument concerned.
-

Note

New wording of para 3 suggested by Chairman on basis of discussion in WG II meeting of 16-18 October, in particular AUS, CAN, US proposals.

Where a dispute arises between GATT members or parties to a GATT-related instrument in circumstances where GATT or such instrument applies then the dispute must be settled according to the procedures of GATT or the instrument in question.

- 48 -

This is to prevent both forum-shopping and the possibility of parallel jurisprudence being developed in GATT areas. This leaves open the possibility of different jurisprudence arising from GATT member/GATT member disputes as compared with GATT member/non-GATT member disputes but there is no way of avoiding this until all Parties to the Agreement are GATT members. There is also the question of differentials in the membership of a GATT-related instrument; it is conceivable that a dispute may arise in the GATT area which is provided for in a related instrument between two parties to GATT which are not both also parties to the instrument. In such circumstances the dispute could be settled under Article 24 of this Agreement until such time as a general dispute resolution mechanism is agreed for GATT; this is under discussion in the Uruguay Round.

Specific comments

24.1: CAN reserve with respect to the Hague Convention.

General comments

- F raised a question on para (2) in relation to automatic arbitration.

- GR asks whether the Hague Convention allows an unilateral approach.

- 49 -

PART VI

[CONTEXTUAL]

ARTICLE 25

GOVERNMENT CONTROLLED ENTITIES

[Each Contracting Party undertakes that if it establishes or maintains a government-controlled entity wherever located, or grants to any such entity formally or in effect, exclusive or special privileges, such entity shall conduct its activities in a manner consistent with this Agreement]⁽¹⁾.

Specific comments

25.1: NL, EC, CAN, US, USSR scrutiny reserve.

- 50 -

ARTICLE 26

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

[The application of the provisions of the Agreement is not limited to countries with a federal system of government but applies in all instances where observance of its provisions is the direct responsibility of regional or local governments and authorities other than the central government of the Contracting Party.]⁽¹⁾

Note

New text based on AUS proposal.

Specific comments

26.1: CAN suggests with reference to Article XXIV/12 of GATT use the same language by replacing Article 26 as follows:

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

General comments

- US : this can be a Constitutional issue in the US (separation of powers between federal and state).

- 51 -

ARTICLE 27

EXCEPTIONS

- (1) The provisions of this Agreement shall not preclude any Contracting Party from taking any action [which it considers]⁽¹⁾ necessary for the purposes of protecting its public order, or human, animal or plant life or health, [or conservation of exhaustible natural resources]⁽²⁾, or from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security, or its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and [of international nuclear safeguards obligations, provided that such prohibitions shall not constitute disguised restrictions on trade or arbitrary discrimination as between Contracting Parties.]⁽³⁾⁽⁴⁾ Such actions shall be duly motivated and shall not be disproportionate to this end.
- (2) A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential defence interests.
- (3) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the benefit of any treatment, preference or privilege resulting from
- (a)⁽⁵⁾ the membership to [or association with] ⁽⁶⁾ any existing [or future] ⁽⁶⁾ customs [or economic] ⁽⁶⁾ union or a free trade area [or similar international agreement] ⁽⁶⁾ to which any of the Contracting Parties concerned is or may become a party, or
- (b) any regulation to facilitate frontier traffic ⁽⁷⁾.

Note

Text of para (3) taken from previous Article 25.

"Essential security interests" removed from para (1) of former Article 18 and the substance moved into a new separate para (2).

Specific comments

- 27.1 : N reserve.
- 27.2 : N reserve as paraphrasing of Art. XX (g) of GATT code is used here in a different context. Should be replaced rather with "energy purposes".
- 27.3 : JPN suggests deletion, and replacement with: "obligations under other nuclear non-proliferation regimes".
- 27.4 : USSR asks for addition of subpara. (J) of Art. XX and Art XII of GATT.
- 27.5 : JPN reserved position and argued that since this Agreement should be based on the principle of non-discrimination among the Contracting Parties, the provision of exception of MFN treatment with regard to customs union, etc ..., should not be included.
- 27.6 : Should be left for later discussion.
- 27.7 : For consideration at next meeting.
-

- 53 -

PART VII

STRUCTURAL AND INSTITUTIONAL

ARTICLE 28

RELATIONSHIP BETWEEN THE AGREEMENT AND ITS PROTOCOLS

- (1) The Contracting Parties agree that in order to give full effect to the principles of the Charter it will be necessary to negotiate Protocols to this Agreement. Any Contracting Party may participate in negotiations or enter into any Protocol.
- (2) [In the event of a conflict between the obligations of a Contracting Party under this Agreement and its obligations under a Protocol, its obligations under this Agreement shall prevail, except as otherwise provided in this Agreement]⁽¹⁾.
- (3) A State or regional economic integration organisation shall not become a Party to a Protocol unless it is, or becomes at the same time, a Party to this Agreement.

Chairman's note

The Chairman draws the attention to the fact that not all Articles in a Protocol need to be relevant for all Contracting Parties.

Specific comments

28.1: D asks for deletion.

[ARTICLE 29]⁽¹⁾

GOVERNING COUNCIL

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

- 55 -

- (a) [promote in accordance with this Agreement and Protocols the coordination of appropriate policies, strategies and measures to carry out the principles of the Charter and the provisions of this Agreement and Protocols, and make recommendations on any other measures relating to this Agreement and Protocols];⁽³⁾
- (b) consider and adopt programmes of work to be carried out by the Secretariat, in accordance with this Agreement and Protocols;
- (c) consider and approve annual accounts and budget estimates in respect of administrative costs;
- (d) consider and approve the terms of any headquarters agreement, including privileges and immunities necessary for the Secretariat to carry out its functions under this Agreement and Protocols;
- (e) encourage joint efforts aimed at facilitating and promoting market oriented reforms and modernization of energy sectors in the countries of Central and Eastern Europe and the Commonwealth of Independent States;
- (f) monitor the implementation of measures undertaken pursuant to transitional arrangements in accordance with Article 42 with a view to assisting any Contracting Party in meeting its objectives and obligations ;
- (g) consider and adopt, as required, in accordance with Article 37 of this Agreement, amendments to this Agreement;
- (h) consider and adopt Protocols together with amendments thereto;
- (i) [consider and undertake any additional action that may be required for the achievement of the purposes of this Agreement].⁽⁴⁾

(5)

- 56 -

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

Note

New paragraph (5) is a Chairman's response to meet concerns expressed by several delegations on the need for a "sunset clause". New subparagraph (4)(e) derives from the Charter.

Specific comments

- 29.1: AUS, CAN general reserve on whole of Article 29.
- 29.2: JPN reserve on the grounds that there is no need for subsidiary bodies.
- 29.3: EC reserved position on subpara (a).
- 29.4: AUS, EC, NZ, US, JPN, reserve, an open-ended commitment. USSR supports retaining this subpara.
- 29.5: D suggests the addition of the following new paragraph :
"The Governing Council should delegate the tasks of the Secretariat as far as possible to other organisations or institutions on a contracting basis against restitution of costs."

General comments

JPN asks for clarification on "programmes of work" in (4)(b).

- 57 -

ARTICLE 30

VOTING

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

- 58 -

- (6) For the purposes of this Article, "Contracting Parties present and voting" means Contracting Parties present and casting an affirmative or negative vote.
- (7) Subject to paragraph (4) above and paragraph (9) below each Contracting Party shall have one vote.
- (8) With the exception of paragraph (4) above, no voting decision shall be valid unless it has positive and expressed support of a majority of all Contracting Parties.
- (9) [For the purposes of this Article a regional economic integration organisation shall, when voting, do so in the following manner:
- (a) in votes concerning this Agreement such organisation shall have a number of votes equal to the number of its member States which are Parties to this Agreement;
 - (b) notwithstanding paragraph (3) above, in votes concerning a Protocol such organisation shall have a number of votes equal to the number of its member States which are Parties to that Protocol].(4)

In either case such organisation shall not exercise its right to vote if its member States exercise theirs, and vice versa.

- 59 -

Specific comments

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

30.2: AUS wishes to delete.

30.3: USSR reserved position on whole para (4).

30.4: EC reserved position on para (9).

General comments

CAN asks how to deal with new and unidentified Protocols.

- 60 -

ARTICLE 31

SECRETARIAT

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

Note

This Article has been redrafted in order to contain only the required provisions.

- 61 -

ARTICLE 32

FUNDING PRINCIPLES

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

Note

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

Specific comments

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

- 62 -

PART VIII

FINAL PROVISIONS

ARTICLE 33

[SIGNATURE]⁽¹⁾

This Agreement shall be open for signature by the States and regional economic integration organisations signatory to the Charter at [Lisbon] from [] to [].

Specific comments

33.1: A reserve

General comments

JPN points out that further, careful study of Part VIII would be necessary from the legal point of view. If the Basic Agreement and other Protocols are legally independent (from each other), the provisions for conclusion, entry into force, amendments and withdrawal should be made in each Protocol.

- 63 -

ARTICLE 34**RATIFICATION, ACCEPTANCE OR APPROVAL**

This Agreement and any Protocol shall be subject to ratification, acceptance or approval by States and by regional economic integration organisations. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

ARTICLE 35

APPLICATION TO OVERSEAS TERRITORIES

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

- 65 -

ARTICLE 36**ACCESSION**

This Agreement and any Protocol shall with the agreement by consensus of the Contracting Parties thereto, be open for accession by States and regional economic integration organisations which have signed the Charter from the date⁽¹⁾ on which the Agreement or the Protocol concerned is closed for signature. The instruments or accession shall be deposited with the Depositary.

Specific comments

36.1: JPN asks that this date should be specified.

- 66 -

ARTICLE 37

AMENDMENT

- (1) Any Contracting Party may propose amendments to this Agreement.
- (2) The text of any proposed amendment to this Agreement or to any Protocol shall be communicated to the Contracting Parties by the Secretariat at least three months before the meeting at which it is proposed for adoption.
- (3) Amendments to this Agreement which have been adopted by the Contracting Parties shall be submitted by the Depository to all Contracting Parties for ratification, approval or acceptance.
- (4) Ratification, approval or acceptance of amendments to this Agreement shall be notified to the Depository in writing. Amendments adopted in accordance with this Agreement shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depository of notification of their ratification, approval or acceptance by at least three-fourths of the Contracting Parties to this Agreement. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.(1)

Specific comments

37.1 : GR suggests that consideration be given to the need for time limits between signature and amendment.

- 67 -

ARTICLE 38

ASSOCIATION AGREEMENTS

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

- 68 -

ARTICLE 39

ENTRY INTO FORCE

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

Note

Former para (2) and (4) dropped.

- 69 -

[ARTICLE 40]⁽¹⁾

PROVISIONAL APPLICATION

The signatories agree to apply this Agreement and any amendments thereto provisionally following signature, to the extent that such provisional application is not inconsistent with their national laws pending its entry into force in accordance with Articles 37 or 39.

Specific comments

40.1: JPN, CAN reserve.

- 70 -

[ARTICLE 41]⁽¹⁾

RESERVATIONS

No reservations may be made to this Agreement.

Specific comments

41.1: AUS, RO, CAN reserve.

- 71 -

[ARTICLE 42]⁽¹⁾

TRANSITIONAL ARRANGEMENTS

(1) [It is recognised that due to differences in the way in which Contracting Parties have managed the matters the subject of this Agreement some Contracting Parties will be unable to comply with all the provisions of this Agreement immediately upon entry into force thereof]⁽²⁾. [Therefore, a transitional period of up to []⁽³⁾ years may, subject to approval by the Governing Council, be invoked by any Contracting Party, provided that a Note setting out the provisions with which it cannot fully comply together with a timetable for the implementation of measures to effect complete compliance is deposited with its instrument of ratification, acceptance or approval in accordance with Article 34 above]⁽⁴⁾.

(2) A Contracting Party which has invoked a transitional period shall notify the Secretariat

(a) of the implementation of any measures needed to effect compliance;

(b) of the need for any revision to the list of measures for which the transitional period has been invoked;

(c) of any application to the Governing Council to extend the timetable for achieving compliance in respect of any particular provision.

- 72 -

- (3) The Secretariat shall circulate to all Contracting Parties every six months the Notes referred to in para (1) above revised as appropriate to take account of any notification made under subparagraphs (2)(a) and (b) above, and at the same time notify all Contracting Parties of any applications under subparagraph (2) (c).
- (4) The Governing Council shall review annually the progress by Contracting Parties towards implementation in accordance with Article 29 (4), at the same time as it reviews progress under Article 16 (6). It may take steps to assist Contracting Parties in facilitating implementation. Applications under subparagraph (2)(c) above shall be subject to approval by the Governing Council.

Note

New paragraphs 2 to 4 suggested by Chairman.

Specific comments

- 42.1: JPN, US reserved their positions and noted that if retained, transitional periods should be kept as short as possible, and that progress toward fulfilment of Charter commitments should be regularly monitored and evaluated.
- 42.2: CAN pointed out that first sentence quotes the Charter and seems to be redundant.
- 42.3: USSR argues for retaining first sentence in the Article, and raises possibility of different durations of transitional period for different countries.
- 42.4: RO reserved position with regard to the conditions required for approval of a transitional period.

- 73 -

ARTICLE 43

WITHDRAWAL

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

Note

Former para (2) dropped. Redraft of para (3) by Chairman to meet JPN concerns.

- 74 -

ARTICLE 44

DEPOSITARY

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

- 75 -

ARTICLE 45

AUTHENTIC TEXTS

The original of this Agreement of which the English, French, German, Italian, Russian and Spanish⁽¹⁾ texts are equally authentic, shall be deposited with [the Secretary-General of the United Nations].

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

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

Specific comments

45.1: JPN wishes to add Japanese language as the seventh language for the authentic text or, if not accepted, to limit the number to two or three (English, French and Russian).

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

4/92

ANNEX 2

BA 6

RESTRICTED

OVERVIEW OF THE RELATIONSHIP BETWEEN ARTICLES IN BA-4 AND BA-6

BA-4

BA-6

ART 1 - Definitions	ART 1 - Definitions
ART 2 - Relationship between the Agreement and its Protocols	ART 28 - Relationship between the Agreement and its Protocols
ART 3 - Relationship to other Agreements	ART 22 - Relationship to other Agreements
ART 4 - Protocols	ART 1 - Definitions - item 9
ART 5 - Sovereignty over Natural Resources	ART 4 - Sovereignty over Energy Resources
ART 6 - Energy Policies	ART 3 - Principles (para 6.1)
	ART 29 - Governing Council (para 6.1)
ART 7 - Energy Markets	ART 8 - Access to Markets - redraft
ART 8 - Standards	Dropped - substance incorporated into new ART 5 and 15
ART 9 - Procurement Policies	ART 6 - Procurement Policies
ART 10 - Non Discrimination	ART 5 - Liberalisation and Non-Discrimination
ART 11 - Freedom of Movement	ART 11 - Transport and Transit
ART 12 - Transparency	ART 15 - Transparency
ART 13 - State Aid	ART 10 - State Aid
ART 14 - Unfair Trade and Subsidisation	Dropped - second para moved to ART 10
ART 15 - Government Controlled Entities	ART 25 - Government Controlled Entities
ART 16 - Avoidance of Double Taxation	Dropped

BA-4

BA-6

ART 17 - Observance by Sub-Federal Authorities	ART 26 - Observance by Sub-Federal Authorities
ART 18 - Exceptions	ART 27 - Exceptions
ART 19 - Intellectual Property	ART 7 - Intellectual Property
ART 20 - Promotion and Protection of Investments	ART 16 - Promotion, Protection and Treatment of Investments
ART 21 - Treatment of Investments	ART 16 - Promotion, Protection and Treatment of Investments
ART 22 - Compensation for Losses	ART 17 - Compensation for Losses
ART 23 - Expropriation	ART 18 - Expropriation
ART 24 - Repatriation of Investments and Returns	ART 19 - Repatriation of Investments and Returns
ART 25 - Exceptions	ART 20 - Taxation (remaining para moved to ART 27)
ART 26 - Assignment of Rights	ART 21 - Assignment of Rights
ART 27 - Investment Transparency	Dropped
ART 28 - Governing Council	ART 29 - Governing Council
ART 19 - Voting	ART 30 - Voting
ART 30 - Secretariat	ART 31 - Secretariat
ART 31 - Funding Principles	ART 32 - Funding Principles
ART 32 - Disputes between an Investor and a Contracting Party	ART 23 - Disputes between an Investor and a Contracting Party
ART 33 - Disputes between Contracting Parties	ART 24 - Disputes between Contracting Parties
ART 34 - Signature	ART 33 - Signature
ART 35 - Ratification, Acceptance or Approval	ART 34 - Ratification, Acceptance or Approval

BA-4

BA-6

ART 36 - Accession

ART 36 - Accession

ART 37 - Amendment

ART 37 - Amendment

ART 38 - Deleted

/

ART 39 - Association Agreements

ART 38 - Association Agreements

ART 40 - Entry into Force

ART 39 - Entry into Force

ART 41 - Provisional Application

ART 40 - Provisional Application

ART 42 - Reservations

ART 41 - Reservations

ART 43 - Transitional
Arrangements

ART 42 - Transitional
Arrangements

ART 44 - Withdrawal

ART 43 - Withdrawal

ART 45 - Depositary

ART 44 - Depositary

ART 46 - Authentic Texts

ART 45 - Authentic Texts

ART 2 - Objective of the
Agreement

ART 9 - Monopolies

ART 12 - Transfer of Technology

ART 13 - Access to Capital

ART 14 - Environmental Aspects

ART 35 - Application to Overseas
Territories

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

4/92

ANNEX 3

BA 6

RESTRICTED

RELATIONSHIP TO GATT - MAIN ISSUES

EUROPEAN ENERGY CHARTER: BASIC AGREEMENT**RELATIONSHIP TO GATT - MAIN ISSUES****A. Purpose of negotiation on trade policy principles**

1. In order to fulfil the objective of the European Energy Charter to create among its parties a common framework of shared principles and practices relating to the exploitation of and trade in energy materials and products, the Basic Agreement needs to contain clear and binding provisions relating principally to:

- i) access to resources
- ii) non-discrimination as between Charter parties
- iii) transparency of regulation
- iv) freedom of transit
- v) avoidance of unfair trading conditions, e.g. through subsidisation
- vi) control of monopoly and dominant positions
- vii) promotion and protection of investment
- viii) settlement of disputes.

2. Provisions of this sort already exist in a variety of international agreements, above all in the General Agreement on Tariffs and Trade (GATT), as well as in the OECD Codes on Capital Movements and on Invisible Operations, and in the many Investment Promotion and Protection Agreements negotiated bilaterally between individual countries.

3. This note concentrates on the fundamental trade policy obligations which need to be incorporated in the Basic Agreement (essentially ii, iii, iv, v and viii above), and on the relationship of that Agreement to the obligations which many Charter parties already have under GATT. It concludes with revised suggestions for drafting to reflect this relationship.

B. Classes of participants

4. The current negotiation involves two classes of participants:

- a) Charter parties who are also Contracting Parties to GATT
- b) Charter parties who are not in GATT.

In addition attention has to be paid to:

- c) GATT Contracting Parties who are not involved in the Charter negotiations

because of obligations which group (a) above has towards group (c) under the general obligations of GATT.

5. Similar issues arise because certain Charter parties are signatories to the GATT Tokyo Round Agreements (the so-called "Codes") and have obligations under those Codes. The following appear to be the Codes which are relevant in this context:

- Technical Barriers to Trade ("Standards")
- Government Procurement
- Anti-dumping
- Subsidies
- Customs valuation
- Import licensing.

The problem of differing levels of obligations or conflicting obligations appears potentially more acute in the case of the GATT Codes than for obligations under the General Agreement itself, because:

- not all GATT Contracting Parties are signatories to the Codes
- the list of signatories to each Code is different
- dispute settlement provisions currently differ as between the General Agreement and some of the Codes, and between the Codes themselves.

C. Objectives of participants who are GATT Contracting Parties

6. Charter parties falling in group (a) above insist that:

- their GATT obligations have primacy in their relations with other Charter parties falling within group (a), including new or modified obligations deriving from Uruguay Round agreements
- disputes with other Charter parties in group (a) must be settled according to applicable GATT dispute settlement procedures
- there must be no infringement of their obligations towards GATT Contracting Parties falling in Group (c).

D. Objectives of participants who are not in GATT

7. Charter parties falling in group (b):

- are prepared to assume binding obligations within the specific context of the energy sector and the Charter
- reserve their position as to whether they are prepared by reference to assume obligations deriving from GATT or its Codes in view of their lack of experience of GATT
- are not prepared to commit themselves to assume obligations which may be varied in future as a result of negotiations in which they do not take part
- have queried whether if they did so assume obligations deriving from GATT, they would also acquire associated GATT rights.

E. Negotiating objectives

8. There is general agreement that the Basic Agreement must:

- establish a clear, uniform and binding framework of obligations for all Charter parties
- not conflict with GATT, i.e. its observance must not entail any breach of GATT obligations by those parties who are in GATT
- not set up a separate and parallel set of obligations as compared with GATT, i.e. must avoid the separate risks of
 - confusion of objectives and obligations
 - conflicting jurisdiction in the event of disputes
- not create any presupposition about the eventual GATT accession of parties who are not in GATT
- not appear to create directly or by implication wider GATT rights for such parties.

9. This means that there is every interest in keeping the nature and detail of the obligations created under the Charter as close as possible to those in the GATT system, both to avoid confusion and because the MFN principle in GATT will anyway require Charter parties who are GATT Contracting parties (group a) to extend to those in group (c) any privileges or rights created under the Charter.

F. Possible relationships to GATT

10. So far two main ways of approaching this issue in the drafting of the Basic Agreement have been tried:

- i) to include a provision recognizing the primacy of GATT obligations and procedures as between GATT Contracting Parties and otherwise to reflect in the text of the Basic Agreement those fundamental trade policy objectives which all Charter parties are committed to observe.

Advantages: - Clarity

- All Charter parties equally bound by basic obligations in the text of the Agreement
- No need for non-GATT parties to commit themselves to uncertain future obligations

Faults:

- Drafting may need to be complex, e.g. to reflect GATT Code obligations
- Risk of two-tier system in treatment of groups (a) and (b)
- Further risk of two-tier system within group (a) as between signatories and non-signatories of specific Codes
- Risk of conflicting jurisdictions for dispute settlement as between Charter Parties who are GATT Contracting Parties
- Would be need for renegotiation to reflect changes in GATT obligations over time.

- ii) to import GATT obligations, including those of the Codes, into the Charter either by reference or by appending the relevant GATT texts to the Basic Agreement. There would be no detailed drafting as to trade policy obligations in the Agreement.

Advantages: - Avoidance of a two-tier system of obligations

- Avoidance of conflicting jurisdictions in the case of disputes between GATT Contracting Parties
- In longer run, could encourage accession to GATT of group (b) parties

Faults:

- Very cumbersome

- GATT Contracting Parties in group (a) who were not Code signatories would be required to observe Code provisions in the energy context only, and not for GATT purposes
- Non-GATT parties would be required to observe detailed requirements without knowledge or experience, and without access to accumulated GATT jurisprudence
- Non-GATT parties would not have access to GATT dispute settlement, so there would still be a de facto two-tier system
- Non-GATT parties would still be confronted with negotiations for amendments to text to reflect changing GATT obligations
- Pressures could be set up by this indirect means for the accession to GATT of group (b) countries without due regard to the sovereignty of the GATT Contracting Parties in this matter and to the normal procedures for negotiating GATT accessions.

G. Appraisal

11. Neither method meets all the objectives of the countries in groups (a) and (b), as set out in sections C and D respectively. Indeed these are probably not capable of being fully reconciled. Group (a)'s priority must be to observe GATT obligations among themselves in all respects, including any modifications deriving from Uruguay Round agreements, future amendments and new jurisprudence arising from the dispute settlement system. Group (b) countries cannot reasonably be expected to assume in the energy policy context alone an order of obligations which they do not or cannot yet assume in their general trade policy, let alone commit themselves to accept future amendments to those obligations which are negotiated by others.

12. It is therefore necessary to seek a different approach. What follows reflects detailed informal consultation between the Energy Charter Secretariat and the Legal Directorate of the GATT Secretariat.

H. Essential interests

13. Of the obligations set out in the draft Basic Agreement only three areas are currently within the ambit of GATT, namely:

- tariffs and other international trade policy regulations relating to products

- taxation and other internal regulations relating to products
- dispute settlement.

14. In these areas the requirement for group (a) countries is that they should not create obligations within the context of the Charter which would entail GATT-illegal discrimination against group (c). Provided that obligations within the Charter were equal or additional to those in GATT - "GATT-plus" - and applied without discrimination against any other GATT contracting party this risk need not arise.

I. A new approach

15. It would be possible to include in the Basic Agreement an undertaking to remove (or an objective of removing) tariffs on energy products. Provided that this objective was applied without discrimination (MFN) no discrimination would arise that would activate the provisions of GATT Article XXIV in relation to the creation of free trade areas. It seems desirable to include reference to such a general objective of liberalisation, linked with a general MFN obligation.

16. The same requirement as to non-discrimination would also apply to use of international trade policy instruments by group (a) countries.

17. As regards taxation and other internal regulation, an obligation to avoid discrimination as between energy materials or products imported from different countries or as between domestic production and imports would meet the GATT MFN and national treatment obligations provided that no discrimination was created against any country in group (a) or (c).

18. On dispute settlement it would be open to Charter parties according to accepted international jurisprudence (Article 30(4) of the Vienna Convention on the Law of Treaties) to settle disputes among themselves according to the latest and most specific international agreement binding those parties: among Charter parties this would normally be the dispute settlement provisions in the Basic Agreement and/or protocols. Under Article 41 also the Charter parties could establish special provisions among themselves, inter alia for dispute settlement, provided that the rights of non-parties under other treaties were not impaired. It would however be possible to specify that GATT provisions should prevail as between group (a) countries (Article 30(2) of the Vienna Convention). Whatever course was chosen, group (c) countries would retain their full GATT rights in any dispute involving a complaint by them against countries in group (a). Thus there is no likelihood of jurisdictional conflict between the Basic Agreement and GATT.

J. Conclusion and drafting suggestions

19. The Basic Agreement needs to specify the fundamental trade policy obligations which the Charter parties assume among themselves in relation to energy materials and products. But in view of the foregoing it is not necessary to repeat or reflect at length the detailed provisions of GATT, or to reproduce GATT language. The trade policy obligations included in the Agreement should relate exclusively to the substance of what is necessary in the energy sector.

20. Specific proposals for drafting changes to the Basic Agreement to reflect the above analysis and conclusions are attached as an Annex.

21. In the light of the informal advice from the GATT Secretariat referred to at paragraph 12 above, it is possible greatly to reduce and simplify references in the text to the GATT and GATT-related instruments. In particular it is proposed:

- a) to delete Article 3(2) (on the primacy of GATT obligations as between GATT members) and to add an appropriate reference to the operational provision on dispute settlement in Article 33(3);
- b) that although Article 8 (Standards) as a whole can be deleted, specific references to compatibility of energy standards and specifications should be included where appropriate in sectoral protocols;
- c) to retain Article 9(1) (Procurement policies), which contains matters of specific relevance to the energy sector and going wider than the general references to trade policy obligations in the new Article 10. Article 9(1) however needs to be reviewed in the light of views already expressed by Charter parties;
- d) to delete Article 11 (Freedom of movement) in its present form. The important subject of transit of energy materials and products must however be addressed in the Basic Agreement. A new draft related more precisely to conditions in the energy sector will be proposed.

Department of Trade and Industry
Department of Energy

London
December 1991.

EUROPEAN ENERGY CHARTER
CONFERENCE SECRETARIAT

4/92 ADDENDUM

BA 6

RESTRICTED

Brussels, 27 January 1992

NOTE FROM THE SECRETARIAT

Subject: Basic Agreement

The revised text of the Basic Agreement circulated on 21 January did not include Article 8 dealing with Access to Markets (paragraph 3 of the cover note to BA 6). A draft of this Article is now attached, based on the provisions of the EEC Treaty. In a footnote to this text the Chairman describes a possible alternative approach which could be considered by the Working Group.

ARTICLE 8

ACCESS TO MARKETS

(1) In respect of [Energy Materials and Products] each Contracting Party undertakes to prohibit all agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between the Contracting Party and another Contracting Party and which have as their object or effect the prevention, restriction or distortion of competition within the Territory of the Contracting Party, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) The provisions of paragraph (1) may however be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

- 2 -

- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
 - b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (3) In respect of [Energy Materials and Products] each Contracting Party undertakes to prohibit any abuse by one or more undertakings of a dominant position within their Territory in so far as it may affect trade between the Contracting Party and another Contracting Party.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

- 3 -

- (4) The Contracting Parties should cooperate by consulting and exchanging information taking into account limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy.
-

Chairman's note

New Article.

Paragraphs (1) to (3) above are based on the provisions of the EEA agreement which replicate provisions of the Treaty of Rome. The same articles are incorporated by direct reference in the EC's Association Agreements with Hungary, Poland and CSFR.

An alternative approach might be to remove much of the detailed provisions and instead require Contracting Parties to restrict and prohibit concerted practices etc. between energy undertakings which distort competition, and abuses by energy undertakings with monopoly or dominant positions, without most of the explicit detail on what precisely was to be prohibited or permitted. But, as a minimum, Contracting Parties would undertake to prevent such activities which

- (a) denied other undertakings access to energy markets on commercial terms;
- (b) led to unfair restriction of competition; or
- (c) involved discriminatory pricing practices.

Under this approach Contracting Parties with existing effective competition authorities and laws would undertake to ensure that their authorities could apply such laws in the energy field to achieve these objectives. There would also be provision for co-operation between authorities in different Contracting Parties, and assistance to those Contracting Parties without effective competition laws and authorities to establish them. The aim of minimising monopolies would remain in Article 9.