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ENVIRONMENT, SCIENCE AND ENERGY DEPARTMENT (ESED)

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REQUEST/FURTHER INFORMATION AS FOLLOWS:

*Dear Leif,*  
*Here - at last! - is the full and final text of the Explanatory Memorandum. Thanks for your patience.*  
*Yours sincerely,*  
*Martin.*

Any enquiries on this fax message please ring (071) 270 2282

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11 SEPTEMBER 1991

EUROPEAN ENERGY CHARTER

WORKING GROUP II

DRAFT BASIC PROTOCOL

EXPLANATORY MEMORANDUM

PART I: DEFINITIONS

Article 1 defines various terms used in the text of the Basic Protocol.

PART II: GENERAL OBLIGATIONS

Article 2(1) limits the applicability by any Contracting Party of the provisions in Parts II and III to the context of Core or Supplementary Protocols which have been ratified, accepted or approved by that Contracting Party.

Article 2(2) places similar limitations on Investors with regard to Part III of the Agreement (Investment Promotion and Protection).

Article 3(1) commits Contracting Parties to negotiate and make their best efforts to adopt, sign and ratify, accept or approve, all Core Protocols.

Article 3(2) is intended to provide a list of subjects mentioned in the Basic Protocol which will be dealt with by Core Protocols.

Article 3(3) is intended to provide a list of those subjects in Title III of the Charter which must be dealt with in separate Core Protocols.

Article 3(4) allows for the list of Core Protocols to be amended.

Article 4(1) provides for Contracting Parties who so wish to sign and ratify, accept or approve Supplementary Protocols.

Article 4(2) is intended to provide a list of the subjects in Title III of the Charter which will be dealt with in separate Supplementary Protocols.

Article 4(3) allows for the list of Supplementary Protocols to be amended.

Article 5(1) reiterates the principle of national sovereignty over natural resources. It makes provision for States to decide which areas of their territory may be made available for exploration and exploitation, the rate of resources depletion, taxation and revenue, and makes States responsible for regulation of environmental and safety matters.

Article 5(2) extends sovereignty to sub-national authorities where appropriate.

Article 6 notes the relationship between the energy policies of different countries. It requires Contracting Parties to consider the need to liberalise markets, improve security of energy supply and protect the environment when implementing policy, and requires the Governing Council periodically to review the energy policies of Contracting Parties.

Article 7 establishes the free market principles which shall apply in order to promote efficiency in energy production, distribution and consumption:

- (a) market pricing where there is no monopoly or dominant position;
- (b) where a monopoly or dominant position exists, to ensure that this emulates free and competitive market operation, with particular reference to pricing;
- (c) in a monopoly or where there is a dominant position, pricing and other conditions or operations to be transparent, in order to reduce opportunities for monopoly pricing, discrimination and cross-subsidy.

Article 8 (1) requires that energy standards or procedures required to be met by investors, be objectively justifiable and non-discriminatory, and published and readily available. (Source: based on GATT Code on Technical Barriers to Trade, Article 2.1).

Article 8(2) requires Contracting Parties to discuss and implement procedures for ensuring compatibility of energy standards or specifications where necessary.

Article 9 requires that contracts for the supply of works, equipment or services be awarded on the basis of objective, transparent and non-discriminatory criteria. In particular, conditions of eligibility and invitations to tender must not be such as to place suppliers or contractors from one Contracting Party at a disadvantage when compared to those from others, including the Contracting Party in whose Territory the contract is to be performed. Except in

limited circumstances, contracts are to be awarded on the basis of open competition.

Article 10 makes provision to ensure that Contracting Parties own laws, regulations and requirements apply equally to its own operations and investors of another Contracting Party so as to promote international trade.

(Source: based on GATT Articles I and III). Specific reference is made to customs duties or charges, domestic or imported production, and technical and safety regulations and standards. Article 10(d) covers freedom of establishment for an investor of another Contracting Party and, once established, access to energy resources.

Article 11 provides for (a) the facilitation of transit of Energy Materials and Products through the Territory of Contracting Parties (Source: GATT Article V); (b) the limitation of fees and charges to the approximate cost of services rendered, including a reasonable commercial rate of return, and the avoidance of fiscal protection of domestic products (Source: GATT Article VIII); and (c) the absence of prohibitions or restrictions (other than duties, taxes and other charges) on imports and exports from and to any Contracting Party (Source: GATT Article XI). Under paragraph (d), Contracting Parties' security of supply is protected.

Article 12(1) requires that Contracting Parties publish certain categories of information that relate to the production, distribution or use of Energy Materials and Products. (Source: GATT Article X).

Article 12(2) grants an exception to the preceding requirement, where the disclosure of information might impede law enforcement or otherwise be contrary to the public interest or to law, or prejudice legitimate

commercial interests of particular enterprises. (Source: GATT Article X)

Article 12(3) requires Contracting Parties to establish a central enquiry point where requests for relevant information may be addressed, and to inform the Charter Secretariat of the details of this enquiry point.

Article 12(4) requires Contracting Parties to notify the Charter Secretariat of all laws and regulations relevant to the Basic Protocol (and details of where such information may be obtained), plus any amendments to this information and reports on the implementation of energy policies.

Article 12(5) requires entities in a monopoly or dominant position to publish financial information on their separate activities.

Article 13 commits Contracting Parties not to grant state aid in circumstances which would distort competition in trade between the Contracting Parties.

Article 14 provides for the criteria and procedures in Article VI, XVI and XXIII of the General Agreement on Tariffs and Trade to be applied when dealing with complaints between Contracting Parties of alleged dumping or subsidisation.

Article 15 requires Contracting Parties to ensure that government-controlled Investors, with or without exclusive or special privileges, conduct their activities in a manner consistent with the provisions of the Basic Protocol. (Source: GATT Article XVII).

Article 16 provides for Contracting Parties, in the context of the Charter and the Basic Protocol, to abolish double taxation between them.

Article 17 extends the application of the Basic Protocol's provisions to the sub-federal level, in the case of Contracting Parties which have a federal structure.

Article 18 lists the circumstances which override Contracting Parties' obligations under the Basic Protocol not to impose prohibitions or restrictions on imports, exports or goods in transit, provided that such prohibitions or restrictions that are imposed do not constitute disguised restrictions on trade or arbitrary discrimination between Contracting Parties.

Article 19(1) sets the degree to which Contracting Parties must afford protection under their municipal (that is, national and, where appropriate, sub-national) law with respect to any intellectual property entailed in or created as a result of activities carried out or Investments made by Investors of other Contracting Parties. Protection must be afforded at least equal to, and to the same extent as, the protection applied to the Contracting Party's own nationals.

Article 19(2) commits Contracting Parties which have not acceded to or ratified, or not yet implemented, the Paris Convention on the Protection of Industrial Property (1967 Stockholm Revision) or the Berne Copyright Convention (1971 Paris Revision) to afford at least the minimum level of protection required by those Conventions.

Article 19(3) provides that where an agreement on Trade Related Aspects of Intellectual Property provides for higher minimum levels of protection than the Paris and Berne Conventions, the higher levels shall apply.

Article 19(4) provides for the protection of secret information of industrial or commercial value, whether or not intellectual property.

Article 19(5) allows additional provisions on intellectual property to be agreed if appropriate.

### PART III

#### INVESTMENT PROMOTION AND PROTECTION

(Source: modified from standard UK bilateral text on investment promotion and protection)

Article 20(1) ensures that Contracting Parties will encourage and create stable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments, and will admit those Investments.

Article 20(2) specifies the way in which Contracting Parties must protect the Investments of Investors of other Contracting Parties.

Article 20(3) limits the extent of the Basic Protocol so as not to affect any existing or future investment promotion and protection agreement between a Contracting Party and any other State which deals with matters outside the scope of the Basic Protocol.

Article 21(1) ensures that a Contracting Party treats the Investments of an Investor of another Contracting Party no less favourably than the Instruments of its own Investors or those of any other State.

Article 21(2) requires a Contracting Party to give the Investors of another Contracting Party investment conditions at least as favourable as those applied to its own or the Investors any other State.

Article 21(3) lists the ways in which Contracting Parties should further liberalise conditions for Investments and Investors of other Contracting Parties:

- (a) by limiting restrictions on the type of investments in connection with the Charter or the Basic Protocol;
- (b) by not introducing taxes with discriminatory or expropriatory effect on investments (although without prejudice to Article 25);
- (c) by not applying any conditions on investments inconsistent with the obligations of Part II;
- (d) by considering what other steps might be taken to improve the conditions for Investments and Investors.

Article 22(1) requires that a Contracting Party's Investors in the Territory of another Contracting Party who suffer losses due to any armed conflict, or other forms of disorder, shall receive settlement on a basis no less favourable than that accorded to Investors of the latter Contracting Party or of any other State. Payments are to be made without delay and freely transferable.

Article 22(2) requires that restitution or adequate compensation be accorded to any Investor of a Contracting Party whose property is requisitioned or destroyed by the forces or authorities of another Contracting Party where such events were not caused in combat action or required by the necessity of the situation. Payments are to be freely transferable.

Article 23(1) imposes criteria in the absence of which Investment cannot be nationalised or expropriated.

Compensation is payable at the real value of the Investment, and includes interest until the date of payment. The Investor shall have the right to a prompt review of his or its case and of the valuation of the Investment.

Article 23(2) extends the provisions in 23(1) to include shareholdings of an Investor of one Contracting Party in a company or enterprise of another.

Article 24(1) provides for the unrestricted transfer of Investments and returns from one Contracting Party to another.

Article 24(2) states the conditions which apply to transfers under Article 24(1).

Article 25 excludes Investors of one Contracting Party from the terms and benefits of regional economic integration organisations of which any other Contracting Party is a member.

Article 26(1) specifies obligations on the "Host Party" to recognise the assignment of certain rights in Investments to an "Indemnifying Party" for the purposes of exercising or enforcing those rights in that Host State as if the Indemnifying Party were the original Investor which assigned the rights (Subrogation).

Article 26(2) ensures for the Indemnifying Party the same treatment and payment as would have been the case for the original Investor.

Article 26(3) provides that any payments received in non-convertible currency shall be freely available to the Indemnifying Party for spending in the Territory of the Host Party.

Article 27 extends the provisions of Article 12 ("Transparency") to Investors and Investments.

#### PART IV

#### ORGANISATION AND MANAGEMENT

(Sources: some material drawn from Vienna Ozone Convention 1985;  
some from Inmarsat Agreement)

Article 28(1) establishes a Governing Council, and empowers it to hold Ordinary Meetings.

Article 28 (2) empowers the Governing Council to hold Extraordinary Meetings.

Article 28(3) requires the Governing Council to adopt administrative and financial measures for itself and subsidiary bodies, and financial provisions and certain staff matters of the Secretariat.

Article 28(4) lists the duties of the Governing Council.

Article 29(1) requires Contracting Parties to make every effort to reach agreement by consensus.

Article 29(2) provides for consensus to be used in adoption of amendments to the Basic protocol, but gives a choice of two alternative methods for the adoption of Core Protocols (as defined in Article 3) and amendments to Core Protocols. As the text stands, Core Protocols and amendments to them would be adopted only by consensus: a Contracting Party unable to accept these would be required, under the provisions of Article 44(5), to withdraw from the Basic

Protocol and any other Protocols it had already signed. An alternative to exclusion, under Article 39, would be to enter into an Association Agreement, which would limit the application of certain provisions of the Basic Protocol. The removal from the text of paragraphs (b) and (c), would have the effect of enabling Core Protocols and amendments to them to be adopted in the same way as other (Supplementary) Protocols, that is, by a three-fourths majority vote of the Governing Council.

Article 29(3) lists the matters which, efforts at consensus having failed, shall as a last resort be decided by a three-fourths majority of those Contracting Parties present and voting at a meeting of the governing Council. These include, at (a), Supplementary Protocols (as defined in Article 4), and amendments to Supplementary Protocols. Square brackets are shown around the words "Supplementary" in view of the square-bracketting of sub-paragraphs (2)(b) and (c). (If Core Protocols and amendments to them were also capable of adoption by three-fourths majority vote, the requirement for specific references to "Supplementary" in sub-paragraph (3)(a) would disappear).

Article 29(4). Where consensus cannot be reached on funding principles or other budgetary matters, decisions can be made by a qualified majority based on Contracting Parties' contributions to the administrative costs of the Secretariat.

Article 29(5) provides for a simple majority vote on other matters.

Article 29(6) explains the term "Contracting Parties present and voting".

Article 30 Paragraphs (1) and (4) govern the appointment of the Secretary-General and other members of the Secretariat. Paragraphs (2) and (3) require specific staff matters, and

privileges, immunities and the terms of any headquarters agreement, to be approved by the Governing Council.

Article 30(5) states the standards which shall be ensured in considering appointments to the Secretariat.

Article 30(6) provides for the Secretariat's functions to be carried out on an interim basis until entry into force of the Basic Protocol.

Article 30(7) lists the functions of the Secretariat.

Article 30(8) The location of the Secretariat is a subject for negotiation.

Article 31 sets out the funding arrangements for meetings of the Governing Council (paragraphs (1) and (2)) and the administrative costs of the Secretariat ((3)). For the latter, the draft proposes the model of the Conference on Security and Cooperation in Europe (CSCE), appropriately modified to take account of those Contracting Parties to the Basic Protocol who do not contribute to the costs of the CSCE (and, similarly, those members of the CSCE who are not Contracting Parties), with any further slight adjustments on a pro-rata basis to ensure there is no shortfall in funds.

## PART V

### DISPUTE RESOLUTION

Article 32 provides an agreed mechanism for the resolution of disputes between an Investor and a Contracting Party.

Article 33 provides an agreed mechanism for the resolution of disputes between Contracting Parties. The Hague Convention was chosen due to its wide acceptance, its well understood and travelled procedures, and its considerable

practise in handling international disputes of the type which may be engendered by the Basic Protocol.

## PART VI

### FINAL PROVISIONS

Article 34 proposes the Headquarters of the United Nations in New York as the location for signature of the Basic Protocol by signatories to the Charter.

Article 35(1) governs the ratification, acceptance or approval of the Basic Protocol.

Article 35(2) provides for regional economic integration organisations to declare the extent of their competence with regard to the matters dealt with in the Basic Protocol or other Protocols, and to inform the depositary of any substantial modification of their competence.

Article 36 provides for accession to the Basic Protocol and other Protocols from the date on which it/they are closed for signature.

Article 37 sets out the procedures for amendment of the Basic Protocol or other Protocols. The square brackets in paragraphs (2) and (4) are consequential to those in Article 29(2) and (3)(a) ("Voting").

Article 38(1) states that Parties to the Basic Protocol are also automatically Parties to all Core Protocols, and that it is not possible to become a Party to a Core or Supplementary Protocol without being a Party to the Basic Protocol.

Article 38(2) puts decisions regarding Core Protocols on the same basis as decisions regarding the Basic Protocol.

Article 39 provides for Association Agreements to be drawn up in respect of certain States, and requires such Agreements to set out the rights, responsibilities and limitations of Associate Status.

Article 40 sets out the time-scales for entry into force of the Basic Protocol, Core Protocols and Supplementary Protocols. Paragraph (5) stipulates that instruments of ratification, acceptance, approval or accession by regional economic integration organisations shall not count towards the total number of instruments required to be deposited before the Basic Protocol, or any Core or Supplementary Protocol, can enter into force.

Article 41 provides for provisional application of the Basic Protocol, with the exceptions mentioned in Article 2, pending entry into force. This would enable the institutional framework to be put into place and import a momentum to the Charter system to proceed with work on the production of Core and Supplementary Protocols and other information exchanges.

Article 42 means that States cannot enter reservations on the applicability to them of any provisions of the Basic Protocol.

Article 43 allows for a transitional period, of a duration to be negotiated, to be invoked by a Contracting Party unable to meet all requirements of the Basic Protocol immediately. An application for such a transitional period must be approved by the Governing Council.

Article 44 paragraphs (1) to (4) provide for the voluntary withdrawal by Contracting Parties from the Basic Protocol, Core and Supplementary Protocols. In particular, paragraph

(4) states that withdrawal from the Basic Protocol is considered to include withdrawal from all other Protocols.

Article 44(5) provides for withdrawal to be imposed by operation of the Basic Protocol on Contracting Parties unable to sign and ratify, accept or approve a Core Protocol within a fixed period. It provides the possibility of an Article 39 Association Agreement being entered into rather than full exclusion from the Charter system.

Article 45 proposes the Secretary-General of the United Nations as depositary for the Basic Protocol, Core and Supplementary Protocols, and lists the standard functions of a depositary.

Article 46 requires original authentic texts of the Basic Protocol in the six official languages to be deposited with the depositary.