

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

15/93

BA-35

RESTRICTED

Brussels, 9 February 1993

NOTE FROM THE SECRETARIAT

Subject: Basic Agreement

Enclosed find updated version of the Basic Agreement. It contains amendments and changes adopted at the Working Group II meeting on 1-6 February 1993.

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15/93 ANNEX

BA-35

RESTRICTED

Brussels, 9 February 1993

REVISED DRAFT

BASIC AGREEMENT FOR THE EUROPEAN ENERGY CHARTER

PREAMBLE

The Contracting Parties to this Agreement,

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

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

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

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

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the General Agreement on Tariffs and Trade and its related instruments and as otherwise provided for in this Agreement;

Determined to remove progressively technical, administrative and other barriers to trade in Energy Materials and Products and related equipment, technologies and services;

Looking to the eventual membership of the General Agreement on Tariffs and Trade of those Contracting Parties which are not currently Contracting Parties to the General Agreement on Tariffs and Trade and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation of themselves for such membership;

Having regard to the rights and obligations of certain Contracting Parties who are also parties to the General Agreement on Tariffs and Trade and its related Agreements, as renegotiated from time to time;

Having regard to national competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position where these are already established;

Having regard to the competition rules applicable to member states of the European Community under the Treaty establishing the European Economic Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community;

Having regard to the competition rules applicable to contracting parties to the European Economic Area;

Having regard to the work in the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development to increase co-operation between sovereign states on competition matters;

Having regard to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and the obligations of international nuclear safeguards;

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

HAVE AGREED AS FOLLOWS:

PART I

DEFINITIONS AND PRINCIPLES

ARTICLE 1

DEFINITIONS

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

- (1) "Charter" means the European Energy Charter signed at The Hague on 17 December 1991;
- (2) "Contracting Party" means a State or Regional Economic Integration Organisation which has consented to be bound by the Agreement and for which the Agreement is in force;
- (3) "A Regional Economic Integration Organisation" means an organisation constituted by Sovereign States to which its Member States have transferred competences over a range of matters governed by this Agreement and Protocols, including the authority to take decisions binding on its Member States in respect of those matters."(1)
- (4) (2)"Energy Materials and Products", based on the Harmonised System (HS) of the Customs Cooperation Council and the Combined Nomenclature (CN) of the European Communities, means the following

items of HS or CN:

- | | | |
|----------------|----------|---|
| Nuclear Energy | 26.12 | Uranium or thorium ores and concentrates. |
| | 26.12.10 | Uranium ores and concentrates. |
| | 26.12.20 | Thorium ores and concentrates. |

28.44 Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.

28.44.10 Natural uranium and its compounds.

28.44.20 Uranium enriched in U235 and its compounds; plutonium and its compounds.

28.44.30 Uranium depleted in U235 and its compounds; thorium and its compounds.

28.44.40 Radioactive elements and isotopes and radioactive compounds other than 28.44.10, 28.44.20 or 28.44.30.

28.44.50 Spent (irradiated) fuel elements (cartridges) of nuclear reactors.

28.45.10 Heavy water (deuterium oxide).

Chapter 27

Coal, Natural Gas,
Petroleum and
Petroleum products,
Electrial Energy

Mineral fuels, mineral oils and
products of their distillation;
bituminous substances; mineral
waxes.

27.01 Coal, briquettes, ovoids and similar solid
fuels manufactured from coal.

- 27.02 Lignite, whether or not agglomerated, excluding Jet.
- 27.03 Peat (including peat litter), whether or not agglomerated.
- 27.04 Coke and semi-coke or coal, of lignite or of peat, whether or not agglomerated; retort carbon.
- 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.
- 27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.
- [27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g. benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).]⁽³⁾
- 27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars.
- 27.09 Petroleum oils and oils obtained from bituminous minerals, crude.
- 27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.

27.11 Petroleum gases and other gaseous hydrocarbons

Liquified:

- natural gas
- propane
- butanes
- [27.11.14 - ethylene, propylene, butylene and butadiene]⁽⁴⁾
- other

In gaseous state:

- natural gas
- other

27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.

27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks.

27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (e.g. bituminous mastics, cut-backs).

27.16 Electrical energy.

Acyclic and
Cyclic
Hydrocarbons

[29.01 Acyclic hydrocarbons (saturated or unsaturated as ethylene, propene (propylene), butene (butylene) and isomers thereof, butadiene and isoprene, other).]⁽⁴⁾

[29.02 Cyclic hydrocarbons (e.g. cyclohexane, benzene, toluene, xylenes and their isomers, styrene, ethylbenzene, cumene and other).]⁽⁴⁾

Renewable Energy [22.07.20 Ethylalcohol and any forms or denaturated spirits.](3)

[29.05.11 Methanol (methylalcohol).](4)

44.01 Firewood, logs, twigs, bundles of firewood and similar forms; woodboards and particles; sawdust, wastes and fragments of wood, whether or not agglomerated, in the form of logs, briquettes, balls or similar forms.

44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

(5) "Investment" means every kind of asset owned [or controlled,](5) directly or indirectly, by Investors of one or more Contracting Parties in the Domain of another Contracting Party. [In particular, though not exclusively, Investments include:](6)

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

(b) a company or business enterprise or shares, stock, or other forms of equity participation (including minority participation) in, and bonds, debentures and debt of(7), a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value [and associated with an Investment](8);

(d) [Intellectual Property](9);

(e) [any right conferred by law,](10) contract or by virtue of any licences and permits granted pursuant to law;(11)

(12)

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the dates of entry into force of this Agreement for the Contracting Party of the Investor making the investment and Contracting Party in which the investment is made (hereinafter referred to as the "effective date") provided that with respect to investments made before the effective date and continuing after the effective date, this Agreement shall only apply to matters affecting such investments after the effective date.

For the purposes of this Agreement, "Investment" refers to any investment associated with an economic activity(*) in the Energy Sector.(13)

"Energy Sector" means the exploration, extraction, production, conversion, storage, transport, transmission, [distribution and trade in, marketing and sales](14) of Energy Materials and Products, [provided, however, that this does not include the following items listed in Article 1 (3): HS 27.07, 29.01, 29.02, 22.07.20, 29.05.11, 44.01, and 44.02].(15)

(*) Note for accompanying document

Economic activity in the Energy Sector includes, for example:

- the prospecting and exploration for, and extraction of, e.g. oil, gas, coal and uranium;
- the construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
- the transportation, distribution, storage and supply of Energy Materials and Products, e.g. by way of transmission and distribution grids and pipelines or dedicated railines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;

- removal and disposal of wastes from energy related facilities such as power stations, including of radioactive wastes from nuclear power stations;
- decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
- the marketing, and sale of, and trade in Energy Materials and Products, e.g. retail sales of gasoline;
- research, consulting, planning, management and design activities, related to the activities mentioned above, including those aimed at improving energy efficiency.

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

(a) natural persons having the citizenship or nationality of [or who are permanently residing in]⁽¹⁶⁾ that Contracting Party in accordance with its applicable laws;

(b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.]⁽¹⁷⁾

(7) ["Make Investments" means establishing a new Investment, acquiring all or part of an existing Investment, expanding an existing Investment, or substantially altering the type or the objective of an existing Investment;]⁽¹⁸⁾

(8) ["Returns" means the amounts yielded in pecuniary form or in kind by an Investment and includes profits, interest, capital gains, dividends, royalties and fees.]⁽¹⁹⁾

(9) ["Domain" means in respect of a Contracting Party the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea, and the sea, [sea-bed and its subsoil over which that Contracting Party exercises, in accordance with international law, sovereign rights or jurisdiction.]⁽²⁰⁾ With respect to a Regional Economic Integration Organisation which is or becomes a Contracting Party to this Agreement, Domain means the domains of the Member States of such an Organisation, under the provisions laid down in the agreement establishing that Organisation.⁽²¹⁾

(10) "GATT and related instruments" means:

- (a) the General Agreement on Tariffs and Trade, signed at Geneva October 30, 1947;
- (b) agreements, arrangements, decisions, understandings, or other joint action pursuant to the General Agreement on Tariffs and Trade;

and any successor agreement or agreements thereto.

(11) ["Intellectual Property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967⁽²²⁾⁽²³⁾.]⁽²⁴⁾

(12) "Protocol" means an agreement entered into by any of the Contracting Parties under the auspices of the Charter in order to complement, supplement, extend or amplify the provisions of this Agreement to specific sectors or categories of activity comprised within the scope of this Agreement, including areas of cooperation referred to in Title III of the Charter.

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

General comments on Article 1(5)

- Legal limitations to the coverage should be done in the relevant Articles or Parts of the Basic Agreement (e.g. Article 16 (10)).
- The Sub-Group on the definition of "Investment" has not excluded from the coverage of this definition the investments in power generating plants or co-generating plants dedicated exclusively for the use of industrial or service facilities.
- Text should be found in the Preamble of the Basic Agreement to cover the importance of energy efficiency.

Specific comments

- 1.1 : EC proposal. Not discussed in WG II.
- 1.2 : General scrutiny reserve. This definition has been considered primarily in relation to trade Articles.
- 1.3 : CDN and H suggest deletion. Chairman invited both delegations to negotiate with other delegations with the aim of deletion of those items.
- 1.4 : CDN suggests deletion.
- 1.5 : RUF reserve. RUF wants explicit guidelines used on case by case basis.
- 1.6 : CDN suggests substituting with: "It consists of the following:". CDN considers that clarity calls for an exclusive rather than an illustrative list.
- 1.7 : CDN proposes the addition of: "with a repayment period of one year or more". Consideration in capital needed.
- 1.8 : CDN proposes replacing with: "and involving the commitment of capital or other resources in the Domain of another Contracting Party to economic activity in such Domain."
- 1.9 : CDN maintains a reserve pending definition and relations between Articles 7, 16 and 18.
- 1.10: N scrutiny reserve.
- 1.11: CDN proposes addition of the provision that "such activity includes the commitment of capital or other resources in the Domain of another Contracting Party."

1.12: CDN suggests additional language following subpara (e) reading:

"For greater clarity:

(a) claims to money which arise solely from:

i) commercial sales contracts of a national or enterprise in the Domain of one Contracting Party to an enterprise in the Domain of another Contracting Party; or

ii) the extension of credit in connection with a commercial transaction (e.g. trade financing), or

(b) any other claims to money;

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

1.13: Some delegations wanted the content of this paragraph to form the basis of a definition of scope, preferably placed in the beginning of Part IV.

1.14: USA is not in a position for final negotiation.

1.15: The substance proposed by J and H but not discussed. All delegations are invited to submit their suggestions on which items of HS should be excluded from the coverage of Energy Sector to the Secretariat by 18 February 1993.

1.16 : CDN, AUS and USA will propose a compromise text for solving up AUS and CDN concerns.

1.17 : RO wants this para should read as follows:

"companies and other entities, legally constituted under the laws and regulations applicable in that Contracting Party,

whether or not organised for pecuniary gain, or privately or governmentally owned or controlled".

N reserve its right to revert to this definition when no satisfactory solution be found under footnote 41.3.

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

1.19 : RO supported by USA suggests replacing the whole definition with:

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

1.20 : RO suggests this part sentence should read:

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

1.21 : N proposal to amend this definition is as follows:

A. The Chairman of Working Group II has presented a proposal concerning the definition of "territory". Also N has presented a proposal concerning the Agreement's scope of application.

The Chairman of Working Group II has since proposed to replace the term "territory" in his proposal with the term "domain".

The Legal Sub-Group has discussed the proposed definition contained in Article 1 (9), and has proposed amendments. The Legal Sub-Group has questioned the suggestion to

replace the term "territory" with the term "domain", but has deferred making a recommendation until N has had an opportunity to explain the legal rationale for its proposal.

B. N has the following comments to the proposed definition:

- a) The fundamental objective of the participants in the Basic Agreement negotiations is to agree on a legal framework, based on the principles expressed in the European Energy Charter, for the development of an efficient energy market in Europe and a better functioning energy market globally. International law recognises state sovereignty rights over the natural resources on the territory and on the continental shelf, and the European Energy Charter explicitly recognises the states rights in this respect. It is recognised under international law that "territory" comprises a state's land territory as well as its internal waters and the territorial sea. There is, accordingly, no need for a definition merely to state this fact. The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. These rights are limited to the purposes of exploring and exploiting the natural resources of the continental shelf, and can therefore not be considered as territorial sovereignty. The coastal state's rights to utilise the natural resources in or on the seabed or its subsoil follow already from its rights according to international law on the continental shelf. The coastal state's rights on the continental shelf to such utilisation overlap with its rights in this respect in the exclusive economic zone. A State does not, with the exception mentioned below, get rights under international law in the exclusive economic zone with respect to utilisation of energy resources additional to those which already follow from its sovereign rights on the continental shelf. The additional rights for the coastal state in the exclusive economic zone pertain in practice to management

and utilisation of living marine resources, i.e. fishery resources, and the question of environmental jurisdiction. In N opinion, matters related to fisheries should be kept outside the scope of the Basic Agreement. A definition of the Basic Agreement's area of application which explicitly and in general terms include the sea above the seabed and its subsoil is, in N opinion, accordingly besides the scope of an agreement relating to energy resources, and should be avoided.

A point of possible relevance to the Basic Agreement in the context of the coastal state's rights in the exclusive economic zone is the following: The UN Convention on the Law of the Sea which, as is well known, is not yet in force, states in Article 56.1 (a) inter alia that the coastal state has the sovereign rights with regard to activities for the economic exploration and exploitation of the zone such as the production of energy from the water, currents and winds. It could thus be argued that a future-orientated Basic Agreement might include in a definition of scope a reference to utilisation of such energy activities. In N opinion, the possibilities that exclusive economic zones will in practice be utilised for such purposes seem rather distant. N accordingly does not find it necessary to let the Basic Agreement include such utilisation.

- b) In N opinion, an Agreement pertaining to energy resources could, if the participants feel that the Agreement's area of application has to be defined, more properly contain a separate article for instance as follows:

"This Agreement is applicable in a Contracting Party's territory, and for coastal states also on the continental shelf over which such states exercise in accordance with international law sovereign rights for the purpose of exploring it and exploiting its natural resources of the seabed and subsoil".

- c) Should the participants in the negotiations be of the opinion that inclusion in the Basic Agreement of a definition of its jurisdictional scope is essential, Norway has the following comments:

The definition proposed by the Legal Sub-Group has considerably improved the legal stringency of the proposal. N does, however, share the concern expressed by the Legal Sub-Group of applying the term "domain" in the definition. The term "domain" has no generally recognised application in the proposed context. Use of such a term may cause uncertainty, and may have unwarranted implications. In N opinion, it is imperative to continue the efforts at improving the proposed definition.

It will, in N view, not be sufficient merely to substitute the term "domain" in the Legal Sub-Group's proposal with the term "territory". The problem would then still remain that the term "territory" would be defined in a manner which disregards the internationally generally accepted concept that a state's territory does not extend beyond its sea territory, and that the state in the area adjacent to the sea territory does not exercise sovereignty, but sovereign rights. In addition, N regards, for reasons explained above in para a), as difficult and unwarranted the inclusion of the term "sea" in such a definition in an Agreement directed at energy activities.

N will on this background propose the following definition, based on the Legal Sub-Group's proposal, and previously accepted definitions in international law (the 1958 Convention on the Continental Shelf and the 1982 Convention on the Law of the Seas):

- (9) "Area under a Contracting Party's jurisdiction" means in respect of a state the territory under its sovereignty, and for coastal states also the continental shelf over which such states exercise in accordance with international law sovereign rights for the purpose of exploring it and exploiting its natural resources of the seabed and subsoil. With respect to a

Regional Economic Integration Organisation which is or becomes a Party to this Agreement, this Agreement applies to the territories and areas which are Parties to this Agreement exercise sovereignty or sovereign rights for the purpose of exploring and exploiting energy resources, in accordance with international law, to the extent of that Organisation's competence in the matters which are the subject of this Agreement".

- C. The word "domain" should wherever it occurs in the Basic Agreement be replaced with the expression "areas under a Contracting Party's Jurisdiction", or the Agreement should otherwise be amended as required.
- D. Pending the outcome of the deliberations on the proposal contained in Article 16 (10) to the effect that nothing in Article 16 shall apply to maritime and inland waterways, transport facilities and services, N has to reserve its position on whether or not to accept the extension of the area of application of the Basic Agreement to the continental shelf over which coastal states exercise in accordance with international law sovereign rights for the purpose of exploring it and exploiting its natural resources. The final position of N on this issue will depend on an assessment of the balance of benefits in the Basic Agreement as a whole.
- 1.22 : AUS suggests adding: "and shall also include confidential information (including trade secrets and know-how), circuit layouts and semi-conductor chips and unregistered trademarks".
- 1.23 : USA supports AUS footnote 1.22 with some amendments, such that the addition should read: "including confidential information (including trade secrets and know-how), layout designs of integrated circuits and unregistered trademarks".

1.24 : A Sub-Group established by the Chairman of WG II under Article 18 chaired by EC and consisting of AUS, CDN, J and USA shall prepare a new draft of the definition of Intellectual Property taking into account the implications for the Investment Articles of the Basic Agreement and also the relation to industrial and commercial property (see square bracketed part in draft of Article 7).

ARTICLE 2
OBJECTIVE OF THE AGREEMENT

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

Chairman's note

Negotiations finished.

ARTICLE 3
PRINCIPLES - Deleted.

[ARTICLE 4](1)
SOVEREIGNTY OVER ENERGY RESOURCES

The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. In accordance with and subject to its international legal rights and obligations, each State holds in particular the rights to decide the geographical areas within its Domain to be made available for exploration and development of its energy resources and the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation and to regulate the environmental and safety aspects of such exploration and development within its Domain.

Specific comments

4.1 : USA reserve.

[ARTICLE 4A]⁽¹⁾

ACCESS TO RESOURCES

The Contracting Parties undertake to facilitate access to and development of energy resources by Investors by formulating transparent rules regarding the acquisition, exploration and development of energy resources. They shall apply such rules [on a non-discriminatory basis]⁽²⁾ in accordance with this Agreement, particularly Article 16, and any relevant Protocol⁽³⁾.

General comments

- Finalisation of this Article dependant on satisfactory completion of trade and investment Articles, as well as Articles 26 and 28.
- N has submitted new text containing three paragraphs reading:

(1) First sentence of current draft.

(2) The Contracting Parties shall maintain or adopt procedures, which shall not discriminate Investors from other Contracting Parties on grounds of nationality or country of origin, governing acceptance and treatment prior to allocation of applications for authorisations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

(3) In allocating authorisations, licences, concessions and contracts pursuant to paragraph (2), a Contracting Party shall treat Investors from other Contracting Parties no less favourably than Investors from any other Contracting Party or any third country, whichever is most favourable.

Specific comments

4A.1 : USA general reserve.

4A.2 : USA scrutiny reserve. Preferentially to be replaced with "on the basis of national treatment".

4A.3 : It is noted that the relevant Protocols would affect the application of such rules by only the Parties to this Protocol.

[ARTICLE 4B](1)**ACCESS TO MARKETS**

(1) The Contracting Parties will strongly promote access to local, export and international markets for the disposal of Energy Materials and Products on commercial terms and undertake to remove progressively barriers to trade. Energy Materials and Products originating from any Contracting Party shall be given [non-discriminatory] access to markets in other Contracting Parties in accordance with this Agreement and any relevant Protocol. Similarly, and in particular in accordance with Article 16, Investors of one Contracting Party shall not be excluded or restricted from entering and operating in the market of another Contracting Party.

(2) The Contracting Parties agree to work to alleviate market distortions and barriers to competition in markets in the energy [sector/cycle]. [In general, price formation shall be based on market principles]⁽²⁾.

General comment

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

Specific comments

4B.1 : USA general reserve.

4B.2 : J scrutiny reserve.

PART II

MARKETS

ARTICLE 5

TRADE IN ENERGY MATERIALS AND PRODUCTS AND RELATED SERVICES

Except as otherwise provided in this Agreement trade in Energy Materials and Products between Contracting Parties shall be governed by the provisions of the GATT and related instruments, as they are applied under GATT rules between particular Contracting Parties who are Members of the GATT.

General comments

- There are presently 4 alternative texts for Article 5. This draft represents Chairman's compromise text. The new underlined text is to ensure that Basic Agreement does not accidentally derogate in any respect from the rights and obligations under GATT of Contracting Parties who are Members of GATT in relation to each other.
For reference to the other three texts, see document 40/92, BA-18 of 18 September 1992.
- In an accompanying Ministerial declaration it will be stated that the Charter Conference will consider how to apply the BA to energy related services after the negotiations in the Uruguay Round on services are concluded. USA and S have reservation on this proposal.

ARTICLE 5 BIS - [Deleted](1)(2)

General comment

An accompanying Ministerial declaration will request that the Charter Conference address the matter after negotiations in the Uruguay Round are concluded.

Specific comments

5.1 : AUS scrutiny reserve.

5.2 : N reserve.

[ARTICLE 6](1)
PROCUREMENT POLICIES

(1) A Contracting Party shall accord, to a supplier of any other Contracting Party, treatment not less favourable than :

- a) that accorded to domestic suppliers; and
- b) that accorded to suppliers of any other Contracting Party;

with respect to the provision of information on its procedures and practices regarding government procurement.

(2) A Contracting Party which establishes or maintains an enterprise, or grants to any enterprise exclusive or special privileges, shall not require such enterprise to accord, to the products or suppliers of any other Contracting Party, treatment less favourable than :

- a) that accorded to domestic products and suppliers; and
- b) that accorded to products and suppliers of any other Contracting Party;

with respect to the provision of information on its procedures and practices regarding procurement.

General comment

USA will consider whether this Article is sufficiently covered by Article 15. If not, USA will present proposal for a revised Article 6 to be submitted to the Secretariat by 20 February 1993.

Specific comments

6.1 : General reserve.

[ARTICLE 7](1)
INTELLECTUAL PROPERTY

[Each Contracting Party shall ensure effective and adequate protection of intellectual [, industrial and commercial] property rights according to the applicable international conventions, and particularly the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971) and the Paris Convention for the Protection of Industrial Property (Stockholm Act of 14 July 1967)](2).

Specific comments

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

7.2 : USA reserve.

[ARTICLE 7 BIS](1)

In the event of the adoption of agreements within the framework of the Uruguay Round of the General Agreement on Tariffs and Trade or other significant and relevant developments in the international trading system, Contracting Parties undertake to consider appropriate amendments to this Agreement.

General comment

The Chairman will consider the most appropriate place in the BA or in a final act for this Article. For the purpose of this Article the following was agreed:

- i) trade narrowly conceived as covered in Article 5 shall, for members of GATT which are also Contracting Parties to the BA, always be governed by GATT
 - ii) non-GATT member Contracting Parties to the BA cannot commit themselves to subscribe to rules for which they are not a negotiating party
 - iii) other GATT related BA-provisions cannot automatically be affected by future GATT changes, both for technical reasons and because of the consideration at (ii) above, but may be considered in light of such changes.
-

Specific comments

7 BIS.1 : General scrutiny reserve.

[ARTICLE 8]⁽¹⁾

COMPETITION

- (1) [The Contracting Parties agree, subject to their existing international rights and obligations, to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission, distribution and marketing) and supply of Energy Materials and Products in [relevant]⁽²⁾ markets, insofar as they may affect trade between Contracting Parties.]⁽³⁾
- (2) Contracting Parties shall ensure that within their jurisdiction they have and enforce such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in markets relevant to areas covered above by this Agreement.⁽⁴⁾
- (3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.
- (4) Contracting Parties may co-operate in the enforcement of their competition rules by consulting and exchanging information, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy.
- (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Domain of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other and may request that the other's competition authorities initiate appropriate enforcement action.

The notifying Contracting Party shall include in such notification sufficient information to permit the other Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as that Contracting Party is able to provide.

The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the other and shall accord full consideration to the request of the other Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the other of its decision or the decision of the relevant competition authorities and, at the sole discretion of the notified Contracting Party, of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party will advise the notifying Contracting Party of its outcome and, to the extent possible, of significant interim developments.

(6) [The procedures set forth in paragraph (5) above shall be the exclusive means within this Agreement of resolving any disputes that may arise over the implementation of this Article.](5)

Chairmans' note

The accompanying Ministerial statement shall contain these interpretative understandings:

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

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

Specific comments

8.1 : N contingency reserve.

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

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

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

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

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

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

8.6 : CDN requests insertion of the following language:

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

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

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

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

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

Chairman's conclusions

After discussion on 18 December 1992 WG II was not able to make any further progress towards agreement. The Chairman then established a Sub-Group of competition experts chaired by EC and composed of USA, CDN, J and AUS to meet in Brussels. EC agreed to make all necessary organisational arrangements. The Sub-Group should seek to resolve all remaining problems under Article 8. To facilitate its deliberations the Legal Sub-Group made its recommendations on para (1).

Legal Sub-Group report

The complete legal opinion on para (1) is contained in document 7/93, LEG-4 of 2 February 1993. The substance of its conclusions is as follows:

- the phrase, "subject to their existing international rights and obligations," in Article 8(1) is suggested to be clarified or deleted;
- the phrase, "in [relevant]⁽²⁾ markets", is suggested to be deleted;
- Working Group II is suggested to decide, on a policy basis, whether to delete from paragraph (1), or to add to paragraph (2), the words, "insofar as they may affect trade between Contracting Parties";
- the last line of paragraph (2) is suggested to be revised by incorporating language from paragraph (1), so that it would read, "markets relevant to extraction, production, conversion, treatment, carriage (including transmission, distribution and marketing) and supply of Energy Materials and Products".

ARTICLE 9
MONOPOLIES - Deleted

ARTICLE 10
STATE AID - Deleted

PART III

OTHER PRESCRIPTIVE

[ARTICLE 11]⁽¹⁾

TRANSPORT AND TRANSIT

(1) Each Contracting Party [shall take the necessary measures to facilitate]⁽²⁾ the transit through its Domain of Energy Materials and Products from the Domain of another Contracting Party to the Domain of a third Contracting Party or to or from port facilities in its Domain for loading or unloading, without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to the pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.

[This paragraph shall not derogate from the obligations of Contracting Parties under article 5 of the GATT as applied by Articles 5 and 41 BIS of this Agreement nor, a Contracting Party's rights and obligations in existing bilateral or multilateral agreements insofar as the exercise of those rights and obligations does not detract from the rights of Contracting Parties who are not party to such agreements or of the Investors of such Contracting Parties.]⁽³⁾

(2) Contracting Parties⁽⁴⁾ shall encourage relevant entities to cooperate in:

(a) modernising transit networks necessary to the supply of Energy Materials and Products;

(b) the development and operation of transport infrastructure serving the Domain of more than one Contracting Party;

(c) measures to mitigate the effects of the interruption in the supply of Energy Materials and Products;

- (d) facilitating the connection to [high-pressure]⁽⁵⁾ transmission pipelines and the interconnection of high-voltage transmission grids.
- (3) ⁽⁷⁾Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products [and the use of harbour facilities]⁽⁶⁾, [high-pressure]⁽⁵⁾ transmission pipelines or high-voltage transmission grids shall treat Energy Materials and Products wholly or partly originating in or destined for the Domain of another Contracting Party, in no less favourable a manner than its provisions treat such materials and products wholly or partly originating in or destined for its own Domain, except if otherwise provided for in an existing international agreement.
- (4) In the event that access to existing [[high-pressure]⁽⁵⁾ transmission pipelines or high-voltage transmission grids]⁽⁸⁾ within a Contracting Party cannot be obtained on commercial terms for transit of energy from another Contracting Party to a third Contracting Party, the Contracting Parties shall not place obstacles in the way of establishing [financially and economically viable]⁽⁹⁾ new capacity—subject to their applicable legislation, [[inter alia on]⁽¹⁰⁾ safety, technical standards, environmental protection and land use.]⁽¹¹⁾
- (5) [The provisions of paragraphs (1) to (4) above shall not require a Contracting Party to take action which it demonstrates to the other Contracting Parties concerned would endanger its [security of energy supply,]⁽¹²⁾ quality of service and the most efficient development and operation of all parts of its electricity and gas systems.]⁽¹³⁾
- (6) A Contracting Party through whose Domain Energy Materials and Products transit [through [high-pressure]⁽⁵⁾ transmission pipelines or high-voltage transmission grids]⁽¹⁴⁾ from the Domain of another Contracting Party to the Domain of a third Contracting Party or to or from port facilities in its Domain for loading or

unloading shall not in the event of a dispute over the terms and conditions of that transit interrupt or reduce, nor permit any entity subject to its control to interrupt or reduce, nor require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products until after [the dispute has been referred to the Charter Conference and the Charter Conference has had adequate time to seek conciliation between the parties in dispute.](15)

General comments

After resequencing paragraphs in Article 11, RUF footnote 11.15 from BA-31 can not be easily referred to any text in the draft of this Article. RUF agreed to reconsider it in the light of new proposal on this Article.

Specific comments

- 11.1 : CDN, N, J and AZB general reserve on whole Article.
- 11.2 : USA scrutiny reserve. EC conditional reserve subject to withdrawal of USA reserve.
- 11.3 : Chairman's proposal derived from earlier H proposal. General scrutiny reserve.
- 11.4 : A suggests inserting: ", subject to their applicable legislation, inter alia on safety, technical standards, environmental protection and land use,".
- 11.5 : CDN proposes deletion.
- 11.6 : USA scrutiny reserve.
- 11.7 : EC may prepare additional language reducing any possible doubt that this provision does not require third party access.

- 11.8 : AUS supported by RUF and ARM asks for replacing with: "facilities for the transport of Energy Materials and Products and harbour facilities".
USA, J and EC strongly oppose this suggestion. Chairman asked delegations for drafting suggestions how to improve text.
- 11.9: N scrutiny reserve.
- 11.10: N wants substituting with: "in areas such as". EC reserve on N proposal.
- 11.11: H and PL reserve.
- 11.12: RUF and AUS reserve.
- 11.13: EC and RUF reserve.
- 11.14: AUS supported by RUF suggests deletion. BRL demands that in case of adoption of this suggestion, para (6) should be amended so as not to apply to nuclear Materials and Products.
- 11.15: General reserve. PL outlined the general idea for a fast track procedure involving primarily conciliation but, if necessary, arbitration with clear time limits. BLR, RUF and H supported. The Chairman invited all delegations to comment on PL approach and submit their proposals to the Secretariat.

Chairman's note

There are three major issues to be addressed when finalising this Article:

- how to take forward matters indicated in footnote 11.9 and 11.15,
- whether PL idea on solving disputes under para (6) can be expressed in an acceptable form,

- following the ARM proposal at footnote 11.16 in Room Document 13 of 3 February 1993, whether BA should contain any provisions which address the problems of emergency situations since Article 27 does not deal with short-term breakdowns.

ARTICLE 12

TRANSFER OF TECHNOLOGY

- (1) The Contracting Parties agree to promote in accordance with their laws and regulations access to and transfer of technology on a commercial and non-discriminatory basis to assist effective trade and investment and to implement the objectives of the Charter, subject to the provisions of Article 7.
- (2) Accordingly to the extent necessary to give effect to paragraph (1), the Contracting Parties shall eliminate existing and create no new obstacles for transfer of technology, in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

Chairman's note

Negotiations finished.

[ARTICLE 13]⁽¹⁾

ACCESS TO CAPITAL

- (1) Each Contracting Party shall accord to Investors of another Contracting Party access to capital markets no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the issuance and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products. Nothing in this Article is intended to impair the ability of financial institutions to establish and apply their own lending practices based on market principles.
- (2) Each Contracting Party shall (2) provide the fullest possible access to public credits, guarantees and insurance for Investors in extraction, production, conversion, treatment, carriage or supply of Energy Materials and Products.⁽³⁾
- (3) The Contracting Parties shall seek to the greatest extent possible to take advantage of the expertise and to support the operations of relevant international financial institutions in mobilising private Investments in connection with the subject matter of this Agreement.

General comment

The discussion in WG II on 4 February 1993 had been based on the analysis prepared by USA delegation exploring the relationship between issues addressed in this Article and Article 16, particularly para (7) (see Room Document 9 of 1 February 1993). USA's view is that issues contained in Article 13 are sufficiently covered by Article 16 and consequently do not require any coverage by Article 13. Some delegations supported this view. Some delegations however, pointed out that its retention, particularly of para (2), has merits.

Chairman asked RUF and USA to discuss the need for this Article once again in the light of the deductions indicated in Room Document 9 and come up with a clear statement of what should be covered in this Article that is not covered by Article 16(7).

Specific comments

13.1 : General scrutiny reserve.

13.2 : CDN prefers inserting: "endeavour to".

13.3 : A suggests adding: "in accordance with its laws and regulations".

[ARTICLE 14]⁽¹⁾

ENVIRONMENTAL ASPECTS

(1) [In pursuit of sustainable development [and consistently with those international environmental agreements to which they are parties]⁽²⁾, each Contracting Party shall strive [to minimise]⁽³⁾ in an economically efficient manner adverse effects on the environment occurring both within and outside its Domain from all operations within its Domain and within the energy cycle taking proper account of safety. In doing so each Contracting Party shall act cost effectively. In its policies and actions each Contracting Party shall [be guided by [, inter alia,]⁽⁴⁾ the principles]⁽⁵⁾ that they should take [, according to their capabilities,]⁽⁶⁾ precautionary measures to anticipate, prevent or minimise environmental degradation and that the polluter should, in principle bear the cost of pollution, with due regard to the public interest and without⁽⁷⁾ distorting investment in the energy cycle or international trade. Contracting Parties shall accordingly:]⁽⁸⁾

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

- (c) encourage cooperation in the attainment of the environmental objectives [of minimising]⁽³⁾ in an economically efficient manner adverse environmental effects in a cost-effective way by taking into account the differences among Contracting Parties⁽¹¹⁾ in abatement costs of any given reduction of such adverse [effects]⁽¹²⁾ [and by coordination measures as appropriate]⁽¹³⁾;

- (d) have particular regard to improving energy efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies that reduce pollution;

- (e) promote the dissemination of information on environmentally sound and economically efficient energy policies and cost effective practices and technologies, in order to increase public awareness of the environmental considerations, ways in which adverse environmental effects arising from the energy cycle can be abated, and the costs associated with various abatement measures. They shall share their experience on how to promote such awareness most effectively. [In particular where such promotion includes, inter alia, labelling and similar schemes for informing the public about comparative energy efficiencies of energy consuming products available on the market, they shall seek to avoid related barriers to trade];⁽¹⁴⁾

- (f) promote and cooperate in the research, development, application and diffusion, including⁽¹⁵⁾ transfer, of [energy efficient and environmentally sound]⁽¹⁶⁾ technologies, practices and processes to attain [environmental goals]⁽¹⁷⁾ cost effectively, consistent with the need for adequate and effective protection of Intellectual Property;

- (g) promote the transparent assessment [at an early stage and prior to decision]⁽¹⁸⁾ of environmental impacts of environmentally significant energy investment projects⁽¹⁹⁾ [and subsequential monitoring of such impacts]⁽²⁰⁾;
- (h) promote internationally awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards.

[(2) For the purposes of this Article:

- i) ["energy cycle" means the entire energy-chain including prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, the decommissioning and treatment of energy-related physical structures and [activities related to disposal of waste]⁽²¹⁾.]⁽²²⁾
- ii) "environmental impacts" means any effect caused by a [proposed]⁽²³⁾ activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.⁽²⁴⁾
- iii) "improving energy efficiency" means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, whilst reducing the amount of energy required to produce that output.]⁽²⁵⁾

(26)

General comments

- The redraft of this Article expresses the outcome of negotiations by an Ad-Hoc Sub-Group on 11 November 1992 taking into account Terms of Reference as indicated in BA-22 and the USA memorandum on various expressions as contained in BA-24.
- Discussion was based on the premise that Article 14 will not be subject to binding arbitration. CH and A delegations expressed their strong reservations on this assumption.
- The Chairman shall redraft the chapeau to more elegant form while retaining the substance unchanged.

Specific comments

- 14.1 : USA general reserve.
- 14.2 : USA reserve.
- 14.3 : USA reserve. (USA prefers replacing with "to limit".)
- 14.4 : N and A scrutiny reserve. A prefers substituting with "in particular".
- 14.5 : USA and J reserve.
- 14.6 : A, N, H and CDN shall seek the deletion.
- 14.7 : A suggests insertion of "unduly" for achieving better balance between Trade and Investment Articles and the Article on Environment.

- 14.8 : General scrutiny reserve, except EC, on the chapeau.
- 14.9 : USA reserve. (USA suggests deletion.)
- 14.10: USA suggests with respect to second footnote 14.8 in this subpara adding: "and encourage implementation of methods which each Contracting Party finds appropriate in internalisation".
- 14.11: N supported by CH and S suggests inclusion: "In costs environmental degradation and".
- 14.12: Legal Drafting Sub-Group will examine whether to use the word "effects" or "environmental impacts".
- 14.13: USA and AUS reserve.
- 14.14: N, J and USA scrutiny reserve.
- 14.15: USA wants to have inserted: "commercial".
- 14.16: EC and H wish to consider inserting "best practicable" (H) or "best available" (EC) before the word "energy".
- 14.17: J and A reserve pending the resolution of their concerns as in subpara (c).
- 14.18: J reserve. (J asks for deletion.)
- 14.19: USA suggests adding : "which are subject to a decision of a competent authority in accordance with an applicable national procedure".
- 14.20: USA substantial reserve. Scrutiny reserve by all other delegations.
- 14.21: TR suggests replacing with : "waste management". Subject to consideration in the Legal Drafting Sub-Group.

14.22: USA scrutiny reserve.

14.23: A suggests deletion, since activity which is only proposed cannot have environmental impacts.

14.24: RO asks for incorporation of concept of transboundary pollution and environmental accidents into this definition.

14.25: AUS suggests moving definitions to Article 1. Legal Drafting Sub-Group considers this possibility in the context of all Basic Agreement Articles.

14.26: A suggests inclusion of definition "cost-effective measures" indicating that general understanding is that they are measures with effects on cost and not on the environment.

[ARTICLE 15]⁽¹⁾**TRANSPARENCY**

- (1) Laws, regulations, judicial decisions and administrative rulings and standards of general application which relate to matters covered by Article 5 [and Article 41 BIS]⁽²⁾ of this Agreement shall be subject to the transparency disciplines of Article X of the GATT.
- (2) Laws, regulations, judicial decisions, and generally applicable administrative rulings or standards made effective by a Contracting Party, [and agreements in force between a Contracting Party and one or more other Contracting Parties,]⁽²⁾ which relate to other matters covered by this Agreement shall also be made public promptly in such a manner as to enable other Contracting Parties and Investors to become acquainted with them.
- (3) The provisions of paragraphs (1) and (2) above shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
- (4) Each Contracting Party undertakes to nominate one or more enquiry points to which requests for information about relevant laws, regulations, judicial decisions and administrative rulings may be addressed and to communicate promptly the location of these enquiry points to the Secretariat established under Article 31, for provision by the Secretariat to any Investor on request.

Specific comments

15.1 : EC reserve.

15.2 : General scrutiny reserve.

Chairman's note

Subject to the 2 specific reserves negotiations finished in WGII. The Article is being referred to the Legal Drafting Sub-Group.

PART IV

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 16⁽¹⁾⁽²⁾

PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

Note : Following is the Chairman's compromise text based on Working Hypotheses. For purposes of clarity, relevant Working Hypotheses are set out beneath the appropriate paragraph.⁽³⁾⁽⁴⁾

- (1) Each Contracting Party shall in accordance with the objectives and principles of the Charter and the provisions of this Agreement encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Domain. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less than that required by international law, including that Contracting Party's international obligations. This Part shall not derogate from the duty of each Contracting Party to observe any obligations it may have entered into with regard to Investments of Investors of any other Contracting Party to the extent that they are more favourable than those accorded by this Part.

- (2) Each Contracting Party shall permit Investors of other Contracting Parties to Make Investments in its Domain on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable subject to the provisions of paragraphs (3) to (6) below.

Working Hypothesis 5

Barriers to Making Investment shall be applied on an MFN basis subject to the Article 27 exception clause.⁽⁵⁾ Working Group II is proceeding on the assumption that the BA will satisfy reciprocity requirements in those cases where they exist in domestic legislation.⁽⁶⁾

(3) Notwithstanding paragraph (2) above Contracting Parties may maintain limited exceptions to the obligations of paragraph (2) which correspond to their domestic legislation in force on the date of signature of this Agreement, provided :

(a) any exception shall not be a greater departure from the obligations of paragraph (2) than that required by or specified in the relevant laws, regulations or administrative commitments;

(b) details of the relevant laws, regulations and administrative commitments are available publicly in line with Contracting Parties' obligations under Article 15 of this Agreement.

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

Working Hypothesis 4

All barriers to NT in the pre-establishment phase cannot be eliminated before entry into force of the Basic Agreement.⁽⁷⁾

Working Hypothesis 7

Independent of NT or MFN being introduced for the pre-establishment phase, a national summary list of discriminatory rules pre-establishment will usefully assist Investors to assess existing barriers to Making an Investment in a Contracting Party.

Working Hypothesis 8

As concerns the national summary list of discriminatory rules pre-establishment, such list should include any measures, broadly construed, which constitute departures from NT pre-establishment.

Working Hypothesis 9

Governments also need transparency as concerns barriers to NT to enable the process of signature and ratification.

- (4) For the avoidance of doubt, the provisions of this Article do not affect the application of a Contracting Party's laws, regulations and administrative commitments concerning the technical fitness of Investors of another Contracting Party to carry out certain particular activities or possible Investments in its Domain under the terms of this Agreement, whether or not such Investors have already made other Investments in such Domain.
- (5) Each Contracting Party agrees not to introduce after its signature of this Agreement any new measures (being laws, regulations or administrative commitments) or changes to measures which would have the effect at any time of adding to any discrimination maintained between the right and ability of its own Investors and Investors of any other Contracting Party or third state, whichever is the most favourable, to Make Investments in its Domain.

[Provided that a Contracting Party may, after its signature of this Agreement, take any relevant measures which are necessary for the ending of any monopoly or privatisation of a state enterprise provided that the totality of such additional measures taken by a Contracting Party, when considered together with existing measures, does not constitute an additional barrier to investment opportunities in the energy field for investors of other Contracting Parties. Any such measures shall also be subject to the other provisions of this Article.](8)

Working Hypothesis 6

There should be standstill precluding any changes to barriers to investment which would add at any time to discrimination against investors from other Contracting Parties. (9)(10)

- (6) The Contracting Parties agree to make every effort to reduce progressively existing restrictions which affect the ability of investors of other Contracting Parties to make investments in their domain. The Governing Council shall review progress in this direction periodically and, in the first instance, no later than 1996 .

Working Hypothesis 3

Progressive reduction of exceptions to NT in the pre-establishment stage in an objective both before and after the entry into force of this Agreement. (11)

Working Hypothesis 10

There should be [regular](12) reviews of countries' exceptions to NT, the first such review coming soon after entry into force of the Agreement.

Working Hypothesis 11

Rollback shall not be subject to dispute resolution.

- (7) In addition each Contracting Party shall in its Domain accord to Investments of Investors of another Contracting Party, and their management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state, and their management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

Working Hypothesis 1

Treatment post-establishment shall be the better of National Treatment (NT) or Most Favourable Nation Treatment (MFN).⁽¹³⁾⁽¹⁴⁾

Working Hypothesis 2

There shall be no exceptions to NT or MFN post-establishment subject to the conclusions of the Taxation Sub-Group on 11.09.92.⁽⁹⁾⁽¹⁵⁾
(16)(17)

(18)

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

- (b) A Contracting Party shall, subject to its laws and regulations, examine in good faith requests by key personnel who are employed by Investors of another Contracting Party to enter and remain temporarily in its Domain to seek to Make or to Make Investments or otherwise to engage in activities connected with relevant Investments.
- (9) Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.
- (10) ⁽²⁰⁾[Nothing in this Article shall apply to : [maritime and inland waterway, transport facilities and services; or]⁽²¹⁾ [subsidies and grants provided by a Contracting Party or a state [enterprise for development of advanced energy technology or guarantees for encouraging companies to invest in the Domain of a Contracting Party which has requested transitional arrangements under Article 42]⁽²²⁾; or]⁽²³⁾ [minority programmes]⁽²⁴⁾⁽²⁵⁾
- (11) [Contracting Parties shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to Investment].⁽²⁶⁾
- (12) [No Contracting Party shall impose trade-related performance requirements as a condition for the making or the operation of an Investment. Such requirements include commitments to export goods produced, or commitments that goods or services must be purchased locally, or other similar commitments]⁽²⁷⁾.

General comments

- Plenary on 15 October 1992 agreed that Chairman in his continuing work on Article 16 be guided by the Working Hypotheses, though without commitment to the final resolution of matters involved and taking note of the opinions expressed by certain delegations.
- Plenary of October 1992 agreed on the procedure which those Working Hypotheses require for reviewing barriers to establishment including a draft declaration, subject to further examination of detail, which ministers might make when initialling the Basic Agreement in order to establish the necessary procedures. For ease of reference the draft Declaration is given in an Annex to Article 16.
- It has not been decided yet whether or not the list of exceptions to national treatment pre-investment (Annex A) should form an integral part of the Basic Agreement.
- N proposes an alternative approach to that set forth in Article 16. The N proposal would either add the following language to or substitute the following language for language in the Articles and paragraphs indicated below :

Article 16, paras (2)-(6) replaced by :

Alternative A

(2) Each Contracting Party shall in areas under its jurisdiction as a minimum standard permit Investors of other Contracting Parties to Make Investments on a basis no less favourable than that accorded to Investors of any other Contracting Party or any third state, whichever is most favourable.

Alternative B

- (2) Each Contracting Party shall in areas under its jurisdiction permit Investors of other Contracting Parties to Make Investments on a basis no less favourable than that accorded to its own Investors or to Investors of any other Contracting Party or any third state, whichever is most favourable.

Article 41 :

- (1) Notwithstanding the provisions of Article 16, any Contracting Party may upon signing this Agreement reserve its right to apply to Investors of other Contracting Parties Most Favoured Nations treatment as a minimum standard. Such reservation shall be confirmed when ratifying, accepting or approving the Agreement.
- (2) The Contracting Parties agree to make every effort to eliminate reservations made pursuant to paragraph (1) which affect the ability of Investors of other Contracting Parties to Make Investments in areas under their jurisdiction.
- (3) Any Contracting Party may accord to Investors of any other Contracting Party the same treatment on a reciprocal basis as that Contracting Party pursuant to paragraph (1) accords to Investors from other Contracting Parties.

Article 44, para (2) (Note subparas (2) (a), (b), (c) and (d) remain unchanged)

- (2) The Depository shall inform the Contracting Parties, other states being signatories to the European Energy Charter, and Parties with an Association Agreement pursuant to Article 38, in particular of :

Article 44, para (2) (e) and (f) (Note subpara (2) (e) replaces existing text and subpara (2) (f) is new text).

(e) any reservation pursuant to Article 41;

(f) any other declaration or notification concerning this Agreement.

Article 1, (Addition of following Definition) :

"Most Favoured Nation treatment" means, unless the GATT otherwise entails, that a Contracting Party in laws, regulations, judicial decisions, administrative rulings or general applications may treat its National Investors more favourably than Investors from other Contracting Parties, but all Investors from other Contracting Parties must be treated equally, and no less favourable than Investors from any third state.

Specific comments

- (1) N general reserve on Article 16.
- (2) N requests a new Article, to precede Article 16 which would read as follows:

"Without prejudice to Article 4A, 11(4), 25 and 26A, Part IV of this Agreement shall apply to Investments in the Energy Sector."
- (3) AUS and N indicate that they cannot take a final position on any of the Working Hypotheses until there is greater clarity with respect to the definitions fo "Energy Materials and Products", "Make Investments" and "Investment". N also indicates it needs a better definition of "Investor".
- (4) H and N general reserve on Working Hypotheses.
- (5) J reserve pending contemplated change in inward investment legislation.

- (6) USA reserve subject to consideration of possible relevance of reciprocity provisions.
- (7) N, IC, AUS and H comment that the elements of exceptions so far submitted to the principle of NT removes Article 16 from NT to such a degree that it is no longer correct to describe it as NT. In their view it will be more correct and pertinent to accept that the basis of Article 16 is more in line with the principle of MFN, which should consequently be reflected as the basis for Article 16.
- (8) USA has proposed alternate version. USA stated that it is particularly desirous that the language concerning "initial purchase" contained therein be a part of any final language in this regard. After discussion in the WG II on 15 December 1992, the Chairman asked that delegations consider both versions in capitals. The alternate USA proposal reads as follows:

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

- (9) See Article 16, paragraph 10 which represents compromise text designed to meet concerns expressed by USA that it is not clear that taxation is the only exception to the principles of NT post-establishment and standstill reflected in current legislation or policies of negotiating parties.

(10) AUS and J reserve.

(11) N comments that the objectives of the BA are spelled out in Article 2 on which negotiations are finished. It is of special interest in this respect that the objective of long term cooperation shall be based on mutual benefits and complementarities, in accordance with the objectives and the principles of the Charter. It is stated in the Concluding Document of the Hague Conference on the European Energy Charter that "in the context in the European Energy Charter, the principle of non-discrimination means Most-Favoured-Nation Treatment as a minimum standard. National Treatment may be agreed to in provisions of the Basic Agreement and/or Protocols".

(12) J and H reserve.

(13) N may be ready to consider favourably NT post-establishment provided that MFN is accepted pre-establishment and all exceptions to NT are spelled out in the BA itself.

(14) General scrutiny reserve.

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

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

(17) CDN can accept this principle on the assumption that the pre-establishment stage covers all elements of "Make Investments" as defined in Article 1 (7).

(18) CDN suggests insertion of additional para before para (8) reading as follows:

"Paragraphs (2) and (7) do not apply to any measure that is an exception to or derogation from the obligations under Article 7, as provided in that Article."

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

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

"Key Personnel:

A natural person or natural persons who will:

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

(ii) establish, develop, or administer an Investment,

in a capacity that is supervisory, executive or that involves special qualifications that are vital to the effectiveness of the Investment over and above the qualifications required of an ordinary skilled worker.

The natural person and the Investor who Makes or has Made the Investment may be one and the same."

The Chairman asked delegations to submit any written proposals for amendment of the CDN text. The Secretariat has received comments only from J and RO.

J view on CDN proposal:

With regard to permission of entrance and/or stay of foreigners, each Contracting Party's existing laws and regulations, which envisage non-economic as well as economic aspects of immigration, should be respected. Therefore the question as to who is a

Key Personnel should be dealt with in each Contracting Party's immigration laws and regulations. To try to define the term Key Personnel in the Basic Agreement risks compounding the discussion; for example, Japan's Immigration Law and its concomitant regulations have an elaborate two-page definition of Key Personnel in investment and management area, which itself gives a good idea of what sort of complex discussion definition of Key Personnel entails. We, therefore, think that the Basic Agreement should dispense with the definition of Key Personnel.

RO view on CDN proposal:

Romanian Foreign Investment Law, the Law nr. 35, article 32 stipulates that:

"The expatriate personnel necessary to implement the foreign Investment shall be agreed upon by the Contracting Parties or by the foreign Investor, as the case may be: such personnel shall be employed in management and expert job only".

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

(8) "A Contracting Party shall, subject to its laws and regulations relating to the entry, temporary stay [and work] of natural persons:

(a) [permit] Investors of another Contracting Party who have made [Investments in the Domain of the first Contracting Party to employ within its Domain Key Personnel of their choice regardless of nationality or citizenship; grant entry into its Domain, grant authorisation to temporarily remain and work therein, and provide confirming documentation to key personnel of an Investor of another Contracting Party that commits a substantial amount of capital to an Investment in its Domain;

(8bis) A Contracting Party shall not require, as a condition for temporary stay and work under paragraph 8(a), labour certification tests or other procedures of similar effect, nor shall a Contracting Party maintain or impose numerical restrictions in relation to the entry and stay of natural persons under this Article."

(b) examine in good faith requests made by natural persons who are employed by Investors of another Contracting Party to enter, remain and work temporarily in its Domain for the purpose of engaging in activities connected with relevant Investments."

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

A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons:

(a) permit Investors of another Contracting Party who have made Investments in the Domain of the first Contracting Party to employ within its Domain key personnel of their choice regardless of nationality or citizenship;

(b) favourably examine requests made by such key personnel who are employed by Investors of another Contracting Party to enter and remain in its Domain for the purpose of engaging in activities connected with relevant Investments."

- (20) General scrutiny reserve on entire paragraph. This paragraph represents text as it emerged from WG II discussion of USA concerns about Working Hypotheses 1 and 2 and in based on USA suggestion for an additional Article creating limited exceptions to National Treatment and MFN Treatment post-establishment and standstill. Present draft would result in listed items being excepted from NT and MFN post-establishment and standstill. However, as indicated in the appropriate footnotes below, consensus as to whether the items should be excepted from NT and MFN post-establishment or standstill or from all three was not reached in each case.
- (21) General consensus was reached that there should be an exception for "maritime and maritime services" from NT and MFN post-establishment but there was no consensus regarding exception from standstill. N states it can accept that "maritime and maritime services" will not be a part of this Agreement.
- (22) CDN reserve.
- (23) Consensus was reached that this exception should apply to both standstill and NT and MFN post-establishment.
- (24) Consensus was not reached in any respect on this proposed exception. Chairman has requested USA to further research the necessity of this exception and to delete if at all possible. Should the USA conclude this exception is necessary, Chairman requests that USA draft as tight a definition of "minority programmes" as is possible taking into account potential implications of such a definition on other negotiating parties.
- (25) USA had requested an additional exception covering "procurement of goods or services by a Contracting Party or a state enterprise". However, Chairman has indicated that this issue will be considered in relation to Article 26 on Sub-Federal Authorities.

(26) Subject to scrutiny reserve.

(27) USA and EC were invited to redraft this paragraph during 1-6 February WG II meeting.

Annex to Article 16

Ministerial Declaration on Exceptions to National Treatment at the
Stage of Making an Investment

Ministers or their representatives intend that the exceptions under Article 16 (3) to the obligations of Article 16 (2) should be in a form which facilitates review and is transparent and helpful to potential investors and other interested parties. To facilitate this:

- (i) The representatives of the Negotiating Parties have communicated to the Secretariat lists of exceptions in summary form. Those provided on behalf of Negotiating Parties which have requested transitional arrangements under Article 42 are wholly or in part provisional and subject to completion of their domestic legislative processes. Where possible, such lists also contain statements of intention in relation to further liberalisation. The Conference is invited to review those lists within [___ months] and make any appropriate recommendations;

- (ii) Final lists of exceptions corresponding to their domestic legislation will be communicated to the Secretariat by those Negotiating Parties which requested a transitional period within [___ months]. Those lists also can be supplemented by statements of intention on further liberalisation together with the expected timetable. The Conference is invited to review those final lists within [___ months];

(iii) Any Negotiating Party may amend its list of exceptions at any time before or after the entry into force of this Agreement: Such amendments would of course be subject to the standstill obligations.

Ministers or their representatives invite the Conference to consider how best to present the summary lists of exceptions to facilitate review and make them transparent to investors and other interested parties.

ARTICLE 17

COMPENSATION FOR LOSSES

(1) Except where Article 18 applies, an Investor of any Contracting Party who suffers a loss with respect to an Investment in the Domain of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Domain, shall be accorded by the latter Contracting Party, treatment, as regards restitution, indemnification, compensation or other settlement, which is the most favourable of that which that Contracting Party accords to any Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third State.

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

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

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

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

Chairman's note

Text revised by the Legal Sub-Group. Negotiations in WG II finished.

ARTICLE 18

EXPROPRIATION

(1) Investment of an Investor of a Contracting Party in the Domain of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") except where such expropriation is:

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

Such compensation shall amount to the fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "valuation date").

Such fair market value shall be calculated in a Freely Convertible Currency on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

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

- (3) Where a Contracting Party expropriates the assets of a company or enterprise which is incorporated or constituted under the law in force in any part of its own Domain, and in which Investors of any other Contracting Party have a shareholding, the provisions of paragraph (1) above shall apply to the extent necessary to guarantee prompt, adequate and effective compensation for those Investors.
- (4) Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.
- (5) Reversion of properties and rights to a resource owner pursuant to laws and regulations in force in a Contracting Party at the time an Investment was made in the Domain of that Contracting Party shall not be regarded, for purposes of this Agreement, as an act of expropriation or nationalisation or as a measure having effect equivalent to nationalisation or expropriation.

(1)

General comments

- Paragraphs (1) to (5) have been reviewed by the Legal Sub-Group and its language incorporated in this Article. However, Legal Sub-Group raised a question on need for paragraphs (3) and (4). Its conclusions are as follows:
 - a) The Sub-Group cannot identify a gap in the protection afforded by paragraphs (1) and (2) of Article 18 that would be filled by paragraph (3), given the current Basic Agreement Article 1(5) definition of "Investment", since "Investment" is defined as assets owned directly or indirectly, which suggests that a shareholder owns a portion of the assets. The need for the paragraph should be re-examined when the definitions are final.

If paragraph(3) is needed, there remains the question of how the universe of interests to be protected by this paragraph, and particularly the limitation to "shareholding", was arrived at.

- b) Likewise, in the case of Article 18(4), the Sub-Group saw no reason for doubt that the other provisions of the article would apply to "Returns". "Returns" is defined in Article 1(8) as "amounts yielded in pecuniary form or in kind by an investment." Even if not yet realized in such forms, these would seem to be "assets owned" in some form by investors, and thus they would appear to be within the Article 1(5) definition of investment, and consequently protected under Article 18(1).
- The Chairman of WG II established a Sub-Group chaired by EC and invited AUS, CDN, J and USA to be represented in the Sub-Group. The Sub-Group is invited to consider:
- i) The appropriate definition of intellectual property under Article 1(11);
 - ii) The appropriateness of including in Article 18 a provision on the lines of the CDN proposal in footnote 18.1;

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

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

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

If the answer to both (a) and (b) above is "yes", the Sub-Group shall consider whether an expropriation under circumstances relevant to an Investment as defined in Article 1(5) would meet the tests at (a), (b), (c), and (d) in paragraph (1) of Article 18.

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

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

The Sub-Group will report its proposal to the Secretariat before the next meeting of WGII.

Specific comment

18.1 : CDN supported by USA and J suggests new paragraph (6) :

"This Article does not apply to the issuance of compulsory licenses granted in relation to Intellectual Property Rights, or the revocation, limitation or creation of Intellectual Property Rights to the extent that such issuance, revocation, limitation or creation is permitted by relevant multilateral conventions on Intellectual Property."

ARTICLE 19

TRANSFER OF PAYMENTS RELATED TO INVESTMENTS

- (1) Each Contracting Party shall in respect to Investments by Investors of any other Contracting Party in its Domain guarantee the freedom of transfers related to these Investments into and out of its Domain. In particular, though not exclusively, including the transfer of:
- (a) the initial capital plus any additional capital for the maintenance and development of an Investment;
 - (b) Returns;
 - (c) payments arising out of the settlement of a dispute;
 - (d) payments under a contract, including amortisation of principal and accrued interest payment pursuant to a loan agreement;
 - (e) compensation pursuant to Articles 17 and 18;
 - (f) proceeds from the sale or liquidation of all or any part of an Investment.
 - (g) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment.⁽¹⁾
- (2) Transfers under paragraph (1) above shall be effected without delay. They shall be effected in a Freely Convertible Currency unless:
- a) effected [before 1 January 2000] directly between the Domains of two Contracting Parties both of which were part of the former USSR; and

- [b] in respect of Investments by [Investors] of a Contracting Party which was part of the former USSR;
- c) effected in accordance with the laws, regulations and practices of both Contracting Parties or in accordance with an agreement between them.
- (3) Transfers shall be made at the [prevailing]⁽²⁾ spot market rate of exchange on the date of transfer. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.
- (4) ⁽³⁾Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may maintain laws and regulations (a) requiring reports of currency transfer.⁽⁴⁾ Furthermore, a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgments in civil and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its law.
- (5)
- (6)

General comments

- The Legal Sub-Group reviewed paragraphs (1) to (4) as indicated in BA-31. Its report is contained in document 10/93, LEG-5 of 2 February 1993. Adoption of the report was delayed until negotiations on Article 19 are completed.
- Mr. Ervik will chair a Sub-Group consisting of USA, CH, AUS, CDN, EC, RUF and J on the subject of Balance of Payments restrictions (footnote 19.5). The relevant delegations should notify the Secretariat by 16 February 1993 of their candidates.

- The consideration of CDN proposal as indicated in footnote 19.6 is postponed until Article 27 is more finalised.
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Specific comments

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

- 19.2 : RUF waiting reserve. RUF prefers to delete this word. RUF understands that the spot market rate is an average rate of exchange with all possible daily fluctuations. If the term "prevailing" be kept it could be understood as the existence of two or more exchange rates in a country. RUF suggests as an alternative substituting the first sentence with:
"Transfers shall be made at a market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred".

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

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

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

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

a) CDN suggestion:

Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may, in exceptional circumstances, exercise such controls as are necessary to regulate international capital movements. No restrictions under this provision shall affect the making of payments or transfers for current international transactions nor provide for discriminatory treatment among Contracting Parties. The Contracting Party taking a measure pursuant to this paragraph shall ensure that such measure least infringes the rights of the other Contracting Parties and is no broader in scope or duration than necessary."

b) CH suggestion:

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

c) RO suggestion:

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

19.6 : CDN proposes further new paragraph reading:

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

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

ARTICLE 20

TAXATION

(1) [GENERAL EXCLUSION]⁽¹⁾

Except as set out in this Article, nothing in this Agreement shall apply to taxation measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of this Agreement, this Article shall prevail to the extent of the inconsistency.

(2) [APPLICATION OF PROVISIONS RELATING TO TRADE]⁽¹⁾

Notwithstanding paragraph (1),

- a) Article [5(2) (c)]⁽¹⁾ shall apply to taxation measures other than those on income or on capital; and
- b) the provisions of this Agreement requiring a Contracting Party to provide most favoured nation treatment relating to trade in [goods and services] shall apply to taxation measures other than taxes on income or on capital, except that such provisions shall not apply to:
 - i) an advantage accorded by a Contracting Party pursuant to the tax provisions in any convention, agreement or arrangement, described in paragraph 6.1(b) of this Article; or
 - ii) any taxation measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates between [goods] of the Contracting Parties or arbitrarily restricts benefits accorded under the above-mentioned provisions of this Agreement.

(3) APPLICATION OF PROVISIONS RELATING TO INVESTMENT

Notwithstanding para (1), the provisions imposing national treatment obligations or most favoured nation obligations under Part IV shall apply to taxation measures of the Contracting Parties other than those on income or on capital, except that nothing in Part IV shall apply to:

- a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions in any convention, agreement or arrangement, described in paragraph 6.1(b) of this Article; or
- b) any taxation measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates between Investors of the Contracting Parties or arbitrarily restricts benefits accorded under the Investment provisions of this Agreement.

[(4) EXPROPRIATORY AND DISCRIMINATORY TAXATION]⁽²⁾

- a) Notwithstanding paragraphs (1) and (3), Article 18 shall apply to taxation measures.
- b) Whenever an issue arises under Article 18, to the extent it pertains to whether a taxation measure constitutes an expropriation or nationalisation or whether a taxation measure alleged to constitute an expropriation or nationalisation is discriminatory, the Investor or the Contracting Party alleging expropriation shall refer the issue of whether the measure is not an expropriation or whether the measure is discriminatory to the competent tax authorities. Referral is required at the earlier of the time when amicable settlement procedures under Article 23(1) or 24(1) begin or the time the issue is submitted to arbitration or dispute resolution. Competent tax authorities

shall, within a period of six months, strive to resolve the non-discrimination issue so referred, applying the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the measure or no such tax convention is in force between the Contracting Parties concerned, applying the non-discrimination principles under the OECD Model Tax Convention on Income and Capital. Bodies called upon to settle disputes pursuant to Articles 23 and 24 may take into account any conclusions arrived at by the competent tax authorities regarding whether the measure is not an expropriation. Such bodies shall take into account any conclusions arrived at by the competent tax authorities regarding whether the measure is discriminatory. Under no circumstances shall involvement of competent tax authorities lead to a delay of proceedings under Articles 23 and 24.

(5) WITHHOLDING TAX

Without limiting the application of the foregoing, and for greater certainty, Article 19 shall not limit the right of a Contracting Party [to impose or collect]⁽³⁾ a tax by withholding or other⁽⁴⁾ means.

(6) DEFINITIONS

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

- a) the provisions relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
- b) [the provisions relating to taxes of any convention for the avoidance of double taxation and any international agreement or arrangement to which the Contracting Party is bound.]⁽⁶⁾

6.2 There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

6.3 "A competent tax authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when there is no such agreement between the countries in question, the Minister or Ministry of Finance or his or its authorised representatives.

General comment

The Sub-Group on Taxation will continue on its "Fax-negotiations". J and RUF were asked to send fax number of experts to the Secretariat.

Specific comments

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

20.2 : J is willing to withdraw its reserve on the understanding that bilateral tax conventions, if any, shall prevail for issues relating to discriminatory tax measures provided for in this subparagraph.

CH do not share J view that the wording could imply an obligation of tax authorities to remove discriminatory tax measures. The wording in CH opinion can only be construed as meaning that the competent authorities should strive - in application of the relevant non-discrimination provision - to reach a consensus on whether a tax measure is discriminatory or not. CH view therefore is that the chosen wording is sufficiently clear and precise.

USA view on J suggestion:

As to the discrimination issue, paragraph 4(B) refers first to the competent authorities "the issue of whether the measure is discriminatory." Thus, the obligation to "strive to resolve the non-discrimination issue so referred" means to strive to determine whether the measure is discriminatory. Therefore, the obligation does not extend to eliminating discrimination.

USA request clarification concerning the understanding sought by J that " bilateral tax conventions, if any, shall prevail for issues relating to discriminatory tax measures provided for in this subparagraph." Is J seeking clarification that bodies called upon to settle disputes pursuant to Articles 23 and 24 must base a decision about whether a tax is discriminatory on the existing tax convention applicable to the measure or, if there is none, to the non-discrimination principles under the OECD Model?

20.3 : RUF finds it desirable to specify the difference of the terms "to impose a tax" and "to collect a tax".

20.4 : J proposes the inclusion of the word "similar".

CH prefers current wording.

USA does not see the need to change "other means" to "other similar means". Imposing a tax by a means other than withholding raises no issue concerning transfers.

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

20.6 : J proposes a new wording as follows:

"A measure taken under the provisions relating to taxes of any agreement or arrangement regarding the avoidance of double taxation to which the Contracting Party is bound."

CH is of the opinion that the current wording is appropriate and should thus not be altered.

USA view on J proposal:

Is J withdrawing its reverse provided that there will be a provision ensuring consistency between the eventual UR Service Agreement and the relevant provisions of this Agreement? Alternatively, is J conditioning its reverse on the inclusion of a provision referring to the question of consistency? The USA has reserved its position on consistency with GATT on taxes pending the completion of Article 5.

USA requests clarification as to the purpose of limiting paragraph 6.1(B) to "agreements or arrangements regarding the avoidance of double taxation to which the Contracting Party is bound."

[ARTICLE 21]⁽¹⁾

ASSIGNMENT OF RIGHTS

(1) If a Contracting Party, its designated agency [or a]⁽²⁾ company or enterprise incorporated in a Contracting Party other than an Investor (the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment and Returns in the Domain of another Contracting Party (the "Host Party") or otherwise acquires the rights and claims to such an Investment⁽³⁾, the Host Party shall recognise

(a)⁽⁴⁾ the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims resulting from such an Investment, and

(b) that the Indemnifying Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the original Investor. [This provision is without prejudice to any right of a Contracting Party under this Agreement, or consistent with its obligation under this Agreement, to require approval of the subrogation of rights referred to in this paragraph].⁽⁵⁾⁽⁶⁾

(2) The Indemnifying Party shall be entitled in all circumstances to

(a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1) above, and

(b) any payments received in pursuance of those rights and claims,

as the original Investor was entitled to receive by virtue of this Agreement in respect of the Investment concerned and its related Returns.

(3) Without prejudice to Article 19 any payments received in non-convertible currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the Domain of the Host Party.

(7)

General comment

- The Chairman established Sub-Group on this Article chaired by IR. The results achieved in the Sub-Group meeting held on 26 January are the following:

1) The main questions arising from the discussions is whether or not Article 21 is necessary. The answer to this question depends on the final outcome of the definitions of "Investor" and "Make Investments".

With the present definitions Article 21 does not seem to be necessary, but a definite answer from some delegations will only be possible after careful consideration.

For the time being the substance of Article 21 shall be retained until further improvements on Article 16 and the above mentioned definitions.

2) If negotiations move in the direction of the necessity of Article 21 it will most probably be needed only to cover political risks and guarantees as far as State owned enterprises are concerned.

3) As to the question of the right of an Investor to appeal to ICSID arbitration when a subrogation takes place it seemed acceptable that the issue would be better dealt in Article 23.

- The Chairman asked Legal Sub-Group to check Article 1 whether relevant definitions include state agency or acquisition of Investment.
-

Specific comments

- 21.1: Need for this Article pending the final outcome of definitions.
- 21.2: RUF suggests substituting with: ",,".
- 21.3: EC suggests insertion of: "as the result of the complete or partial default of the Investor."
- 21.4: A suggests to start subpara (a) with or to insert in a proper place in subpara (a) the following:

"without prejudice to the rights of the Investor under Article 23".
- 21.5: General scrutiny reserve on the second sentence.
- 21.6: EC suggests substituting second sentence with:

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

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

ARTICLE 22

RELATIONSHIP TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part IV and V of this Agreement, nothing in this Agreement shall derogate from the terms of the other international agreement to the extent that those terms are more favourable to the Investors or Investment.

Chairman's note

Negotiations finished with full agreement on substance. Subject to examination by the Legal Sub-Group.

The Legal Sub-Group

suggests the rewrite of Article 22, which is intended to improve the Article from a technical standpoint, and is not meant as a recommendation to include such an Article in the Agreement:

"RELATION TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part IV or V of this Agreement, nothing in Part IV or V of this Agreement shall be construed to supersede any incompatible provision of such terms of the other agreement, and nothing in such terms of the other agreement shall be construed to supersede any incompatible provision of Part IV or V of this Agreement, where any such incompatible provision is more favourable to the Investor or Investment."

PART V

DISPUTE SETTLEMENTS

[ARTICLE 23]⁽¹⁾

[SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY]⁽²⁾⁽³⁾

- (1) Disputes between one Contracting Party and an Investor of another Contracting Party concerning an alleged breach of an obligation of the former under Part IV of this Agreement, relating to an investment of the latter in the Domain of the former shall, if possible, be settled amicably.
- (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date at which either party to the dispute requested amicable settlement, the dispute shall, subject to paragraph (3) below, at the written request of the Investor concerned be submitted to international arbitration or conciliation in accordance with paragraph (4).
- (3) An Investor may choose to submit the dispute for resolution :
- a) to the courts or administrative tribunals of the Contracting Party that is a party to the dispute; or
 - b) in accordance with any applicable, previously agreed dispute settlement procedure; or
 - c) in accordance with paragraph (4), only if:"
 - i) the Investor has consented in writing [to settlement by arbitration or conciliation in accordance with the appropriate rules, thereunder;]⁽⁴⁾

ii) the Investor has waived its right to initiate an action, in relation to the same subject matter, before the courts or tribunals of the Contracting Party concerned or, where an action has already commenced, the Investor has [subject to national law of the Contracting Party concerned]⁽⁵⁾ discontinued it before any judgement or award is made; and

iii) not more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the alleged breach [or the date on which the Investor incurred loss or damage if later. Such a period may exceed three years if the Contracting Party concerned so permits.]⁽⁵⁾

(4) Unless within the period of 3 months provided in paragraph (2) above, the Parties to the dispute have agreed an alternative dispute settlement procedure, the dispute may, at the election in writing of the Investor concerned, be submitted for settlement by arbitration or conciliation to:⁽⁶⁾

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington 18 March 1965 (ICSID Convention) if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties for the ICSID Convention); or

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

OR

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

OR

- (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce;

(5) Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.⁽¹⁾

[(6) (a) The consent given in paragraph (5), together with the consent given under paragraph (3), shall satisfy the requirements for:

(i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and

(ii) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

(b) Any arbitration under this Article shall be held in a State that is a party to the New York Convention, and claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of that Convention.]⁽⁷⁾

(7) A tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

(8)

(8) [An Investor other than a natural person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by Investors of another Contracting Party shall for the purpose of Article 25 (2)(b) of the Convention referred to in paragraph 4(a) above be treated as an Investor of that other Contracting Party].⁽⁹⁾⁽¹⁰⁾

(11)

(12)

(9) The awards of arbitration, which may include an award of interest, shall be final and binding [and shall be enforceable in the Domain of the Contracting Parties].⁽¹³⁾⁽¹⁴⁾

(15)

(10)⁽¹⁶⁾Any proceedings initiated under this Article are without prejudice to the rights of Contracting Parties under Article 24.

General comments

A special Sub-Group to meet on the fringes of the Legal Sub-Group meeting that is being scheduled for the 1st week of March, will address the matters referred in footnotes (*).

Specific comments

23.1 : N general reservation on the whole Article. N reserve involves Constitutional matters and would have to be referred to Plenary. N proposals for deletion of para (5) and amend para (6) will be addressed in this context. N's possible solution may be to open for reservations on Article 23.

23.2 : USA and J produced a proposal to be inserted at an appropriate place in this Article:

"() Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investment, investment agreements, and investment authorisations."

Note : could alternatively be included in Article 16.

23.3 : CDN suggests that the scope of Article 23 should cover the following:

Where an Investor of one Contracting Party has established a company (or other organisation) with distinct legal personality under the laws and regulations of another Contracting Party, and a breach of an obligation under Part IV by that other Contracting Party affects the company, the Investor's injury will be measured by the effect that the breach has upon the value of the Investor's shares in the company. This effect will not always be a readily ascertainable or an accurate measure of the injury suffered by the Investor. Thought needs to be given to allowing an Investor to have recourse to Article 23 dispute settlement on behalf of a company that it owns or controls but that is established under the laws and regulations of the Contracting Party with which dispute settlement is sought. Any such provision would need to be accompanied by provision that restitution of property be made or payment of monetary damages be paid to this company. This proposal will be taken together with para (8) which is subject to EC and RUF reserves.

23.4 : CDN proposes to add "as modified in this Article".

23.5 : Chairman's compromise. General scrutiny reserve .

23.6: A requests that the right of an investor to appeal for an ICSID-arbitration should explicitly be secured also for cases in which the investor was indemnified by a state agency and a subrogation took place. This footnote is contingent upon the maintenance of Article 21. If Article 21 is maintained this footnote will be dealt in that Article.

23.7: EC proposal deletion of whole paragraph.

(*) This matter is put to the special Sub-Group.

23.8: CDN suggests a new para 7(bis) which would provide for interim measures reading:

"A tribunal may order, or recommend, an interim measure of protection to preserve the rights of a disputing party, or to ensure that a tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order, or recommend, attachment of assets or order, or recommend, that a measure alleged to constitute a breach of an obligation in Part IV of this Agreement be enjoined."

23.9: RUF proposes to exclude this para or to formulate it closer to the text of Article 25 para 2(B) of the Washington Convention. In accordance with that Convention the question of the nationality of the juridical persons is decided by the parties to the dispute.

23.10: EC suggested the following text for para (8): "An investor other than a natural person which has the nationality of one Contracting Party and which before (...) a dispute between it and that Contracting Party arises is controlled by investors of another Contracting Party shall for the purpose of Article 25 (2)(b) of the Convention referred to in paragraph 4(a) above be treated as an investor of that other Contracting Party."
To be discussed with footnote 23.3.

23.11: CDN proposes a new para 8(bis) reading:

"An arbitral tribunal established pursuant to this Article may award, separately or in combination, only monetary damages and restitution of property. Any award or restitution shall provide that the disputing Contracting Party may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules. A tribunal may not order the payment of punitive damages."

23.12: CDN proposes a new para 8(Ter) reading:

"On written notice to the disputing parties, a Contracting Party that is not a party to the dispute may make submissions to any arbitral tribunal constituted pursuant to this Article on any question of interpretation of this Agreement or of any attached Annexes."

23.13: USA proposes that this para should be amended in order more clearly to impose an affirmative obligation on CPs that have not done so to make arbitral awards rendered under this Article enforceable within their Domains. To this end USA suggests period after "binding" and substitute the bracketed part with a new sentence reading as follows: ". Each Contracting Party undertakes to carry out without delay the provisions of any such award and to provide for its enforcement within its Domain".

(* This matter is put to the special Sub-Group.

23.14: RO suggests replacing the bracketed part with: "on the parties to the dispute. Each Contracting Party undertakes to provide in its Domain for the enforcement of any such award".

(*) This matter is put to the special Sub-Group.

23.15: CDN suggests a new para 9(bis) reading:

"Unless the disputing parties agree otherwise, a copy of any award of arbitration pursuant to this Article shall be deposited with the Secretariat who shall make it generally available."

23.16: AUS believes that there might be a clash with the ICSID Convention. The principle implied in general international law that diplomatic protection should not be given when a matter is being dealt with in arbitration, and prior to the breakdown of that arbitration shall prevail.

This matter is put to the Legal Sub-Group with an instruction to recommend minimum changes, if any, to ensure that any clash with ICSID or general international law should be avoided.

[ARTICLE 24]⁽¹⁾

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Agreement through diplomatic channels.⁽²⁾
- (2) If the dispute has not been settled in accordance with paragraph (1) above within a reasonable time, except as otherwise provided for in this Agreement or unless the Contracting Parties otherwise agree in writing, either Contracting Party may, by written notice to the other Contracting Party, submit the matter to an ad hoc arbitral tribunal under this Article.
- (3) (3)(4) Such an ad hoc arbitral tribunal shall be constituted as follows:
 - (a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal within 30 days of delivering the notice in paragraph (2) and inform the other Contracting party of its appointment;
 - (b) Within 60 days of the receipt of the written notice under paragraph (2), the other Contracting Party to the dispute shall, in turn, appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the written notice under paragraph (2) request that the appointment be made in accordance with sub-paragraph (d) below;
 - (c) A third member, who may not be a national or citizen of a Contracting Party to the dispute, shall then be appointed between the Contracting Parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the delivery of the notice referred to in paragraph (2) above, the Contracting Parties are unable to agree on the appointment

of a third member, that appointment shall be made, in accordance with sub-paragraph (d) below, at the request of either Contracting Party submitted within 180 days of delivery of that notice;

- (d) Appointments pursuant to sub-paragraphs (b) or (c) above shall be made by the Secretary-General of the Permanent Court of International Arbitration (PCIA) within 30 days of the receipt of a request to do so. If he is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. [If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the next most senior Deputy ...;]⁽⁵⁾
- (e) Appointments made in accordance with sub-paragraphs (a), (b), (c) and (d) above shall have regard to the qualifications and experience, particularly in matters covered by this Agreement, of the members to be appointed;⁽³⁾
- (f) In the absence of an agreement between the Contracting Parties to the contrary, [the Arbitration rules of the United Nation Commission on International Trade Law (UNCITRAL) shall govern,]⁽⁶⁾ except to the extent modified by the Contracting Parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members.
- (g) The tribunal shall decide the dispute in accordance with this Agreement and International Law.
- (h) [The arbitral award shall be final and binding upon the Contracting Parties to the dispute.]⁽⁷⁾
- (i) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties to the dispute.

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

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

General comments

- The new concept of Article 24 comprises Articles 24, 24 BIS and 24 TER and is together with Appendix D of Article 41 BIS (former Article 41 TER) a package to be viewed in totality:
 - a) Dispute settlement for 41 BIS, Appendix D.
 - b) Dispute settlement for the rest of the Basic Agreement – except Article 5 which goes to GATT (Articles 24 and 24 BIS) with the following additional language at the beginning of Article 5 "Except as otherwise provided in this Agreement".
 - c) An ad hoc fast track tribunal to deal with questions of authority as to whether Article 24 BIS applies.
- As agreed on WG II meeting on 6 February 1993 J suggestion for an additional paragraph stating that dispute settlement provisions of bilateral agreements should prevail and the question whether the subject of sub-paragraph (3)(f) is "arbitral proceedings" were referred to consideration in the Legal Sub-Group.
- As concluded on WG II meeting on 6 February 1993 WG II will work under the assumption that matters outside Articles 5 and 41 BIS will be subject to dispute settlement under Article 24 and that awards shall be final and binding. Furthermore the Chairman will provide WG II with a note on what to do with "GATT-plus" disputes.

Specific comments

24.1 : N reserve on the architecture of Articles 24, 24 BIS, 24 TER and 41 BIS, Appendix D.

24.2 : J was invited to discuss the inclusion of following additional language with EC: "Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another Contracting Party with respect to any matter affecting the interpretation or application of this Agreement". And if they could not agree, then J was asked to lift the footnote.

24.3 : AUS waiting reserve, subject to checking with Capital on suggestions concerning among others appointment and qualifications of panellists.

24.4 : Chairman's redraft of this paragraph is underlined. General scrutiny reserve.

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

24.6 : CDN scrutiny reserve, pending its review of UNCITRAL applicability.

24.7 : CDN reserve.

[ARTICLE 24 BIS]⁽¹⁾

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

(2)

General comments

See general comments on Article 24.

Specific comments

24 BIS.1 : N reserve on the architecture of Articles 24, 24 BIS, 24 TER and 41 BIS, Appendix D are attached.

24 BIS.2 : CH suggests following additional paragraph:

"A dispute between Contracting Parties, being both Contracting Parties to the GATT Agreement on Government Procurement, concerning a dispute arising under Article 6 on any matter covered by the GATT Agreement on Government Procurement may be settled in the GATT and shall not be settled under Article 24".

In order to avoid any disequilibrium by providing for issues covered by the GATT-Code the same possibilities as for other trade related matters covered under Article 5 of the BA. The question could eventually only be solved once the exact coverage of Article 6 and its relation to the GATT Government procurement Code is clarified.

[ARTICLE 24 TER]⁽¹⁾⁽²⁾

(1) If a disagreement arises over whether Article 24 BIS applies to a dispute between Contracting Parties [it]⁽³⁾ may request that an ad hoc fast track tribunal determine whether Article 24 BIS applies. Such an ad hoc tribunal shall be constituted as follows:

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

(b) An appointment pursuant to sub-paragraph (a) above shall be made by the Secretary-General of the Permanent Court of International Arbitration (PCIA) within 30 days of the receipt of a request to do so. If he is prevented from discharging this task the appointment shall be made by the First Secretary of the Bureau. [If the latter, in turn, is prevented from discharging this task, the appointment shall be made by the next most senior Deputy ...;]⁽⁴⁾

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

(d) In the absence of an agreement between the Contracting Parties to the dispute to the contrary, the Arbitration rules of the United Nation Commission on International Trade Law (UNCITRAL) shall govern, except to the extent modified by the Contracting Parties to the dispute or by the arbitrator.

- (e) The arbitrator shall decide the dispute in accordance with this Agreement and International Law.⁽⁵⁾
- (f) The arbitral award shall be final and binding upon the Contracting Parties to the dispute.
- (g) The expenses of the arbitrator, including his remuneration, shall be borne in equal shares by the Contracting Parties to the dispute. The arbitrator may, however, at his discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties to the dispute.
- (h) Unless the Contracting Parties to the dispute agree otherwise, the arbitrator shall sit in the Hague, and will use the premises and facilities of the Permanent Court of Arbitration.
- (i) A copy of the award shall be deposited with the Secretariat who shall make it generally available.
- (2) (6) Neither Contracting Party shall initiate or continue dispute settlement proceeding under the GATT or a GATT related instrument pending the results of arbitration pursuant to this Article.

General comments

See general comments on Article 24.

Specific comments

24.TER.1 : N reserve on the architecture of Articles 24, 24 BIS, 24 TER and 41 BIS, Appendix D.

24.TER.2 : USA suggests deletion of this Article as the choice of dispute settlement forum is a matter best left for the complaining party to determine. In addition the Article

would derogate from the right of Contracting Parties under GATT to recourse to GATT dispute settlement procedures.

24.TER.3 : J suggests replacing with: "any Contracting Party to the dispute".

24.TER.4 : See footnote 24.5.

24.TER.5 : CH suggests following additional sentence:
"The decision shall be made within [] days from the establishment of the Fast Track Tribunal".

24.TER.6 : J requests clarification of the significance of this paragraph. The present GATT dispute settlement procedure is open to all GATT parties to bring forward cases including these whose jurisdiction is not agreed upon.

PART VI

CONTEXTUAL

[ARTICLE 25]⁽¹⁾

EXCLUSIVE OR SPECIAL PRIVILEGES AND GOVERNMENT PARTICIPATION

- (1) Each Contracting Party undertakes that if it establishes or maintains a state entity wherever located and grants to any such entity formally or in effect, exclusive or special privileges, such entity shall conduct its activities in a manner consistent with this Agreement.
- (2) Each Contracting Party undertakes that if it grants to any other entity exclusive or special privileges, in the field of energy, it shall not require that entity to conduct its activities in a manner inconsistent with this Agreement.

General comment

To be able to proceed with negotiations on Article 16 the Chairman of WG II proposed the compromise text on Article 25 leaving it open for further discussion at a later stage. This is without prejudice to addressing trade in Energy Materials and Products by state trading enterprises through the GATT-reference approach.

Specific comments

25.1 : EC suggests this Article should read:

"EXCLUSIVE OR SPECIAL PRIVILEGES

Each Contracting Party undertakes that if it grants to any entity exclusive or special privileges, in the field of energy, such entity shall conduct its activities in a manner consistent with this Agreement".

25.2 : N has submitted its suggestion on Article 25 reading:

"GOVERNMENT PARTICIPATION

Any Contracting Party shall be free to participate in energy activities through direct participation by the Government or through government-controlled investors. Such investors may be granted exclusive or special privileges in this respect. In such cases they shall conduct these activities in a manner consistent with this Agreement."

25.3 : USA has submitted its suggestion with reference to move it under the Part IV of the BA:

- (1) Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining or establishing a state enterprise.
- (2) Each Contracting Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes, and any other enterprise owned or controlled through ownership interest by a Contracting Party, acts in a manner that is not inconsistent with the Contracting Party's obligations under Part IV, whenever such enterprise exercises any

regulatory, administrative, or other governmental authority that the Contracting Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions, or impose quotas, fees or other charges.

- (3) Each Contracting Party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to Investments in the Contracting Party's Domain of Investors of another Contracting Party."

[ARTICLE 26]⁽¹⁾

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

[Each Contracting Party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and other governmental authorities within the Domain of a Contracting Party.]⁽²⁾

Specific comments

26.1: USA, CDN, EC and RUF reserve.

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

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

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

[ARTICLE 26A]⁽¹⁾

PROPERTY

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

Specific comment

26.A.1: N proposal.

ARTICLE 27

EXCEPTIONS

(1) [General and security exceptions to trade provisions are addressed in Article 5 via reference to Articles XX and XXI of the GATT. In particular, nothing in Article 5 of this Agreement shall preclude any Contracting Party from taking any action in pursuance of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear safeguards obligations provided any such action shall not constitute disguised restrictions on trade or arbitrary discrimination between Contracting Parties.]⁽¹⁾

(2) The provisions of this Agreement shall not preclude any Contracting Party from adopting or enforcing any measures:

(a) necessary for the maintenance of public order;

(b) necessary to protect human, animal or plant life or health;

(c) essential to the acquisition or distribution of [Energy Materials and Products] in general or local short supply, if such measures are consistent with the principle that all other Contracting Parties are entitled to an equitable share of the international supply of such [Energy Materials and Products] and that any such measures that are inconsistent with this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist; or

provided that such measures shall not constitute disguised restrictions on Investment, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures

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

(3) Nothing in this Agreement shall be construed:

(a) to require any Contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any Contracting Party from taking any measure which it considers necessary for the protection of its essential security interests,

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

(ii) taken in the time of war or other international emergency in international relations involving the Contracting Party taking the measure; or

(iii) relating to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons or other international nuclear non-proliferation undertakings, or required by national nuclear non-proliferation laws, regulations or policies; or

(c) to prevent any Contracting Party from taking any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;

provided that such measures shall not constitute a disguised restriction on investment and that any such measure shall be duly motivated.

- (4) If a Contracting Party considers that any measure taken by another Contracting Party pursuant to paragraph (3) constitutes a disguised restriction on investment or otherwise nullifies or impairs any benefit reasonable expected under this Agreement, it may request consultations with the Contracting Party taking the measure. Such consultations shall be held promptly, and the Contracting Party whose measure is the subject of the consultations shall give full and sympathetic consideration to the views of the other Contracting Party and shall explain, in as much detail as is consistent with its security interests, the reasons for the measure.
- (5) No Contracting Party may invoke the provisions of this Article to derogate from the requirements to pay compensation pursuant to Articles 17 or 18.
- (6) The provisions of this Agreement shall not be construed so as to oblige any Contracting Party to extend to another Contracting Party the benefit of any treatment, preference or privilege resulting from the former's membership in any existing or future customs union or free trade area.

Chairman's note

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

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

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

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

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

Specific comments

27.1 : EC reserve on GATT reference approach.

PART VII

STRUCTURAL AND INSTITUTIONAL

General comment

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

The Articles under the Part VII had been reviewed by the Legal Sub-Group on 26 and 27 January 1993. The results are contained in document 11/93, LEG-6 of 2 February 1993.

[ARTICLE 28]⁽¹⁾

PROTOCOLS

- (1) The Contracting Parties agree that in order to give further effect in detail to the objectives and principles of the Charter it will be necessary to negotiate a number of Protocols.
- (2) The assent of the Charter Conference shall be required for the negotiation of a Protocol. Any Contracting Party may participate in such negotiation. A Protocol shall apply only to the Contracting Parties which consent to be bound by it. [The provisions of Articles 29 and 30 shall apply to the adoption of the text of Protocols.]⁽²⁾
- (3)
- (3) A State or Regional Economic Integration Organisation shall not become a Party to a Protocol unless it is, or becomes at the same time, a Signatory to the Charter and a Party to this Agreement.

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

Specific comments

28.1 : General reserve.

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

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

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

[ARTICLE 29]⁽¹⁾

CHARTER CONFERENCE

- (1) The Contracting Parties shall meet periodically in a Conference of the Parties (hereafter called "the Charter Conference") at which each Contracting Party shall have one representative. The first meeting of the Charter Conference shall be convened by the provisional Secretariat designated on an interim basis under Article 31 paragraph (5), not later than ninety days after the closing date for signature of this Agreement as specified in Article 33. Each subsequent ordinary meeting of the Charter Conference shall be held at a time determined by the preceding meeting of the Conference.
- (2) Extraordinary meetings of the Charter Conference may be held at times other than those referred to in paragraph (1) of this Article at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to them by the Secretariat, it is supported by at least one-third of the Contracting Parties.
- (3) The Charter Conference shall:
 - (a) carry out the duties assigned it by this Agreement and Protocols;
 - (b) keep under review and facilitate the implementation of the principles of the Charter and of the provisions of this Agreement and the Protocols;
 - (c) facilitate in accordance with this Agreement and Protocols the co-ordination of appropriate general measures to carry out the principles of the Charter;
 - (d) consider and adopt programmes of work to be carried out by the Secretariat;

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

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

Chairman's note

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

Specific comments

29.1 : General reserve.

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

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

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

[ARTICLE 30]⁽¹⁾

VOTING

- (1) The Contracting Parties shall make every effort to reach agreement by consensus on any matter requiring their decision, adoption or approval under this Agreement.
- (2) The adoption of texts of amendments to this Agreement other than for Articles 29 and 31, [the initiation of negotiations of any Protocol,]⁽²⁾ agreement to accessions under Article 36, and the approval of Association Agreements shall be by consensus.
- (3) Voting provisions for adoption of texts of amendments and for accessions to any Protocol shall be defined in that Protocol.
- (4) Decisions regarding budgetary matters of the Charter Conference and Secretariat including amendments to Annex B referred to in Article 32 (3) of this Agreement, shall, subject to paragraph (1) above, be taken by a qualified majority consisting of that proportion of the Contracting Parties which under Article 32 below together contribute at least three fourths of the mandatory funding to meet the administrative costs of the Charter Conference and the Secretariat.
- (5) In all other cases, unless otherwise stated, decisions shall be taken by a three fourths majority vote of the Contracting Parties present and voting at the meeting of the Charter Conference at which such matters fall to be decided.
- (6) For the purposes of this Article, "Contracting Parties present and voting" means Contracting Parties present and casting an affirmative or negative vote.
- (7) Subject to paragraph (4) above and paragraph (9) below each Contracting Party shall have one vote.

- (8) With the exception of paragraph (4) above, no voting decision shall be valid unless it has the positive and expressed support of a majority vote of all Contracting Parties.
- (9) For the purposes of this Article a Regional Economic Integration Organisation shall, when voting, do so in the following manner:
- (a) in votes concerning this Agreement such organisation shall have a number of votes equal to the number of its member States which are Contracting Parties to this Agreement;
- (b) notwithstanding paragraph (3) above, in votes concerning a Protocol such organisation shall have a number of votes equal to the number of its member States which are Parties to that Protocol.

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

Specific comments

30.1 : General reserve.

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

[ARTICLE 31]⁽¹⁾

SECRETARIAT

- (1) The Secretariat shall be composed of a Secretary General and such staff as the minimum consistent with efficiency.
- (2) The Secretary General shall be appointed by the Charter Conference, initially for a period of maximum 5 years.
- (3) In the performance of its duties under this Agreement the Secretariat shall be responsible to and report to the Charter Conference.
- (4) The Secretariat shall provide the Conference with all necessary assistance for the performance of the duties defined in Article 29(3) and shall carry out the functions assigned to it in this Agreement and in any Protocol and any other functions assigned to it by the Charter Conference.
- (5) The Secretariat functions will be carried out on an interim basis by a provisional Secretariat until the entry into force of this Agreement pursuant to Article 39 and the appointment of a Secretariat under this Article.

Specific comments

31.1 : General reserve.

[ARTICLE 32]⁽¹⁾

FUNDING PRINCIPLES

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

Specific comments

32.1 : General reserve.

PART VIII**FINAL PROVISIONS**General comment

- General waiting reserve.
- With regard to Chairman's suggestion on new Article 28 (4) the reference to Protocol has been deleted from Articles 34, 36, 37 and 38.
- Articles 33, 34, 35, 36, 37, 38, 39, 39 BIS, 43 (except para 3), 44 and 45 had been reviewed by the Legal Sub-Group on 27 and 28 January 1993. The results are contained in document 12/93, LEG-7 of 2 February 1993.

ARTICLE 33**SIGNATURE**

This Agreement shall be open for signature at Lisbon from [] to [] by the States and Regional Economic Integration Organisations whose representatives signed the Charter.

ARTICLE 34**RATIFICATION, ACCEPTANCE OR APPROVAL**

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

Specific comments

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

[ARTICLE 35]⁽¹⁾

APPLICATION TO OVERSEAS TERRITORIES

- (1) Any State or Regional Economic Integration Organization may at the time of signature, ratification, acceptance, approval or accession declare that the Agreement shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Agreement enters into force for that Contracting Party.
- (2) Any Contracting Party may at a later date, by a declaration addressed to the Depository, extend the application of this Agreement to other territory specified in the declaration. In respect of such territory the Agreement shall enter into force on the ninetieth day following the receipt by the Depository 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 Depository. 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 Depository.

Specific comment

35.1: EC and N scrutiny reserve.

ARTICLE 36**ACCESSION**

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

Specific comments

36.1: EC suggests adding: "according to Article 33".

ARTICLE 37**AMENDMENT**

- (1) Any Contracting Party may propose amendments to this Agreement.
- (2) The text of any proposed amendment to this Agreement shall be communicated to the Contracting Parties by the Secretariat at least three months before the meeting at which it is proposed for adoption.
- (3) Amendments to this Agreement texts of which have been adopted in accordance with Article 29 shall be submitted by the Depository to all Contracting Parties for ratification, acceptance or approval.

(4) Ratification, acceptance or approval of amendments to this Agreement shall be notified to the Depository in writing. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after the receipt by the Depository of notification of their ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

ARTICLE 38

[ASSOCIATION AGREEMENTS]⁽¹⁾

Where, in order to further the implementation of the objectives and the principles of the Charter or the provisions of this Agreement, it is considered necessary or desirable by the Charter Conference referred to in Article 29 to permit a State, international organisation or Regional Economic Integration Organisation to associate itself with this Agreement, an Association Agreement shall be submitted to the Charter Conference for its consideration. Such Association Agreement shall set out clearly the rights, responsibilities and limitations of associate status for that State or organisation, [it being agreed that differing limitations may be applicable to different States or organisations depending upon the number of Protocols with which the State or organisation wishes to be associated, the nature of such Protocols and the level of association envisaged by the associating State or organisation and permitted by the Charter Conference].

Specific comments

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

ARTICLE 39
ENTRY INTO FORCE

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

[ARTICLE 39 BIS]⁽¹⁾

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

Specific comments

39 BIS. 1 : RO proposal.

The proposal is considered conditional depending on whether or not the substance is covered by Vienna Convention. RO submitted a written statement advocating its need for this Article which has been referred to the Legal Sub-Group.

[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 laws or constitutional requirements pending its entry into force in accordance with Articles 37 or 39]⁽²⁾⁽³⁾.

Specific comments

40.1: N scrutiny reserve.

40.2: J suggests replacing the whole Article with :

"(1) Any Signatory of this Agreement may notify the Depository that it will apply this Agreement provisionally to the extent that the obligations of this Agreement are not inconsistent with its national laws and regulations.

(2) The Depository shall inform all Contracting Parties and Signatories of the notification made in accordance with paragraph (1) of this Article."

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

40.3: CDN suggests replacing the whole Article with the following text that reflects one approach to addressing concerns expressed by the CDN delegation over the need to protect Investments made during the period of provisional application of the Basic Agreement.

This text is presented without prejudice to subsequent CDN comments on the drafting of the current text for Article 40 or on other measures necessary to give effect to the provisional application of the Basic Agreement:

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

(2) Any signatory may terminate its provisional application of this Agreement.* Termination of provisional application for any Signatory shall take effect upon the expiration of [one year] from the day on which such Signatory's written notice of its intention not to become a party to this Agreement is received by the Depository.

(3) Notwithstanding that a Signatory terminates its provisional application of this Agreement, Article 1 and Parts IV and V of this Agreement shall apply, in accordance with paragraph (1), to any investment made in the Domain of that Signatory prior to the effective date of termination of provisional application for a period of [twenty years] from such date."

* In CDN's view, the provisional application of amendments to the Basic Agreement should be addressed in the treaty instrument that embodies the amendment.

** The decision of Working Group II about the J proposal for Article 43(3), recorded in footnote 43.2, may bear upon the obligations to be established in this paragraph.

[ARTICLE 41]⁽¹⁾⁽²⁾

RESERVATIONS

[No reservations may be made to this Agreement but the following:

Each Contracting Party reserves the right to deny the advantages of this Agreement to a legal entity if citizens or nationals of a non-signatory country control such entity and if that entity has no substantial business activities in the Domain of the Contracting Party in which it is organised; or the denying Contracting Party does not maintain diplomatic relationship with the non-signatory or adopts or maintains measures with respect to the non-signatory that prohibit transactions with the Investor or that would be violated or circumvented if the advantages in Part IV of this Agreement were accorded to the Investor or to its Investments.]⁽³⁾

Specific comments

- 41.1: General reserve subject to finalisation of other Articles of this Agreement. Substance should be moved to Article 16 when the negotiations on this Article reach more advanced stage.
- 41.2: N reserve pending in particular the outcome of the Norwegian proposal on reservations in Article 16.
- 41.3: If no adequate solution shall be found in Article 16(3), the following reservation can also be made:

"Each Contracting Party reserves the right to deny an Investor to Make an Investment if the Investor has no substantial business activities in the Domain of a Contracting Party or if the ultimate parent company of the Investor is not located in the Domain of a Contracting Party."

In such a case attempt should be made to combine both types of reservations.

[ARTICLE 41 BIS]⁽¹⁾

INTERIM PROVISIONS ON TRADE RELATED MATTERS

By derogation from Article 5, so long as one or more Contracting Party is not a contracting party to the GATT and related instruments, the following provisions shall apply to trade between Contracting Parties at least one of which is not a member of the GATT:

- (1) (2) If such trade is governed by an existing bilateral agreement between those Contracting Parties, that agreement shall apply between them following notification to all other Contracting Parties by both Contracting Parties concerned provided that its application does not distort the trade of any third Contracting Party.
- (2) In all other cases trade in Energy Materials and Products shall be governed by the provisions of the GATT and related instruments, as in effect on 1 July 1992, except as provided in Annex G. The Charter Conference may amend Annex G by consensus.
- (3) (3) Each Signatory to this Agreement, and each State or Regional Economic Integration Organisation acceding to this Agreement, shall on the date of its signature or of its deposit of its instrument of accession, deposit with the Depository a list of all tariff rates and other charges at the level applied on such date of signature or deposit, on Energy Materials and Products imported into its Domain.
- (4) (3)(4) subject to paragraph (5) below, each Contracting Party undertakes not to increase any tariff rates or other charges on Energy Materials or Products above the level applied on the date of its signature or deposit as referred to in paragraph (3).

- (5) (3) Notwithstanding paragraph (4), a Contracting Party may maintain limited exceptions to the obligations of paragraph (4), provided that it deposits with the Depository on the date of signature or deposit as referred to in paragraph (3), along with the list referred to in paragraph (3), a list of such exceptions, specifically identified by reference to the HS or CN items to which such exceptions apply.
- (6 bis) (5) Appendix D to this Agreement shall apply to disputes regarding compliance with provisions applicable to trade under this Article, except that Appendix D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:
- (a) has been notified in accordance with and meets the other requirements of paragraph (1) of this Article; or
 - (b) establishes a free-trade area or a customs union as described in paragraph 5 of Article XXIV of the GATT.

ANNEX G

1. THE FOLLOWING PROVISIONS OF THE GATT AND RELATED INSTRUMENTS SHALL NOT BE APPLICABLE UNDER ARTICLE 41 BIS, PARA (2)

a) THE GATT

II	Schedule of Concessions
IV	Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXV	Joint Action by the Contracting Parties
XXII	Consultations

XXIII	Nullification and Impairment
XXVI	Acceptance, Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules
XXVIII bis	Tariff Negotiations
XXIX	The relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXIII	Accessions

XXXVI-XXXVIII Trade and Development

Appendix H

All ad articles in Appendix I related to above GATT Articles
Agreement on Government Procurement
Arrangement Regarding Bovine Meat
International Dairy Arrangement
The Multifiber Arrangement
Agreement on Trade in Civil Aircraft
Decision on Differential and More Favourable Treatment,
Reciprocity and Fuller Participation of Developing Countries
Decision on Safeguard Action for Development Purposes

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

Preamble (tirets 1, 8, 9)

1(3)

11

12

13

14

15 other than 15(13)

Annex 2

Annex 3

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

[3(1)-3(3)	Consultations]
[10	Export Subsidies on Certain Primary Products]
[12	Consultations]
13	Conciliation, Dispute Settlement and Authorised Countermeasures
14	Developing Countries
16	Committee on Subsidies and Countervailing Measures
17	Conciliation
18	Dispute Settlement
19(2)	Acceptance and Accession
19(3)	Reservations
19(4)	Entry into Force
19(6)	Review by Committee
19(7)	Amendments
19(8)	Withdrawal
[19(9)	Non-application between Particular Signatories]
19(11)	Secretariat
19(12)	Deposit
19(13)	Registration

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

14	(second sentence) Application of Annexes
18	Committee on Customs Valuation
19	Consultation
20	Dispute Settlement
21	Developing Countries
22	Acceptance and Accession
24	Entry into Force
[25	National Legislation]
26	Review

27 Amendment
28 Withdrawal
29 Secretariat Services
30 Depository
31 Registration
Annex II
Annex III
Protocol to the Agreement

e) THE AGREEMENT ON IMPORT LICENSING PROCEDURES

4
5 [except paragraphs (4) and (8)]

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

13 Developing Countries
14 Committee on Anti-Dumping Practices
15 Consultation, Conciliation and Dispute Settlement
16 Final Provisions, except paragraphs (1), (5), [(6), (10)]

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

4 to 13 inclusive

h) UNDERSTANDING REGARDING NOTIFICATION, CONSULTATION, DISPUTE SETTLEMENT AND SURVEILLANCE

all except paragraphs (1) to (4) inclusive

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

i) governmental assistance to economic development and the treatment of developing countries;

ii) the establishment of specialist committee and other subsidiary institutions;

iii) reconciliation and dispute resolution;

iv) matters which have no relevance to trade in Energy Materials and Products.

J) ALL FINAL PROVISIONS OTHER THAN IN THE GATT AND THE TOKYO ROUND AGREEMENTS

2. So long as one or more Contracting Party is not a Contracting Party to an instrument related to GATT, where a provision in such and instrument, requires matters to be notified to or through the GATT, the GATT Secretariat or a Committee, such matters shall be notified to or through the Secretariat established by Article 31 of this Agreement or such other body subsequently appointed by the Charter Conference.

[APPENDIX D](1)(2)

INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT

- (1) (a) In their relations with one another, Contracting Parties shall make every effort through co-operation and consultations to arrive at a mutually satisfactory resolution of any difference of views about existing measures that might materially affect compliance with the provisions applicable to trade under Article 41 BIS.

- (b) A Contracting Party may make a written request for consultations with any other Contracting Party regarding any existing measure of the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 41 BIS. A Contracting Party that requests consultations shall to the fullest extent possible indicate the measure complained of and specify the provisions of Article 41 BIS and of the GATT and Related Instruments that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretariat, who shall periodically inform the Contracting Parties of pending consultations that have been notified.
- (c) A Contracting Party shall treat any confidential or proprietary information identified as such and contained in or received in response to a written request, or received in the course of consultations, in the same manner that it is treated by the Contracting Party providing the information.
- [(d) In seeking to resolve matters that are considered by a Contracting Party to affect compliance with Article 41 BIS as between itself and another Contracting Party, the Contracting Parties participating in consultations or other dispute settlement shall make every effort to avoid a resolution that adversely affects the trade of any other Contracting Party.](3)
- (2) (a) If the Contracting Parties have not within 60 days from the request for consultation under paragraph (1) (b) above resolved their dispute or agreed to resolve it by conciliation, mediation, arbitration or other method, either Contracting Party may deliver to the Secretariat a written request for the establishment of a panel in accordance with paragraph (2) (b)-(d) below. In its request it shall state the substance of the dispute and indicate which provisions of Article 41 BIS and of the GATT and related instruments are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.

- (b) Any other Contracting Party which [has a substantial interest in the matter]⁽⁴⁾ shall be entitled to participate as an intervenor in the dispute resolution by delivering to the disputing Contracting Parties, to any other Contracting Party that has joined as an intervenor under this subparagraph, and to the Secretariat, no later than the date of establishment of a panel as determined in accordance with paragraph (2) (c) below, written notice of its intention to participate. An intervenor shall have the right to make submissions to the panel and to participate in the panel proceedings.
- (c) A panel shall be deemed to be established 45 days after the date of receipt of the written request of a Contracting Party by the Secretariat pursuant to paragraph (2)(a) above.
- (d) (5) A panel shall be composed of three members who shall be chosen from the dispute settlement roster⁽⁶⁾ described in paragraph (7) below. Within 15 days of establishment of the panel each of the two original disputing Contracting Parties shall choose one member of the panel. The disputing Contracting Parties shall agree on the identity of the third panellist who shall chair the panel. If a Contracting Party fails to choose a panellist within 15 days, such panellist shall be chosen promptly by the Secretary-General from the roster described in paragraph (7) below. If the Contracting Parties are unable to agree upon the third panellist within 10 days of the selection of the second of the first two panellists, the third panellist shall be chosen promptly by the Secretary-General from the roster described in paragraph (7) below.

No panellist chosen shall be a citizen of either of the disputing Contracting Parties or any other Contracting Party which as of the time of selection of the panel has delivered a written notice under paragraph (2)(b) unless both of the disputing Contracting Parties agree otherwise.

- (e) [The Secretariat shall promptly notify all Contracting Parties that a panel has been composed.]
- (3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Appendix. Rules of procedure shall be as closely as possible to those of GATT. The panel shall also have the right to adopt additional rules of procedure not inconsistent with the rules of procedure adopted by the Charter Conference or with this Appendix. In a proceeding before a panel each participating Contracting Party shall have the right to at least one hearing before the panel, to provide a written submission and written rebuttal argument. [The proceedings of the panel shall be confidential.](7) A panel shall make an objective assessment of the matters before it, including the facts of the dispute and the compliance of measures and conduct with the provisions applicable under Article 41 BIS. In exercising its functions, a panel shall consult with the disputing Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by the disputing Contracting Parties, the panel shall base its decision on the arguments and submissions of the participating Contracting Parties. Panels shall be guided by the interpretations given to the GATT and related instruments within the GATT and by relevant bodies within the framework of GATT.

Unless otherwise agreed by the disputing Contracting Parties, all procedures involving the panel, including the issuance of its final report, should be completed within 180 days of the date of establishment of the panel; however, a failure to complete all procedures within this period shall not affect the validity of a final report.

- (b) A panel shall be the judge of its own jurisdiction. Any objection by a disputing Contracting Party in the dispute resolution that a dispute is not within the jurisdiction of the panel shall be considered by the panel, which shall decide whether to deal with the objection as a preliminary question or to join it to the merits of the dispute.
- (c) In the event of two or more requests for establishment of a panel in relation to disputes that are substantively similar, the Secretary-General may with the consent of all the disputing Contracting Parties appoint a single panel.
- (4) (a) After having considered rebuttal arguments, a panel shall submit to the disputing Contracting Parties the descriptive sections of its draft written report, including a statement of the facts and a summary of the arguments made by the participating Contracting Parties. All participating Contracting Parties shall be afforded an opportunity to submit written comments on the descriptive sections within a period set by the panel.(8)

Following the date set for receipt of comments from the Contracting Parties, the panel shall issue to the disputing Contracting Parties an interim written report, including both the descriptive sections and the panel's proposed findings and conclusions. Within a period set by the panel a disputing Contracting Party may submit to the panel a written request that the panel review specific aspects of the interim report before issuing a final report. Before issuing a final report, the panel may, in its discretion, meet with the disputing Contracting Parties to consider, the issues raised in such a request.

The final report shall include both descriptive sections, including a statement of the facts and a summary of the arguments made by the participating Contracting Parties, and the panel's findings and conclusions; it also shall include a discussion of arguments made on specific aspects of the interim report at the stage of reviewing the interim report. The final report shall deal with every substantial issue raised before the panel and necessary to the resolution of the dispute and shall state the reasons for the panel's conclusions.

A panel shall issue its final report by providing it promptly to the Secretariat and to the participating Contracting Parties. [The Secretariat shall at the earliest practicable opportunity distribute the final report, together with any written views that a participating Contracting Party desires to have appended, to all Contracting Parties.]

- (b) Where a panel concludes that a measure, introduced or maintained by, or other conduct of, a Contracting Party does not comply with a provision of Article 41 BIS or with a provision of the GATT and Related Instruments that applies under Article 41 BIS, the panel may recommend in its final report that the Contracting Party alter or abandon the measure or conduct so as to be in compliance with that provision.
- (c) Panel reports shall be adopted by the Charter Conference, acting by [a three fourths majority vote]⁽⁹⁾ in accordance with Article 30(5). In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be considered for adoption by the Charter Conference until at least 30 days after it has been provided to all Contracting Parties by the Secretariat. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretariat at least 10 days prior to the date on which the report is to be considered for adoption

by the Charter Conference, and the Secretariat shall promptly provide them to all Contracting Parties. Participating Contracting Parties shall have the right to participate fully in the consideration of the panel report on that dispute by the Charter Conference, and their views shall be fully recorded.

- (d) In order to ensure effective resolution of disputes to the benefit of all Contracting Parties, prompt compliance with rulings and recommendations of a final panel report that has been adopted by the Charter Conference is essential. A Contracting Party which is subject to a ruling or recommendation of a final panel report that has been adopted by the Charter Conference shall inform the Charter Conference of its intentions in respect to complying with such ruling or recommendation. If it is impracticable to comply immediately, the Contracting Party concerned shall explain to the Charter Conference why this is so and shall, in light of this explanation, have a reasonable period of time in which to so comply. The aim of dispute resolution is the modification or removal of inconsistent measures.
- (5) (a) Where a Contracting Party has failed within a reasonable period of time to comply with a ruling or recommendation of a final panel report that has been adopted by the Charter Conference, a Contracting Party to the dispute injured by such noncompliance may deliver to the noncomplying Contracting Party a written request that the noncomplying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the noncomplying Contracting Party shall promptly enter into such negotiations.
- (b) If the noncomplying Contracting Party refuses to negotiate, or if the Contracting Parties have not reached agreement within 30 days after delivery of the request for negotiations, the injured Contracting Party may make a written request for authorisation of the Charter Conference to suspend obligations owed by it to the noncomplying Contracting Party under Article 41 BIS.

- (c) The Charter Conference, acting by [a three fourths majority vote]⁽⁹⁾ in accordance with Article 30(5), may authorise the injured Contracting Party to suspend obligations to the noncomplying Contracting Party which the injured Contracting Party considers equivalent in the circumstances.
- (d) The suspension of obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with Article 41 BIS has been removed, or the Party that must implement recommendations or rulings provides a mutually acceptable solution or a mutually satisfactory solution is reached.
- (6) (a) Before suspending such obligations the injured Contracting Party shall inform the noncomplying Contracting Party of the nature and level of its proposed suspension. If the noncomplying Contracting Party delivers to the Secretary-General a written objection to the level of suspension of obligations proposed by the injured Contracting Party, the objection shall be referred to arbitration as provided below in this paragraph, and the suspension of obligations shall be stayed until the arbitration has been completed and the determination of the arbitral panel has become final and binding in accordance with paragraph (6) (e) below.
- (b) The Secretary-General shall establish an arbitral panel in accordance with paragraph (2)(d), though if practicable it shall be the same panel that made the ruling or recommendation referred to in paragraph (4)(d) above, to examine the level of obligations that the injured Contracting Party proposes to suspend. Unless the Charter Conference decides otherwise the rules of procedure for panel proceedings shall be adopted in accordance with paragraph 3(a).

- (c) The arbitral panel shall determine whether the level of obligations proposed to be suspended by the Injured Contracting Party is excessive in relation to the injury it experienced, and if so, to what extent. It shall not review the nature of the obligations suspended, except insofar as the nature of such obligations may be inseparable from the panel's determination with regard to the level of suspended obligations.
- (d) The arbitral panel shall deliver its written determination to the suspending and the noncomplying Contracting Parties and to the Secretariat within 60 days after the panel has been established or within such other period as may be agreed by the suspending and the noncomplying Contracting Parties. The Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than its next meeting following receipt of the determination.
- (e) The determination of the arbitral panel shall become final and binding 30 days after the date of its presentation to the Charter Conference, and any level of suspension of benefits allowed thereby may thereupon be put into effect by the injured Contracting Party in such manner as that Contracting Party considers equivalent in the circumstances, unless prior to the expiration of the 30 days period, the Charter Conference, acting by a three fourths majority vote in accordance with Article 30(5), decides otherwise.
- (f) In suspending any obligations to a noncomplying Contracting Party, an injured Contracting Party shall make every effort not to adversely affect the trade of any other Contracting Party.

- (7) Each Contracting Party may designate two individuals, who shall, in the case of Contracting Parties who are also contracting parties to the GATT, if they are willing and able to serve as panellists under this Article, be panellists currently nominated for the purpose of GATT dispute panels. The Secretary-General may also designate, with the approval of the Charter Conference, acting by consensus, not more than ten individuals, who are willing and able to serve as panellists for purposes of dispute resolution in accordance with paragraphs (2) to (4) above. The Charter Conference may in addition decide, acting by consensus, to designate for the same purposes, up to 20 individuals who serve on dispute settlement rosters of other international bodies, who are willing and able to serve as panellists. The names of all of the individuals so designated shall constitute the dispute settlement roster. Individuals shall be designated strictly on the basis of objectivity, reliability and sound judgement and, to the greatest extent possible, shall have expertise in international trade and energy matters, in particular as relates to provisions applicable under Article 41 BIS; they need not be citizens of the designating country. In fulfilling any function under this Appendix, designees shall not be affiliated with or take instructions from any Contracting Party. Designees shall serve for renewable terms of five years and until their successors have been designated. A designee whose term expires shall continue to fulfil any function for which that individual has been chosen under this Appendix. In the case of death, resignation or incapacity of a designee, the Contracting Party or the Secretary General, whichever designated said designee, shall have the right to designate another individual to serve for the remainder of that designee's term, the designation by the Secretary-General being subject to approval of the Charter Conference, acting by consensus.
- (8) Notwithstanding the provisions contained in this Appendix, Contracting Parties are encouraged to consult throughout the pendency of any dispute resolution proceeding with a view to settling their dispute.

- (9) The Charter Conference may appoint other bodies or foras to perform the function ascribed in this Article to the Secretariat and the Secretary-General.
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General comments

- The references to the Secretariat and Charter Conference are without prejudice to resolution of Institutional questions in the final text of the Basic Agreement.
 - Article 41 TER is deleted and the substance thereof is contained in Appendix D to Article 41 BIS of the Basic Agreement.
 - New paragraph (6 bis) and Appendix D create, together with the new concept of Article 24, a package to be viewed in a totality (see general comments on Article 24).
 - The accompanying document will include wording to encourage the closest possible liaison between Charter and GATT institutions to minimise the risk of inconsistency between findings by GATT panels and by panels established under this Article.
 - The set up and treatment of Annex G are Chairman's proposals derived from discussion in WG II on 1 February 1993.
 - Some delegations have indicated that they wish to maintain a general reserve with respect to Appendix D pending resolution of the question of Charter institutions. Chairman agreed that it may be necessary to revisit Appendix D in the light of that resolution.
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Specific comments

41 BIS.1 : General scrutiny reserve.

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

- 41 BIS.3 : USA reserve on paragraphs (3), (4) and (5).
- 41 BIS.4 : H reserve on para (4) pending the final agreement on the scope of definitions in Article 1.
- 41 BIS.5 : RUF stated that it might need to come back to para (6 bis) if there are any changes in Article 41 BIS.
- 41 BIS.D.1: N and J reserve.
- 41 BIS.D.2: USA believes the draft Appendix D to be too elaborate in relation to the problem it seeks to address. Furthermore USA suggests that time periods specified should reflect the corresponding time periods under GATT.
- 41 BIS.D.3: J reserve.
- 41 BIS.D.4: CH suggests replacing with "can justify an interest related to the obligations of the Basic Agreement."
- 41 BIS.D.5: AUS and EC will draft a proposal for amending the approach to align the methods of selecting the panellists with those in GATT.
- 41 BIS.D.6: Possible Ministerial declaration strongly to encourage GATT members to appoint the same panellists for the BA-roster. USA reserve on the need for a roster of potential panel members. And if, then much smaller.
- 41 BIS.D.7: USA suggests consideration as to ensure effective protection of confidential information.
- 41 BIS.D.8: AUS will propose any amendments needed to limit the rights of intervention by third Parties to the dispute to written submissions in line with their rights under GATT procedures.

41 BIS.D.9: Possible substitution with:

- a) "Consensus", followed by additional GATT provisions such as an appellate body.
- b) "Consensus of all Parties other than the disputant Parties".

ARTICLE 41 QUAT - deleted

ARTICLE 42

TRANSITIONAL ARRANGEMENTS

(1) The Signatories recognise that, due to the need to adapt to the requirements of a market economy, certain Contracting Parties of Central and Eastern Europe and the former USSR may be unable to implement some of the provisions of this Agreement immediately or fully upon entry into force thereof. Therefore, any of the eligible Contracting Parties which wishes to be exempted from the implementation of provisions of this Agreement other than Article 41 BIS (4) should invoke transitional arrangements by depositing, prior to signing this Agreement, a Note setting out the provisions with which it cannot fully and immediately comply and a timetable for the implementation of the measures to effect complete compliance.

(2) Transitional arrangements shall be agreed upon before the end of the negotiations of this Agreement and will constitute an integral part of it.

- (3) Transitional arrangements will not exceed [a period of three years after entry into force of this Agreement](1). In exceptional cases the Charter Conference can decide to prolong this period by one year(2).
- (4) A Contracting Party which has invoked transitional arrangements shall notify the Secretariat:
- (a) of the implementation of any measures needed to effect compliance;
 - [(b) of the need for technical assistance facilitating full and complete implementation of this Agreement;](3)(4)
 - (c) of any application to the Charter Conference to extend the timetable for achieving compliance in respect of any particular provision which is subject to the maximum periods in paragraph (3) above.
- (5) The Secretariat shall:
- (a) circulate to all Contracting Parties the Notes referred to in paragraph (1) above;
 - [(b) circulate and actively promote the matching of requests and offers for technical assistance referred to in paragraph 4(b);](3)(4)
 - (c) circulate to all Contracting Parties at the end of each six month period a summary of any notifications made under subparagraph 4(a) above and of any applications under subparagraph 4(c) above.
- (6) The Charter Conference shall review annually the progress by Contracting Parties towards implementation of the provisions of this Article in accordance with Article 29(4) [at the same time as it reviews progress under Article 16 (6)].(6)

General comment

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

Specific comments

- 42.1: H can accept 5 years after entry into force as a minimum. As an alternative a substitution with a specific date (1.1.98) had been suggested.
- 42.2: It was suggested to add after one year "at a time, taking into account provisions of Article 30(5)".
- 42.3: J does not deny the importance of technical assistance in general, but doubts relevance of stipulating in the BA arrangements including matchmaking for specific technical assistance measures, since there are in its view other appropriate international fora which deal with those issues in detail and effectiveness.
- 42.4: H points out that this formulation does not reflect the views expressed by delegations during the discussion of TA Sub-Group in relation to the need for undertaking obligations for assisting to the transformation process in a broad sense.
- 42.5: H reserve on para (5) pointing out that review mechanism and frequency should be agreed only after cleaning up of the institutional aspects.
- 42.6: EC asks for deletion in accordance with a similar deletion in para (2).

ARTICLE 43

WITHDRAWAL

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

- 43.1: N will present a proposal after examination of the Basic Agreement with a purpose of refining this Article indicating provisions from other Articles which should not apply to Article 43.

43.2: J proposes substituting with:

"The provisions of this Agreement shall continue to be effective for a period twenty years from the date when the withdrawal of a Contracting Party takes effect, in respect of Investments and Returns acquired prior to such date in the Domain of the Contracting Party by Investors of other Contracting Parties and in the Domains of other Contracting Parties by Investors of that Contracting Party".

ARTICLE 44

DEPOSITORY

- (1) The Government of the Portuguese Republic shall assume the functions of Depository of this Agreement.
- (2) The Depository shall inform the Contracting Parties and Signatories to the Charter by sending them certified copies, in particular, of:
- (a) the signature of this Agreement, or Association Agreement and the deposit of instruments of ratification, acceptance, approval or accession in accordance with Articles 34 and 36;
 - [(a bis) any reservation made under Article 41];(1)
 - (b) the date on which the Agreement, or Association Agreement will come into force in accordance with Article 39;
 - (c) notification of withdrawal made in accordance with Article 43;
 - (d) amendments adopted with respect to the Agreement, or Association Agreement, their acceptance by the Contracting Parties thereto and their date of entry into force in accordance with Article 37;
 - (e) any other declaration or notification concerning this Agreement.

Specific comments

44.1: Pending the outcome of deliberation of Article 41.

ARTICLE 45

AUTHENTIC TEXTS

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

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

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

Specific comments

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

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

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