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DATE: *20.12.91*  
Date: .....

FOR THE ATTENTION OF: *MR C WAETERHOOS*  
A l'attention de: .....

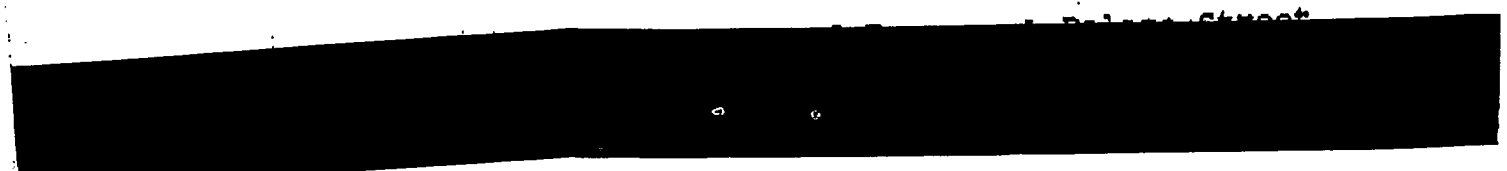
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TIME: ..... PAGES: 1+  
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COMMENTS:  
Commentaire:



ANNEX

EUROPEAN ENERGY CHARTER: BASIC AGREEMENT

PROPOSALS FOR REVISED DRAFTING ON TRADE POLICY OBLIGATIONS AND RELATIONSHIP TO GATT

Preamble

Unchanged. In particular, retain existing references to trade liberalisation, to GATT and to other relevant international organisations.

Article 1 - Definitions

Retain Article 1(8) - definition of "GATT-related instrument".

Article 3 - Relationship to other agreements

Delete paragraph 3(2).

Article 8 Standards

Delete whole Article.

Article 9 - Procurement policies

Delete paragraph 9(2).

Article 10

Delete whole Article and replace with the following:

"Article 10 - liberalisation and non-discrimination"

- (1) Contracting parties declare their intention to work for the elimination of customs duties and other charges or restrictions on imports and exports of [Energy Materials and Products] and related equipment and services so as to achieve the greatest possible degree of liberalisation in the market.
- (2) In particular, Contracting parties undertake in relation to [Energy Materials and Products] and related equipment and services:
  - (a) Not to introduce new restrictions on imports or exports as from the date of entry into force of this Agreement;

- (b) Not to apply any customs duties, charges or other regulations relating to importation or exportation in a discriminatory manner as between other Contracting Parties, provided that Contracting parties may take action according to agreed international criteria against unfair trading practices;
- (c) Not to apply internal laws, taxes, charges, standards or other regulations in such a manner as to treat domestic products more favourably than those of other Contracting Parties, or to discriminate on the basis of nationality of origin of an investor."

Article 11 - Freedom of movement

Delete.

Article 14 - Unfair trade and subsidisation

Delete.

Article 33 - Disputes between Contracting Parties

Paragraph (3) - In line 1, delete "Subject to paragraph (4) below". Insert the following:

"The provisions of the General Agreement on Tariffs and Trade or a GATT-related instrument shall prevail as between Contracting Parties who are also parties to the GATT or the GATT-related instrument concerned."

Paragraph (4) - Delete whole paragraph.



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20 December 1991

*Dear Mr Miguens,*

### EUROPEAN ENERGY CHARTER: BASIC AGREEMENT TRANSPORT AND TRANSIT

I attach a complete redraft of Article 11 on Transit. I have decided that the current draft, which was based on the GATT provisions drawn up in 1948, is quite inappropriate to today's energy movements and was a source of confusion as to its meaning. The redraft starts from provisions in the EEA but I have added other material. Of this the most important provisions follow from the discussion in the Ad Hoc Group on 10-11 December: they are:

Para 2 which provides the framework for including in sectoral protocols more detailed provisions which could reproduce our transit directives and also provide for other forms of co-operation between grid companies;

Para 7 which provides machinery for conciliation should a dispute over transit threaten to interrupt the flow of oil or gas and thus threaten the security of the Community's gas supplies.

The redraft is quite long and it may be possible with a bit of thought to compress the provisions into fewer paragraphs. I do not think its substance should arouse any controversy among Community Member States but I am less certain how acceptable it will be to the negotiating parties outside the EC. I have not yet cleared it either with our Department of Transport or our Legal Advisers; any points they might wish to make on it I can bring with me to our meeting on 13-14 January.

I am sending copies of this letter and draft to Laurens Knegt and Christian Waeterloos.

*Yours sincerely,*  
*Sydney Fremantle*

S W Fremantle

*Best wishes for a happy Christmas & a prosperous New Year*



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20 December 1991

*Dear Mr Miguens,*

### ENERGY CHARTER BASIC AGREEMENT: RELATION TO GATT

I attach a discussion paper prepared by Michael Johnson who looks GATT matters in our Department of Trade and Industry following conversations he and Mr Ervik of the Charter Secretariat had with the GATT Secretariat. The paper is self-explanatory.

You will notice that the paper does not accord with the conclusions of the Ad Hoc Group on 10-11 December. This departure, which is justified in the paper, follows the strong recommendations of the GATT Secretariat. The avoidance of references to GATT in the Basic Agreement enables us considerably to simplify the draft, reduces the risk that we might have to extend the rights under the Basic Agreement to GATT members who are not members of the Charter, and should be considerably more acceptable to the Russians and other non-GATT members of the Charter.

I am sending copies to Laurens Knegt and Christian Waeterloos.

*Yours sincerely,*

*Sydney Green*

S W Fremantle

ARTICLE 11 - TRANSPORT AND TRANSIT

1. Each Contracting Party undertakes to facilitate the transit through its territory of Energy Materials and Products between two or more Contracting Parties, without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to the pricing on the basis of such distinction, and without imposing any unnecessary or unreasonable delays, restrictions or charges.

2. CPs shall co-operate in or, as appropriate, encourage relevant entities to co-operate in:

- (i) minimising the cost of transit and related operations necessary to the supply of [Energy Materials and Products] through existing pipelines and transmission lines;
- (ii) the development and operation of transport infrastructure serving the territory of more than one CP to minimise the costs of that infrastructure;
- (iii) measures to mitigate the effects of an interruption in the supply of [Energy Materials and Products].

Sectoral Protocols may include binding provisions to achieve these objectives.

3. Each CP undertakes that its provisions relative to transport of [Energy Materials and Products] by rail, road, inland waterway or sea, shall not be made less favourable in their direct or indirect effect on carriers of other states as compared with carriers who are nationals of another CP as compared with carriers who are nationals of that state or less favourable for [Energy Materials or Products] originating in or destined for the territory of another CP compared with such [Materials or Products] originating in or destined for its own territory.

4. In the case of transport within its territory each CP will prohibit discrimination which takes the form of carriers or other providers of transportation services or harbour facilities charging different rates and imposing different conditions in respect of the same [Energy Materials and Products] over the same transport links on grounds of the country of origin or of destination of the goods in question.

5. Each CP undertakes that its provisions relative to the construction and use of pipelines or high voltage transmission lines shall not be less favourable in their direct or indirect effect for pipelines or transmission lines carrying [Energy Products or Materials] wholly or partly originating in or destined for the territory of another CP compared with such

[Energy Materials or Products] wholly originating in or destined for its own territory.

6. In the event that access to an existing pipeline or transmission line within a CP cannot be obtained on acceptable terms for transit of [Energy Materials or Products] from another CP to a third CP, the CP shall permit new capacity to be established in accordance with its applicable legislation inter alia on safety, environmental protection and land use.

7. In the event of a dispute over the terms and conditions of transit of [Energy Materials and Products] through pipeline or transmission lines in the territory of a CP to the territory of another CP or to or from port facilities for loading or unloading a CP through which the [Energy Materials or Products] transit shall not interrupt nor permit any entity subject to his jurisdiction to interrupt the flow of [Energy Materials or Products] until after the dispute has been referred to the Governing Council and the Governing Council has had adequate time to seek conciliation between the parties in dispute.

8. The provisions of this Article shall not require a Contracting Party to take action which reduces substantially its security of energy supply or impedes the optimisation of local electricity grids.

**EUROPEAN ENERGY CHARTER: BASIC AGREEMENT**  
**RELATIONSHIP TO GATT - MAIN ISSUES**

**A. Purpose of negotiation on trade policy principles**

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

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

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

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

**B. Classes of participants**

4. The current negotiation involves two classes of participants:

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

In addition attention has to be paid to:

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

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

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

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

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

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

C. Objectives of participants who are GATT Contracting Parties

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

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

D. Objectives of participants who are not in GATT

7. Charter parties falling in group (b):

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

E. Negotiating objectives

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

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

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

## F. Possible relationships to GATT

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

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

### Advantages: - Clarity

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

### Faults:

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

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

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

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

### Faults: - Very cumbersome

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

#### G. Appraisal

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

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

#### H. Essential interests

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

- tariffs and other international trade policy regulations relating to products

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

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

#### I. A new approach

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

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

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

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

## J. Conclusion and drafting suggestions

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

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

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

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

Department of Trade and Industry  
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London  
December 1991