

Brussels, 21 October 1992

NOTE FROM THE SECRETARIAT

Subject : Basic Agreement

The next scheduled meeting of Working Group II will address most of the Articles contained in the Basic Agreement. Accordingly, an updated version of the Basic Agreement has been prepared and is annexed hereto.

Delegations should note that there are 4 additional documents forthcoming which are relevant to the work of the next meeting of WGII and Sub-Groups. These are:

- 1) Memorandum prepared by USA on expressions used in Article 14 (for discussion in the next meeting of the Sub-Group on Article 14) - due no later than 30 October 1992;
- 2) Suggestion from the Sub-Group chaired by CDN and composed of AUS, CH and USA on a new Balance of Payments provision in Article 19 - due no later than 4 November 1992;
- 3) Updated version of Article 20 based on comments from the members of the Taxation Sub-Group (for discussion at the next Taxation Sub-Group meeting) - due no later than 2 November 1992; and

- 4) First draft of Article 41 TER on interim trade dispute settlement based on USA conceptual approach as prepared by ad hoc Sub-Group under the chairmanship of Mr. Craig Bamberger and composed of representatives from A, CH, CDN and RUF - due no later than 2 November 1992.

The Secretariat will distribute those documents as soon as available.

The Secretariat also reminds delegations of their commitments to consider and advise the Secretariat on particular footnotes of the Basic Agreement, as listed below:

Responsible Delegations

- 1) Footnote 1.1 - EC
- 2) Footnote 1.25 - Sub-Group chaired by AUS and consisting of USA, CDN, EC and C. Bamberger
- 3) Footnote 8.4 - USA
- 4) Footnote 8.7 - EC
- 5) Footnote 24.3 - Sub-Group chaired by Mr. Bamberger and consisting of A, CH, CDN and RUF on Article 41 TER
- 6) Footnote 34.1 - Legal Sub-Group

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

53/92 ANNEX

BA-22

RESTRICTED

Brussels, 21 October 1992

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;⁽¹⁾
- (3) (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 minerals and their compounds.
	26.12.10	Uranium minerals and their compounds.
	[26.12.20	Thorium minerals and their compounds]. ⁽³⁾

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].(3)

28.44.30 Uranium depleted in U235 and its compounds; [thorium and its compounds].(3)

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 fuel elements (cells) of nuclear reactors.

[28.45.10 Heavy water.](4)

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 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, lignite or peat and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.

[27.07 Oils and other products of the distillation or high temperature coal tars, whether or not dehydrated or partially distilled, including reconstituted tars (e.g. benzoles, toluoles, xyloles, naphthalenes, other aromatic hydrocarbon mixtures, phenoles, creosote oils and others).] (5)

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
- butane
- ethylene, propylene, butylene, butadiene
- other

in gaseous state:

- natural gas
- other

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

27.14 Bitumen and asphalt natural; bituminous or oil shale and tar sands; asphaltities 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 non saturated as ethylene, propylene, butylene and its isomeres, butadiene and its isomeres and others).](5)

[29.02 Cyclic hydrocarbons (e.g. cyclohexane, benzene, toluene, xylenes and their mixtures, styrene, ethylbenzene and others).](5)

Renewable Energy

[22.07.20 Ethylalcohol and any forms or denaturated spirits.](6)(7)

29.05.11 Methanol (methylalcohol).

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.

(4) "Investment" means every kind of [energy asset](8) owned [or controlled, directly or indirectly],(9) by investors of one Contracting Party. [In particular, though not exclusively, it includes any of the following:](10)

(a) tangible or intangible, movable and immovable property and any other related property rights such as mortgages, liens or pledges as well as leases;(11)

(b) shares in, or stock, or other forms of equity, bonds or debentures or debt(12) of, or any other form of participation including minority forms in, a company or business enterprise;

(c) claims to money and claims to performance under contract having an economic value [and associated with an investment;](13)

(d) [Intellectual Property;](14)

(e) [any right conferred by law or contract, relating to an investment or by virtue of any licences and permits pursuant to law];(15)(16)

(17)

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 or 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.

(5) "Investor" means [with regard to a Contracting Party:](18)

(a) natural persons having the citizenship [or nationality](19) of(20) that Contracting Party in accordance with its laws;

(b) [companies or other organisations under the laws and regulations applicable in that Contracting Party.](21)

(6) "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;

(7) "Returns" means the amounts yielded in pecuniary form or in kind by an investment and includes profits, interest, capital gains, dividends, royalties and fees.

(8) "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, seabed and its subsoil over which that Contracting Party exercises, in accordance with international law, sovereign rights or jurisdiction. [With respect to a Regional Economic Integration Organisation which is or becomes a Contracting Party to this Agreement the term "Domain" shall be construed as meaning the respective territories of those member states of such organisation which are also Contracting Parties to this Agreement, to the extent of that organisation's competence in the matters which are the subject of this Agreement in those territories](22).

(9) "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.

(10) ["Intellectual Property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967(23)(24).](25)

(11) "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.

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

Specific comments

- 1.1 : EC will submit the definition of the Regional Economic Integration Organization for the November meeting of Legal Drafting Sub-Group.
- 1.2 : General scrutiny reserve. This definition only applies to trade Articles of the Basic Agreement.
- 1.3 : CDN supported by USA suggests deletion.
- 1.4 : J scrutiny reserve.
- 1.5 : CDN asks for deletion.
- 1.6 : CDN suggests deletion.
- 1.7 : CH scrutiny reserve.
- 1.8 : H and J scrutiny reserve. J suggests replacing with: "asset in energy field".
- 1.9 : RUF scrutiny reserve.
- 1.10 : CDN proposes substituting with: "it consists of the following:". CDN considers the list should be exclusive rather than illustrative.
- 1.11 : CDN proposes the addition of: "acquired in the expectation or used for the purpose of economic benefits or the business purposes".

- 1.12 : CDN proposes the addition of: "with a repayment period of one year or more".
- 1.13 : 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."
- 1.14 : CDN scrutiny reserve pending clarification of relationship between Articles 7, 16 and 18.
- 1.15 : Subject to scrutiny reserve by all delegations.
- 1.16 : On the basis of the previous text, CDN proposed the addition of the proviso that "such activity includes the commitment of capital or other resources in the Domain of another Contracting Party." The Chairman suggested consideration of this as a substantive provision under Article 16.
- 1.17 : 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 claim to money;

which do not involve the kinds of interests as specified in portions (a) through (d) in the preceding paragraphs shall not be considered investments."

1.18 : Drafting group established for 5(b) recommends change in language of the chapeau which will require either discussion in WG II or assignment to Legal Sub-Group for consideration.

1.19 : H scrutiny reserve.

1.20 : AUS asks for insertion of : "or who are permanently residing in".

1.21 : USA, N and CDN reserve. All reserve right to revisit this definition should a satisfactory solution not be reached to the issue expressed in USA footnote 1.33 contained in BA-14. Footnote 1.33 in BA-14, which the USA suggested be added to Article 1 or Article 16, read as follows :

"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 non substantial business activities in the Domain of the Contracting Party in which it is organised; or the denying Contracting Party does not maintain normal economic relations with the non-signatory country the nationals of which control such entity."

1.22 : EC will propose a new text.

1.23 : AUS suggests adding: "and shall also include confidential information (including trade secrets and know-how), circuit layouts and semi-conductor chips and unregistered trademarks".

1.24 : USA supports AUS footnote 1.23 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".

1.25 : Sub-Group chaired by AUS and consisting of USA, CDN, EC and the Chairman of Legal Sub-Group should prepare for the November meeting of WG II 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). The Secretariat will contact relevant bodies with the aim of informing negotiating parties on the progress and content of TRIPS negotiations.

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/field]. [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

- (1) Trade in Energy Materials and Products between Contracting Parties shall be governed by the provisions of the GATT and related instruments, other than the Agreement on Government Procurement and agreements, arrangements, decisions, understandings, declarations and other joint action pursuant to that latter Agreement.
- (2) [(Depending upon definitions agreed under Article 1 (11) and text agreed to Article 28) Protocols may compliment, supplement, extend or amplify the provisions of the GATT and related instruments but may not conflict with them.]
- (3) The GATT Agreement on Technical Barriers to Trade shall govern the provisions of Contracting Parties relating to the technical regulations and standards for investments.

General comments

There are presently 4 alternative texts for Article 5, only one of which, the Chairman's revised compromise text, is herein represented. For reference to the other three texts, see document 40/92, BA-18 of 18 September 1992.

**ARTICLE 6
PROCUREMENT POLICIES**

- (1) Contracting Parties will make best efforts to apply the provisions of the GATT Agreement on Government Procurement to the procurement of Energy Materials and Products by government controlled entities and to the procurement of works, equipment and services by government controlled entities producing Energy Materials and Products.
- (2) Each Contracting Party undertakes that if it grants to any entity exclusive or special privileges in the field of energy it shall not require that entity in the procurement of works, equipment or services to afford protection to domestic products or suppliers or to discriminate among foreign products or suppliers. Moreover each Contracting Party undertakes that it shall encourage any such entity to provide transparency of procedures and practices regarding its procurement.

**[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 : AUS and USA 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 markets, insofar as they may affect trade between Contracting Parties.

(2) Contracting Parties shall ensure that within their jurisdiction they have and [enforce](2) such laws, as are necessary and appropriate to address unilateral and concerted anti-competitive conduct(3) in the areas covered by this Agreement.

[Where Contracting Parties already have such laws, their scope, interpretation or implementation shall not be affected by this Article](4).

(3) (5) 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 practice carried out within the Domain of another Contracting Party is adversely affecting an important interest, the Contracting Party may notify and request consultations with the other Contracting Party. The notifying Contracting Party shall include, in such notices and consultations, sufficient information to permit the other Contracting Party to identify the anti-competitive activities that are the subject of the notification.

Upon receipt of a notification under this Article, a Contracting Party [may consider whether to initiate (6) action within its national jurisdiction including, where appropriate, additional or expanded enforcement activities]⁽⁷⁾ to remedy the anti-competitive activities identified in the notification.

- (6) [The procedures set forth in paragraph 5 above shall be the exclusive means of resolving any disputes that may arise over the implementation of this Article.]⁽⁸⁾

Specific comments

- 8.1 : N scrutiny reserve on whole Article.
- 8.2 : USA scrutiny reserve.
- 8.3 : EC, GB suggest insertion of "and exploitative abuses".
- 8.4 : Contingency reserve by J and USA. USA is considering, if necessary, to submit a particular wording to the Secretariat.
- 8.5 : Article 42 could contain an appropriate reference to the notion of paragraph 8.3. To the attention of the Transitional Subgroup.

8.6 : AUS proposes inserting of "legitimate".

8.7 : N suggests replacing with "shall seek". EC will propose a compromise text incorporating N suggestion and current text.

8.8 : General scrutiny reserve on new para (6).

ARTICLE 9

MONOPOLIES - Deleted.

ARTICLE 10

STATE AID - Deleted.

PART III

OTHER PROSPECTIVE

[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.
- (2) ⁽³⁾Contracting Parties 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 transmission pipelines and the synchronous interconnection of high-voltage transmission grids.

- (3) (3)(6) Each Contracting Party undertakes that its provisions relating to [transport of Energy Materials and Products and the use of harbour facilities]⁽⁴⁾, high-pressure 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]⁽⁵⁾.
- (4) (3) In the event that access to existing [high-pressure transmission pipelines or high-voltage transmission grids]⁽⁷⁾ 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 new capacity—subject to their applicable legislation, inter alia on safety, technical standards, environmental protection and land use]⁽⁸⁾.
- (5) A Contracting Party through whose Domain Energy Materials and Products transit [through high-pressure transmission pipelines or high-voltage transmission grids]⁽⁹⁾ 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 nor permit any entity, subject to its [jurisdiction]⁽¹⁰⁾ to interrupt the existing flow of Energy Materials and Products until after [the dispute has been referred to the Governing Council and the Governing Council has had]⁽¹¹⁾ adequate time to seek conciliation between the parties in dispute.

(6) (3) The provisions of this Article shall not require a Contracting Party to take action [- other than the protection of existing flows - which it demonstrates to the other Contracting Parties concerned would endanger its] (12) [security of] (13) energy supply, quality of service and the most efficient development and operation of all parts of its electricity and gas systems(14).

Specific comments

- 11.1 : CDN, AUS, N, J and AZB general on whole Article.
- 11.2 : USA scrutiny reserve. EC conditional reserve subject to withdrawal of USA reserve.
- 11.3 : GR reserve.
- 11.4 : USA reserve pending further instructions from capital.
- 11.5 : AUS asks for substituting with "law".
- 11.6 : EC may prepare additional language reducing any possible doubt that this provision does not require third party access.
- 11.7 : AUS asks for replacing with: "facilities for the transport of Energy Materials and Products and harbour facilities".
- 11.8 : GR suggests substituting with "for transit of energy from another Contracting Party, the first Contracting Party shall, if requested, attempt to resolve the issue - including if appropriate by considering the possibility of new capacity being established - in accordance with its applicable legislation, inter alia on safety, environmental protection and land use".

- 11.9 : AUS supported by RUF suggests deletion.
- 11.10: SF supported by S and CH requests substituting with "control".
- 11.11: General reserve by J, N, USA, AUS and A. Chairman noted that the appropriate form of conciliation procedure could be discussed in the context of Article 29 but asked AUS, USA, RUF to come up with a compromise solution.
- 11.12: A suggests replacing with: "which - apart from existing supply flows and contractual relations to be maintained - proves to endanger its own".
- 11.13: RUF and AUS reserve.
- 11.14: RUF suggests adding the following text:
", subject to the requirement, that the relevant policies, measures and practices in the fields covered by this Article are not applied in a manner which causes disturbances to the principles of the present Agreement, would constitute a means of discrimination between the Contracting Parties or its investors, or cause serious damage to existing contractual relations in the fields covered by this Agreement or to the trade flows, and that such relevant policies, measures and practices shall be discontinued as soon as the conditions giving rise to them have ceased to exist".

Chairman's note

Work has been completed on this Article in WGII and is being referred to Plenary.

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 insurance 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⁾.
- (2) Each Contracting Party shall 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) 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.

Specific comments

13.1 : General scrutiny reserve.

13.2 : J scrutiny reserve on para (1).

[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) adverse effects on the environment occurring both within and outside its Domain from all operations within its Domain and within the energy cycle in an economically sound manner taking proper account of safety. In doing so each Contracting Party shall [in its policies and actions be guided by [, inter alia,](4) the principles](5) that they should take [, according to their capabilities,](6) cost-effective 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 distorting investment in the energy cycle or international trade. Contracting Parties shall accordingly:](7)

(a) take account of environmental considerations throughout the formulation and implementation of their energy policies;

(b) promote market[-oriented](8) price-formation throughout the energy cycle and [a fuller reflection therein of environmental costs and benefits and promote](8) research in appropriate fora on methods to quantify and appropriately recognize such environmental costs and benefits;(9)

- (c) encourage cooperation [to reduce]⁽¹⁰⁾ adverse [effects]⁽¹¹⁾ in the most cost-effective way [and maximize overall social benefits]⁽¹²⁾ [and by coordination measures as appropriate]⁽¹³⁾ taking into account the differences among Contracting Parties⁽¹⁴⁾ in abatement costs of any given reduction of such effects;
- (d) promote in their national energy policies action [to minimise]⁽³⁾ in an economically acceptable way adverse environmental effects having particular regard to the improvement of energy efficiency and to the economic development and use of renewable energy sources and promoting the use of cleaner fuels and employing technologies that reduce pollution;
- (e) promote the dissemination of information on environmentally sound and economically efficient energy policies, 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];⁽¹⁵⁾
- (f) promote and cooperate in the research, development, application and diffusion, including⁽¹⁶⁾ transfer, of [energy efficient and environmentally sound]⁽¹⁷⁾ technologies, practices and processes which [reduce]⁽³⁾ adverse environmental effects cost effectively, consistent with⁽¹⁸⁾ the need for adequate and effective protection of Intellectual Property;

- (g) promote the transparent assessment [at an early stage and prior to decision](19) of environmental impacts of environmentally significant energy investment projects(20) [and subsequential monitoring of such impacts](21);
- (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](22).](23)
- ii) "environmental impacts" means any effect caused by a proposed 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)] (25)

General comments

- To be able to conduct further negotiation of this Article Chairman adopted Working hypotheses based on the following assumptions:
- 1) precautionary and pollution pay principles shall be mentioned in the chapeau;

- 2) the chapeau (third sentence) will use the word : "shall";
- 3) Article 14 will not be subject to binding arbitration.

CH delegation expressed its strong reservation on item 3.

- USA will submit a memorandum on various expressions used in Article 14 to the Secretariat by 30 October 1992 for circulation.
- The Chairman established ad hoc Sub-Group on Article 14 which shall meet probably on 16 or 17 November 1992. The Sub-Group is opened for any delegation which desires to participate.
- The WGII on 20 October 1992 adopted following Terms of Reference for Sub-Group on Article 14:

1. To examine on the basis of a memorandum from the USA the concepts involved in the following expressions in Article 14.

List of expressions:

- | | | |
|---------------------|---|--|
| Chapeau, 6th line | : | "in an economically sound manner" |
| 10th line | : | "cost-effective" |
| Subpara c, 2nd line | : | "most cost-effective way" |
| 2nd & 3rd line: | : | "maximise general social benefits" |
| (F.N. 14.12) | | |
| Subpara d, 2nd line | : | "in an economically acceptable way" |
| 4th & 5th line: | : | "economic development and use" |
| Subpara e, 2nd line | : | "economically efficient" |
| Subpara f, 2nd line | : | "energy efficient" |
| 5th line | : | "cost effectively" |
| F.N. 14.18 | : | "overall maximization of net benefits" |

2. To make recommendations to WG II on the expression to use when different expressions are used to express the same concept; to identify any occasions where the same expression is used to cover different concepts and make recommendations to remove any resulting ambiguity.

 3. To propose to WG II in relation to these expressions and the concepts they relate to formulations designed to facilitate as much consensus as possible among the negotiating parties.
-

Specific comments

- 14.1 : USA general reserve.

- 14.2 : USA reserve.

- 14.3 : USA reserve. (USA prefers replacing with "to limit".)

- 14.4 : N scrutiny reserve.

- 14.5 : To meet USA concerns Chairman suggests that delegations consider the substitution with : "observe the guidelines".

- 14.6 : A, N, H and CDN shall seek the deletion.

- 14.7 : General scrutiny reserve on the chapeau.

- 14.8 : USA reserve. (USA suggests deletion.)

- 14.9 : 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".

- 14.10: USA, EC and A scrutiny reserve. (USA suggests replacing with "to limit", EC and A with "to minimise".)
- 14.11: Legal Drafting Sub-Group will examine whether to use the word "effects" or "environmental impacts".
- 14.12: EC scrutiny reserve subject to examination by Sub-Group on Article 14.
- 14.13: USA and AUS reserve.
- 14.14: N supported by CH and S suggests inclusion: "in costs environmental degradation and".
- 14.15: N, J, USA and CDN scrutiny reserve.
- 14.16: USA wants to have inserted: "commercial".
- 14.17: EC and H wish to consider inserting "best practicable" (H) or "best available" (EC) before the word "energy".
- 14.18: USA suggests insertion of : "the overall maximalization of net benefits and recognising".
- 14.19: J reserve. (J asks for deletion.)
- 14.20: USA suggests adding : "which are subject to a decision of a competent authority in accordance with an applicable national procedure".
- 14.21: USA substantial reserve. Scrutiny reserve by all other delegations.
- 14.22: TR suggests replacing with : "waste management". Subject to consideration in the Legal Drafting Sub-Group.

14.23: USA scrutiny reserve.

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

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

[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 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].(3)

Specific comments

- 15.1 : EC reserve.
15.2 : General scrutiny reserve.
15.3 : EC scrutiny reserve.

Chairman's note

Subject to 3 above reserves negotiations finished in WGII.

PART IV

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 16

PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS

- (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 favorable 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.

(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 law or regulation;

(b) details of the relevant laws, regulations and policies 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.

(4) For the avoidance of doubt, the provisions of this Article do not affect the application of a Contracting Party's laws, regulations and policies 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 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 a significant 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.

(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 .

(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.

(8) 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 natural persons 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.

(9) Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.

Note

Chairman's compromise text based on Working Hypotheses.

General comments

- Plenary on 15 October 1992 agreed that Chairman in its 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. The Working Hypotheses comprising some countries' reservations is included as Annex 1 to Article 16.

- Plenary on October 1992 agreed on the procedure which this Working Hypotheses requires for reviewing of barriers to establishment including a draft declaration subject to further examination detail ministers might make when initialling the Basic Agreement in order to establish the necessary procedures. For ease of reference the draft Declaration is enclosed as Annex 2 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.

Annex 1 to Article 16

Working Hypotheses

All Negotiating Parties, with the exceptions noted below,
accept the following as working hypotheses:(1)

1. Treatment post-establishment shall be the better of National Treatment (NT) or Most Favoured Nation Treatment (MFN)(2).
2. There shall be no exceptions to NT or MFN post-establishment subject to the conclusions of the Taxation Sub-Group on 11.9.92.(3)(4)(5)(6)
3. Progressive reduction of exceptions to NT in the pre-establishment stage is an objective both before and after the Entry into Force of this Agreement.(7)
4. All barriers to NT in the pre-establishment phase cannot be eliminated before Entry into Force of the Basic Agreement.(8)
5. Barriers to Making Investment shall be applied on an MFN basis subject to the Article 27 exception clause.(9) 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. 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.(3)(10)(11)
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.

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.
9. Governments also need transparency as concerns barriers to NT to enable the process of signature and ratification.
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.
11. Rollback shall not be subject to dispute resolution.

-
- (1) AUS cannot agree a final position on any of these hypotheses until there is greater clarity with respect to the definitions of "Energy Materials and Products", "Make Investments" and "Investment".
 - (2) 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.
 - (3) USA fully supports the principle of NT post-establishment but notes that it is by no means clear that taxation is the only exception to this principle reflected in current legislation or policies of negotiating parties. For example, OECD countries have registered other limited exceptions to the principle. Among those are subsidies, political risk insurance and restrictions on maritime transport. USA also notes that, although it considers the general principle of standstill essential to the agreement, it may be necessary for countries to take similar limited exception to it.

- (4) RUF notes that it cannot yet state that it will have no exception to NT post-establishment.
- (5) J reserve pending clarification of definition of "Make Investments".
- (6) CDN can accept this principle on the assumption that the pre-establishment stage covers all elements of "Make Investments" as defined in Article 1(6) of BA-15.
- (7) 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".
- (8) 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, and should consequently be reflected as the basis for Article 16.
- (9) J waiting reserve pending coordination of J position in this respect in capital.

(10) AUS reserve.

(11) RUF reserve pending the transition arrangement provisions with respect to legislation, because of the need to arrange for exceptions which will be difficult to anticipate given that the legislation is currently under preparation.

(12) J and H reserve.

Annex 2 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) Investors of any Contracting Party whose investments in the Domain of another Contracting Party suffer losses owing to any armed conflict, including war, a state of national emergency or civil disturbances or other similar events in the Domain of the latter Contracting Party and where the procedure laid down in Article 18 is not applicable 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 the latter Contracting Party accords to its own investors or the investors of any other Contracting Party or any third State.

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

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

(b) destruction of their property by the latter's forces or authorities, which was not caused in combat action [or was not required by the necessity of the situation]⁽¹⁾,

shall be accorded restitution or prompt, adequate and effective compensation.

General comments

It is of the view that the provisions of Article 17 should not cover a conflict situation in which the investment in the Domain of the aggrieved Contracting Party belongs to the aggressor Contracting Party. Consideration should be given to this issue during preparation of any Final Act for potential inclusion therein.

Specific comments

17.1 : J waiting reserve.

ARTICLE 18

EXPROPRIATION

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

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

Such compensation shall amount to the 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 (the "valuation date").

Such compensation shall be calculated on the basis of the prevailing market rate of exchange 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) Under the law of the Contracting Party making the expropriation the Investor affected shall have a right to prompt review, by a judicial or other independent competent authority of that Party, of its case, of the payment of compensation and of the valuation of its investment, 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) For the purposes of this Article the laws and regulations of a Contracting Party at the time an investment is made with regards to the reversion of properties and rights for a resource owner in force shall not be regarded as an act of expropriation.

(1)

Specific comments

18.1 : CDN 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.

(2) Transfers under paragraph (1) above shall be effected without delay and in a Freely Convertible Currency.

(3) (1) Transfers shall be made at the prevailing 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 rate applied by the IMF in purchasing currencies, whichever is more favourable to the investor.

(4) Notwithstanding the provisions of paragraphs (1) to (3), a Contracting Party may maintain laws and regulations (a) requiring reports of currency transfer[; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers].(2) 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.

(3)

General comment

In consideration of this Article in the Sub-Group on Articles 17, 18 and 19, RUF and other CIS delegations raised certain concerns in applying this Article to CIS countries in a transitional period. As a consequence, it was agreed that an effort would be undertaken to investigate whether it might be possible to alleviate these concerns through use of an additional document, side letter, or possible incorporation into transitional provisions.

It was additionally agreed that any such carve-out or exemption should be worked out between former USSR countries, seeking not to interfere with any rights and obligations vis a vis companies of other Contracting Parties. It was also agreed it should be temporary in nature.

Specific comments

- 19.1 : Replacement of the BA-15 text of paragraph (3) with the USA substitute text by the Sub-Group on Articles 17, 18 and 19 was based on the assumption that the USA solution more closely reflected a market rate of exchange than did the BA-15 alternative. EC must confirm this understanding with its experts.
- 19.2 : Sub-Group on Articles 17, 18 and 19 concluded that this language should be deleted after consideration by WG II of Article 20 on assumption that issues raised herein are adequately covered by that Article.
- 19.3 : AUS, CDN and RUF had proposed the addition of a new paragraph (4) dealing with Balance of Payments considerations. Note that Plenary took up this issue at its meeting of 15 October 1992. Reference is therefore made to the Conference Document emanating from the Plenary and reflecting decisions made therein in respect of this issue. However, notwithstanding those conclusions CDN has undertaken to work with USA, CH and AUS to attempt to come up with a compromise formulation in this regard. One possible solution may be to apply this type of provision only in cases of liquidation. It has agreed to report any suggestion to the Secretariat by 4 November at the latest. The Secretariat will communicate any such suggestion to the Working Group to enable consideration by delegations at WG II meeting the week of 9 November.

ARTICLE 20

[TAXATION](1)(2)(3)

(1) GENERAL EXCLUSION

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](4)

Notwithstanding paragraph (1),

- a) Article 5(2) (c) shall apply to taxation measures other than those on income, capital gains or capital; and
- b) the provisions on 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 (b) of this Article;
 - ii) any taxation measure aimed at ensuring the effective collection and services of such taxes, except where the measure arbitrarily discriminates between goods of the Contracting Parties or arbitrarily restricts benefits accorded under the above-mentioned provisions.

(3) [APPLICATION OF PROVISIONS RELATING TO INVESTMENT](5)

Notwithstanding para (1), the provisions imposing national treatment obligations or most favoured nation obligations under Part IV (Investment Promotion and Protection) shall apply to tax measures of the Contracting Parties other than taxes on income, capital, estates or inheritances, except that nothing in Part IV shall apply to:

- a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party under any convention, agreement or arrangement, described in paragraph 6 (b) of this Article;
- 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](6)

- 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 is discriminatory, it shall be referred, by the investor or Contracting Party alleging discrimination in connection with an expropriation, to the competent tax authorities of the Contracting Parties concerned 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 issue so referred, applying the non-discrimination principles under the OECD Model Income Tax

Convention on Income and Capital. Bodies called upon to settle disputes pursuant to Articles 23 and 24 shall take into account any conclusions arrived at by the competent tax authorities. Such bodies shall, in the event there is no agreement between the competent tax authorities concerned, base their decision on the issue as defined above on the non-discrimination principles of the OECD Model Income Tax Convention on Income and Capital. Under no circumstances shall involvement of competent authorities lead to a delay of proceedings under Articles 23 and 24.

(5) [WITHHOLDING TAX](7)

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 a tax by withholding or other means.

(6) The term "taxation measure" includes:

- 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 of any convention for the avoidance of double taxation and any international agreement or arrangement to which the Contracting Party is bound.

(7) 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 [movable or immovable property],⁽⁸⁾ taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

General comment

The Taxation Sub-Group is working on completion of this Article on the above basis. The text reflects the status on 6 October 1992. An updated version will be available by 2 November 1992.

Specific comments

20.1 : RUF, PL and H scrutiny reserve pending in depth consideration in capitals.

20.2 : AUS reserve. NL preference on BA-15 approach.

20.3 : A scrutiny reserve.

20.4 : This paragraph needs to be revisited after finalisation of trade provisions.

20.5 : NL wants deletion of para (3).

20.6 : CDN suggests the following text for para(4):

"Article 18 of this Agreement relating to expropriation shall apply o a claim by a Contracting Party or an investor of a Contracting Party that a measure expressed as a taxation measure constitutes an expropriation or nationalization except that no investor or Contracting Party may invoke that Article as the basis for arbitration under Article 23 or 24, as the case may be, where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor or the Contracting Party shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities under the

tax convention, if any, between the Contracting Parties involved. If there is no such tax convention or if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to resolve it within a period of six months after the referral, or such other period as may be agreed upon by the Contracting Parties involved, the Investor or the Contracting Party may bring such a claim under Article 23 or 24, as the case may be."

20.7 : N suggests deletion.

20.8 : For consideration - the definition of investment as currently drafted contains both movable and immovable and tangible or intangible property.

ARTICLE 21

ASSIGNMENT OF RIGHTS

(1) (1) If a Contracting Party, its designated agency or a company or enterprise incorporated in a Contracting Party other than an investor (the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an investment (2) in the Domain of another Contracting Party (the "Host Party") or (3) acquires the rights and claims to such an investment, [as the result of the complete or partial default of the investor], (4) the Host Party shall recognise

(a) 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 (5).

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

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

(b) any payments received in pursuance of those rights and claims, as the original investor was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related Returns.

(3) [Any payments received in non-convertible currency by the Indemnifying Party in pursuance of the rights and claims acquired shall be freely available to the Indemnifying Party for the purpose of meeting any expenditure incurred in the Domain of the Host Party](6).

Specific comments

- 21.1: A asks for inclusion in para (1) a provision concerning the rights of the investor in spite of a subrogation.
- 21.2: J suggests insertion of "and Returns".
- 21.3: EC asks for insertion of "otherwise".
- 21.4: CDN requests deletion pointing out that the Canadian Export Development Corporation insures political risks, but not commercial risks.
- 21.5: N asks for adding "provided that where initial investment approval is required any change of ownership of rights held by a foreign investor shall be approved by the Host Party in the same way as the initial investment" comprised in BA-6 but not retained here.
- 21.6: J can accept this provision since this could be interpreted as a provision which intends to prevent restrictions on expenditure in non-convertible currency. It is necessary, however, to clarify whether the transfer of any payments by the assignment of rights come under Article 19 (1).

[ARTICLE 22]⁽¹⁾

RELATIONSHIP TO OTHER AGREEMENTS

(1) 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, the terms of that other international agreement shall prevail between such Contracting Parties to the extent that they are not less favourable to the investor.

(2) [For the avoidance of doubt, when an investor chooses to invoke the terms of another international agreement in accordance with paragraph (1) above, Parts IV and V of this Agreement shall not apply to the investor's activities under that other agreement]⁽²⁾.

Specific comments

22.1: AUS and CDN reserve.

22.2: USA scrutiny reserve.

PART V

DISPUTE SETTLEMENTS

[ARTICLE 23](1)

SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

- (1) Disputes between one Contracting Party and an investor of another Contracting Party concerning an obligation of the former under Part IV of this Agreement, relating to an investment of the latter in the Domain of the former⁽²⁾ 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 request of the investor concerned be submitted to international arbitration or conciliation⁽³⁾.
- (3) [An investor that has submitted the dispute to the courts or administrative tribunals of the Contracting Party that is a party to the dispute, or that has submitted the dispute for resolution in accordance with any previously agreed dispute settlement procedures, shall not be able to submit the dispute to international arbitration or conciliation in accordance with the terms of this Article]⁽⁴⁾.
- (4) Each Contracting Party which is or has become a member of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965 hereby consents to submit any dispute as defined in paragraph (1) of this Article to the International Centre for Settlement of Investment Disputes for arbitration or conciliation under that Convention.

(5) In case the Contracting Party concerned is not or has not yet become a Contracting State of the Convention referred to in paragraph (4), the dispute may, at the [choice]⁽⁵⁾ of the Investor concerned, be submitted to:

(a) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in paragraph (3) under the rules governing the Additional Facility for the Administration of Proceedings by the secretariat of the Centre (Additional Facility Rules); or

(b) an international 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 proceedings under the Institute of Arbitration of the Stockholm Chamber of Commerce; or

(d) an international arbitrator or ad hoc arbitration tribunal appointed by a special agreement⁽⁶⁾.

[In the event that the dispute is submitted to an international arbitrator or ad hoc arbitration tribunal in accordance with subparagraph (d) above and no agreement on the appointment of that international arbitrator or ad hoc arbitration tribunal has been reached within sixty days of the submission of this dispute, the Investor may submit the dispute to (a), (b) or (c) above]⁽⁷⁾.

(6) [[A legal person]⁽⁸⁾ which has the nationality of one Contracting Party and which before such a dispute arises is⁽⁹⁾ controlled by investors of another Contracting Party shall for the purpose of article 25 (2)(b) of the Convention referred to in paragraph (5)(a) above be treated as an investor of that other Contracting Party]⁽¹⁰⁾⁽¹¹⁾.

(7) [Each Contracting Party hereby gives its unconditional consent to the submission of disputes to international arbitration in accordance with the provisions of this Article]⁽¹²⁾.

(8) The awards of arbitration, which may include an award of interest, shall be final and binding and shall be [enforced in accordance with domestic law](13).

General comments

CDN cannot agree that disputes regarding tax matters be referred to an international tribunal.

In order to assist Canadian authorities in their consideration of Article 23, the Canadian delegation seeks clarification of how Article 23 might be applied. For instance, the Canadian delegation would wish to discuss the following questions:

- Would all matters covered by Part IV be subject to arbitration at the instance of an investor? For instance, would public measures taken in situations covered by Article 17 (1) be subject to arbitral review?
- In situations involving more than one investor or potential investor, there is a possibility of multiple proceedings. How would that eventually be addressed? Will there be provision for the consolidation of proceedings? What would that provision be like?
- Some measures by Contracting Parties will affect both their own investors and investors of other Contracting Parties. That could result in the same measure being challenged before domestic tribunals and before an international arbitrary tribunal. How can the consistency of the findings in the different fora be ensured?
- If the Contracting Party has a counterclaim against an investor seeking dispute settlement, will the Contracting Party be able to choose the forum in which to bring that counterclaim?

- How will the place of arbitration be chosen? This will be important because, other than arbitration under ICSID, the place of arbitration will determine the law under which judicial control will be exercised over the arbitral proceedings.
- Will an arbitral tribunal be authorized to award the costs of the proceedings? If so, on what basis?
- Would investors with dual nationality of two Contracting Parties be able to choose international arbitration to challenge measures of one or the other of those Contracting Parties?
- How would the investor/Host Contracting Party dispute settlement apply to sub-national governments in a federal system?
- What remedies will be available pursuant to arbitration under Article 23? In some federations, the national government cannot compel the sub-federal governments to make restitution.
- What will be the relationship between dispute settlement under Article 23 and dispute settlement under Article 24? For instance, will Article 24 dispute settlement be available to determine whether Article 23 dispute settlement is available? What provisions will be made to cover situations where the same measure is challenged or may be challenged under both Articles 23 and 24.

Specific comments

23.1: General reservation by some delegations.

- 23.2: USA asks for inserting: ", interpretation or application of an Investment agreement between a Contracting Party and an Investor, or the interpretation or application of an Investment authorisation granted by a Contracting Party".
AUS and J do not favour USA suggestion.
- 23.3: USA asks for adding: "in accordance with paragraphs (4) and (5)".
- 23.4: SF requests deletion. USA supports retention.
- 23.5: SF suggests substituting with "request".
- 23.6: SF asks for adding a new sentence reading:
"If no agreement on the appointment of that international arbitrator or ad hoc arbitration tribunal has been reached within sixty days of the request for such arbitration, the Investor may submit the dispute to (a), (b), or (c) above".
- 23.7: SF suggests deletion in context with footnote 23.6.
- 23.8: J asks for replacing with "An Investor other than a natural person".
- 23.9: USA suggests insertion of: "owned or".
- 23.10: EC doubts on the need for this para. AUS and USA support retention of this para.
- 23.11: AUS suggests following wording for this paragraph pending the final draft of the definition of Investor:
"An Investor which is not a natural person is incorporated, constituted or otherwise organised in the Domain of one Contracting Party and which before such 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 the latter Contracting Party".

23.12: J considers this para to be redundant. USA supports retention of this para.

23.13: AUS suggests substituting with: "enforceable in the Domain of the Contracting Parties". To this AUS comments that the wording would oblige CPs to make arbitration awards enforceable whereas the present wording makes enforcement of such awards dependent on and subject to domestic law, ie. the enforceability is at the discretion of a CP and an investor has no guarantee that his awards could be enforced.

[ARTICLE 24]⁽¹⁾

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Disputes between Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through diplomatic channels.
- (2) If such a dispute can be brought under the provisions of a bilateral agreement between Contracting Parties, those provisions shall prevail in relation to dispute settlement.
- (3) Subject to paragraph (2) above, if the dispute cannot be settled in accordance with paragraph (1) above [within 180 days],⁽²⁾ except as otherwise provided in this Agreement, it shall, if one of the Contracting Parties to the dispute so requests in writing, be submitted to dispute resolution under paragraph (4) below, unless otherwise agreed between such Contracting Parties.
- (4) Where the dispute between the Contracting Parties has not been settled according to paragraph (1) above, and has not been submitted to dispute resolution within 60 days of the request referred to in paragraph (3) above, it shall be submitted, if one of the Contracting Parties to the dispute so requests in writing, to an ad hoc arbitral tribunal. 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, who may be its national or citizen;

- (b) Within 30 days of the receipt of notification of that appointment, the other Contracting Party to the dispute shall, in turn, appoint one member, who may be its national or citizen. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within a further period of 30 days 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 180 days of the receipt of the request referred to in paragraph (3) 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 any Contracting Party submitted within 30 days of the expiry of the 180 day period provided for in this paragraph;
- (d) Appointments pursuant to sub-paragraphs (b) or (c) above shall be made by the President of the International Court of Justice within 30 days of the receipt of a request to do so. If he is prevented from discharging this task or is a national or citizen of a Contracting Party to the dispute, the appointments shall be made by the Vice-President. If the latter, in turn, is prevented from discharging this task or is a national or citizen of a Contracting Party, the appointments shall be made by the most senior Judge of the Court who is not a national or citizen of a Contracting Party;
- (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;

- (f) The Tribunal shall establish its own rules of procedure, unless otherwise agreed by the Contracting Parties to the dispute, and shall take its decisions by a majority vote of its members;
- (g) The arbitral award shall be final and binding upon the Contracting Parties to the dispute;
- (h) The expenses of the Tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties to the dispute.
- (5) (3) Notwithstanding paragraphs (3) and (4) above, in the event of a dispute between Contracting Parties who are also parties to the GATT and related instruments, which could also be brought under the provisions of the GATT and related instruments concerned, the Contracting Parties to the dispute, except where they have agreed to an alternative procedure, shall, without prejudice to the initial application of paragraph (1) above, settle the dispute [according to the procedures provided for]⁽⁴⁾ in the GATT and related instruments concerned. Should a Contracting Party who is not a party to the GATT and related instruments but who has made or received a written request under paragraph (3) above become a party to the GATT and related instruments, the dispute in question shall be resolved in accordance with paragraph (3) above except where the Contracting Parties agree to an alternative procedure.

General comments

CDN believes that consideration should be given to measures for :

- a) settlement of disputes involving more than one Contracting Party;
- b) intervention in dispute settlement by a Contracting Party not party to the dispute; and

- c) ensuring the consistency of interpretation given to provisions of the Basic Agreement in dispute resolution.

The question regarding disputes arising from Protocols is deferred until discussion of Article 28.

Specific comments

- 24.1: Subject to scrutiny by all delegations. CDN scrutiny reserve also concerns relationship between this Article and Article 27.
- 24.2: EC and RO reserve.
- 24.3: Finalisation of this paragraph awaits outcome of an ad hoc Sub-Group under the Chairmanship of Mr. C. Bamberger drafting a new Article 41TER which should contain the interim dispute settlement for trade.
- 24.4: AUS asks for deletion.

PART VI

[CONTEXTUAL]

[ARTICLE 25](1)

[GOVERNMENT CONTROLLED ENTITIES](2)(3)

Each Contracting Party undertakes that if it establishes or maintains a government-controlled 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.

Specific comments

25.1: NL, EC, CDN, USA, RUF scrutiny reserve.

25.2: EC proposed a new text with changed heading as follows :

"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".

25.3: N has submitted its suggestion on Article 25, including new heading, which reads:

"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."

[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 its Domain.

Specific comments

26.1: USA, CDN, EC and RUF reserve.

ARTICLE 26A

PROPERTY

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

Note

This is N proposal for additional Article.

[ARTICLE 27](1)(2)(3)

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.](4)
- (2) (5) Other provisions of this Agreement shall not preclude any Contracting Party from taking any action [[which it considers](6) necessary for the purposes of protecting its public order, or [human, animal or plant life or health, [or conservation of exhaustible natural resources](7)](8), or from taking any action in pursuance of](9) its obligations under the United Nations Charter for the maintenance of international peace and security, [or](10) its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and [[of international nuclear safeguards obligations, provided that such prohibitions](11) shall not constitute disguised restrictions on trade(12) or arbitrary discrimination as between Contracting Parties](13)(14). Such actions shall be duly motivated and shall not be disproportionate to this end.
- (3) (5) A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential [defence](15) interests.
- (4) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the (16)(17) benefit of any treatment, preference or privilege resulting from

(a) ⁽¹⁸⁾the membership to [or association with]⁽¹⁹⁾ any existing [or future]⁽¹⁹⁾ customs [or economic]⁽¹⁹⁾ union or a free trade area [or similar international agreement]⁽¹⁹⁾ to which any of the Contracting Parties concerned is or may become a party, or

(b) [any regulation to facilitate frontier traffic]⁽²⁰⁾.

(21)(22)

Specific comments

27.1 : EC reserve.

27.2 : CDN believes that substantive and organizational changes are required in Article 27. It proposes the following illustrative text as addressing those needs :

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

- a) necessary to protect its public [order/morals];
- b) necessary to protect human, animal or plant life or health;
- c) relating to the conservation of exhaustible energy resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

d) 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 Contracting Parties are entitled to an equitable share of the interantional 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

e) necessary for prudential, fiduciary or consumer protection reasons;

provided that such measures shall not constitute disguised restrictions on trade or investment, or arbitrary or unjustifiable discrimination between Contracting Parties or between investors of Contracting Parties. Such measures shall be duly motivated and shall not be disproportionate to the stated end.

(2) 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 emergency in international relations involving the Contracting Party taking the measure;

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

(3) If a Contracting Party considers that any measure taken by another Contracting Party pursuant to paragraph (2) constitutes a disguised restriction on trade or investment or otherwise nullifies or impairs any benefit reasonably 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 considerations 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.

(4) No Contracting Party may invoke the provisions of this Article to derogate from the requirements to pay compensation pursuant to Articles 17 and 18 or to permit the transfer of an Investment or Returns in accordance with Article 19.

(5) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the benefit of any treatment, preference or privilege resulting from

(a) the membership to or association with any existing or future customs or economic union or a free trade area or similar international agreement to which any of the Contracting Parties concerned is or may become a party, or

(b) any regulation to facilitate frontier traffic.

27.3 : N suggests substituting whole Article with the following:

"The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend to another Contracting Party the benefit of any treatment, preference or privilege resulting from the membership to or association with any existing or future customs union or a free trade area or interim agreement leading to the formation of a customs union or a free trade area, unless also that other Contracting Party is or becomes a member to or associated with such customs union, free trade area or interim arrangement; provided that the Contracting Party's membership to or association with the customs union, free trade area or interim arrangement has been duly notified to the other Contracting Parties."

To this N adds that other possible exceptions will have to be considered in view of the outcome of the discussion concerning the handling of trade policy articles (the relationship to GATT).

- 27.4 : USA has undertaken to discuss the issue of the relationship between trade and other aspects of the Basic Agreement in this and other Articles with its legal experts and to circulate results in advance in due time before the November meeting of WGII.
- 27.5 : EC final position reserved on this para.
- 27.6 : N reserve.
- 27.7 : N reserve as paraphrasing of Art. XX (g) of GATT code is used here in a different context. Should be replaced rather with "energy purposes".
- 27.8 : CH suggests deletion subject to the purview of Part IV of this Agreement. USA supports deletion.
- 27.9 : EC suggests substituting with: "justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of intellectual, industrial and commercial property, or the protection of national treasures, possessing artistic, historic or archaeological value,".
- 27.10: EC in context with footnote 27.9 suggests deletion.
- 27.11: EC suggests substituting with: "its international nuclear safeguards obligations or in pursuance of other issues of nuclear proliferation. Such actions".
- 27.12: USA asks for adding "and investment".
- 27.13: J suggests deletion, and replacement with: "obligations under other nuclear non-proliferation regimes".
- 27.14: RUF asks for addition of subpara. (j) of Art. XX and Art XII of GATT.

- 27.15: USA and EC ask for substituting with "security".
- 27.16: USA suggests insertion: "most favoured nation".
- 27.17: EC suggests insertion: "to another Contracting Party".
- 27.18: J reserved position and argued that since this Agreement should be based on the principle of non-discrimination among the Contracting Parties, the provision of exception of MFN treatment with regard to customs union, etc ..., should not be included.
- 27.19: Left for later discussion. USA suggests deletion.
- 27.20: For consideration at next meeting.
- 27.21: EC - a statement in the minutes of the concluding document could substitute, if necessary, the ex-paragraph (4) concerning a Community exception:
- (4) In their mutual relations, Contracting Parties which are Members of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned.
- 27.22: AUS proposes new para, which provides wording to prevent "double-dipping" (i.e. repeated action on the same matter by an Investor who is a citizen/national of one Contracting Party and a permanent resident of another Contracting Party):
- "() This Agreement shall not apply to a natural person who is not a citizen or national of a Contracting Party (the first Contracting Party) but who is a permanent resident of that Contracting Party, if :

- (a) that person has already invoked the provisions of this Agreement against the Contracting Party in which that person has made an investment (the second Contracting Party), provided that this has occurred in respect of the same matter or,
- (b) the person is a citizen or national or permanent resident of the second Contracting Party."

Note

The proposed new para (4) should be read in conjunction with Article 1(5)(a) (Definition of "Investor"), as it would read with the insertion of the words "or who are permanently residing in", as requested by AUS in footnote 1.5.3 of Article 1(5) as in Room Document 13 of 10 September 1992.

PART VII

STRUCTURAL AND INSTITUTIONAL

ARTICLE 28

RELATIONSHIP BETWEEN THE AGREEMENT AND ITS 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 some appropriate Protocols to this Agreement, [for adoption by the Governing Council in accordance with Articles 29... and 30.....]⁽¹⁾ Each Protocol shall only apply to the Contracting Parties which enter into it. Any Contracting Party may participate in negotiations or enter into any Protocol⁽²⁾.
- (2) [In the event of a conflict between the obligations of a Contracting Party under this Agreement and [its]⁽³⁾ obligations⁽⁴⁾ under a Protocol, its obligations under this Agreement shall prevail, except as otherwise provided in this Agreement]⁽⁵⁾⁽⁶⁾.
- (3) A State or Regional Economic Integration Organisation shall not become a Party to a Protocol unless it is, or becomes at the same time, a Party to this Agreement.

Chairman's note

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

General comments

N argues that this Article should specify that the BA, in addition to being fully applied in Protocols, should also apply equally in areas, if any, covered by the term Energy Materials and Products, which are not explicitly dealt with in any Protocol.

Specific comments

- 28.1: Pending discussion of Articles 29 and 30 and a clearer understanding of the impact of portions of those Articles on this Article.
- 28.2: RUF requests additional sentence : "The Contracting Parties may subsequently increase the number of Protocols concluded as the need for them arises".
- 28.3: USA requests deletion.
- 28.4: USA suggests insertion of : "that may be established".
- 28.5: D asks for deletion.
- 28.6: EC general reserve.

[ARTICLE 29]⁽¹⁾

GOVERNING COUNCIL

- (1) A Governing Council composed of one representative of each Contracting Party is hereby established. The first meeting of the Governing Council shall be convened by the Secretariat designated on an interim basis under Article 31 not later than [one year]⁽²⁾ after the closing date for signature of this Agreement in accordance with Article 33. Thereafter, ordinary meetings of the Governing Council shall be held at [regular] intervals to be determined by the Council.
- (2) Extraordinary meetings of the Governing Council shall be held at such other times as may be deemed necessary by the Council, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to them by the Secretariat, it is supported by at least one-third of the Contracting Parties.
- (3) The Governing Council shall agree upon and adopt rules of procedure and financial rules for itself [and for any subsidiary bodies it may establish within the scope of this Agreement]⁽³⁾, as well as the staff matters referred to in Article 31 paragraphs (2) and (3) below and the financial provisions governing the functioning of the Secretariat.
- (4) The Governing Council [,while taking care to]⁽⁴⁾ avoid duplication and taking full advantage of the work and expertise of competent international or other bodies, [shall]⁽⁵⁾ keep under continuous review the implementation of the principles of the Charter, and of the provisions of this Agreement and the Protocols and, in addition, [shall]⁽⁶⁾

- (a) promote in accordance with this Agreement and Protocols the coordination of appropriate [policies, strategies and]⁽⁷⁾ measures to carry out the principles of the Charter and the provisions of this Agreement and Protocols, and [make recommendations on]⁽⁸⁾ any other measures relating to this Agreement and Protocols;
- (b) consider and adopt programmes of work to be carried out by the Secretariat, in accordance with this Agreement and Protocols;
- (c) [consider and approve annual accounts and budget estimates in respect of administrative costs]⁽⁹⁾;
- (d) consider and approve the terms of any headquarters agreement, including privileges and immunities necessary for the Secretariat to carry out its functions under this Agreement and Protocols;
- (e) encourage joint efforts aimed at facilitating and promoting market oriented reforms and modernization of energy sectors in the countries of Central and Eastern Europe and the [Commonwealth of] Independent States;
- (f) monitor the implementation of measures undertaken pursuant to transitional arrangements in accordance with Article 42 with a view to assisting any Contracting Party in meeting its objectives and obligations ;
- (g) consider and adopt, as required, in accordance with Article 37 of this Agreement, amendments to this Agreement;
- (h) consider and adopt Protocols together with amendments thereto;
- (i) [consider and undertake any additional action that may be required for the achievement of the purposes of this Agreement].⁽¹⁰⁾

(5) [In 1999]⁽¹²⁾ and every 5 years thereafter the Governing Council shall review the functions remaining to it in the light of the extent to which the provisions of this Agreement and Protocols have been implemented. Following each review the function specified in paragraph (4) above may be amended or abolished by the Governing Council [by a vote,]⁽¹³⁾ in accordance with [Article 30.]⁽¹⁴⁾

General comments

- EC has a general reserve on this Article pending the clarification of the following issues:
 - a) the role of the Secretariat and of the Governing Council,
 - b) length of life of Governing Council should normally coincide with that of the Secretariat,
 - c) need for a sunset clause for both the Governing Council and the Secretariat,
 - d) need to clarify the tasks of the Governing Council in relation to Protocols (in particular paragraph 4(h), Article 28(2) and Article 30(4) and (5).

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

Specific comments

- 29.1: AUS, CDN and EC general reserve on whole Article 29.

- 29.2: EC suggests substituting with: "three months".

- 29.3: J reserve on the grounds that there is no need for subsidiary bodies.
EC suggests deletion.

- 29.4: EC suggests replacing with: "shall".
- 29.5: EC suggests, in relation to its footnote 29.4, substituting with "and".
- 29.6: EC deletion.
- 29.7: EC proposes deletion.
- 29.8: EC suggests replacing with: "undertake".
- 29.9: EC amends this subpara to read: "in respect of administrative costs, consider and approve annual accounts and, before the beginning of the budget year, budget estimates;"
- 29.10: AUS, EC, USA, J, reserve; an open-ended commitment.
RUF supports retaining this subpara.
EC suggests deletion.
- 29.11: EC proposes adding a new subparagraph which should read:
"(J)where appropriate, delegate, if economic and efficient, the tasks of the Secretariat as far as possible to other organisations or institutions on a contractual basis".
- 29.12: EC suggests replacing with: "Not later than 5 years after entry into force".
- 29.13: EC delete.
- 29.14: EC suggests, in the context of footnote 29.13, substituting with: "Article 30(2)".

ARTICLE 30

VOTING

- (1) The Contracting Parties shall make every effort to reach agreement by consensus on any matter requiring their decision, adoption or approval under this Agreement.
- (2) The adoption of amendments to this Agreement shall be by [consensus]⁽¹⁾.
- (3) Procedures for adoption of amendments to any Protocol shall be defined in that Protocol.
- (4) [Decisions regarding funding principles for the Governing Council, or other budgetary matters of the Council [or the Secretariat]⁽²⁾, shall, subject to paragraph (1) above, be taken by a qualified majority consisting of that proportion of the Contracting Parties which together contribute at least three fourths of the funding to meet the administrative costs of the Council [and the Secretariat]⁽²⁾ under Article 32 below].⁽³⁾
- (5) In all other cases, unless [a contrary intention appears herein]⁽⁴⁾, decisions shall be taken by a three fourths majority vote of the Contracting Parties present and voting at the meeting of the Governing Council at which such matters fall to be decided.
- (6) For the purposes of this Article, "Contracting Parties present and voting" means Contracting Parties present and casting an affirmative or negative vote.
- (7) Subject to paragraph (4) above and paragraph (9) below each Contracting Party shall have one vote.

(8) With the exception of paragraph (4) above, no voting decision shall be valid unless it has positive and expressed support of a majority of all Contracting Parties.

(9) [For the purposes of this Article a Regional Economic Integration Organisation shall, when voting, do so in the following manner:

(a) in votes concerning this Agreement such organisation shall have a number of votes equal to the number of its member States which are 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.](5)

General comments

CDN asks how to deal with new and unidentified Protocols.

Specific comments

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

30.2: AUS wishes to delete.

30.3: RUF reserved position on para (4).

30.4: EC suggests replacing with: "otherwise stated".

30.5: EC reserved position on para (9).

ARTICLE 31

SECRETARIAT

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

ARTICLE 32

FUNDING PRINCIPLES

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

Note

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

Specific comments

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

**PART VIII
FINAL PROVISIONS**

General comment

AUS, CDN and USA have a general reserve on "Governing Council" pending completion of the Article 29.

**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 and any Protocol shall be subject to ratification, acceptance or approval by [Signatories].⁽¹⁾ Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

Specific comments

34.1 : The Legal drafting Sub-Group recommends introducing a definition of "Signatory". The Chairman of this Subgroup submits this definition for the November meeting of the Subgroup.

[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.

General comment

AUS might come back to this Article after finalisation of use of the word Domain.

Specific comment

35.1: EC and N scrutiny reserve.

ARTICLE 36

ACCESSION

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

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 or to any Protocol shall be communicated to the Contracting Parties by the Secretariat at least three months before the meeting at which it is proposed for adoption.
- (3) Amendments to this Agreement which have been adopted in accordance with Article 29 shall be submitted by the Depositary to all Contracting Parties for ratification, acceptance or approval.

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

ARTICLE 38

ASSOCIATION AGREEMENTS

Where, in order to further the implementation of the objectives and the principles of the Charter or the provisions of this Agreement or any Protocol, it is considered necessary or desirable by the Governing Council referred to in Article 29 to permit a State, international organisation or Regional Economic Integration Organisation to associate itself with this Agreement and any Protocol, an Association Agreement shall be submitted to the Governing Council 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 Governing Council.

**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 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⁾.

Specific comments

- 40.1: CDN reserve.
 N scrutiny reserve.

40.2: J suggests replacing the whole Article with :

"(1) Any Signatory of this Agreement may notify the Depositary 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 Depositary shall inform all Contracting Parties and Signatories of the notification made in accordance with paragraph (1) of this Article."

[ARTICLE 41]⁽¹⁾

RESERVATIONS

No reservations may be made to this Agreement.

Specific comments

41.1: AUS and N reserve pending the outcome of the Norwegian proposal of reservations in Article 16.

CDN reserve subject to finalization of this Agreement.

ARTICLE 41 BIS

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) If such trade is governed by a 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 save those listed in Annex G.
- (3) Prior to the entry into force of this Agreement each Contracting Party shall provide to all other Contracting Parties a schedule of tariff rates on Energy Materials and Products.
- (4) Each Contracting Party which is not yet a contracting party to the GATT undertakes not to increase the tariff rates for Energy Materials and Products above the levels listed in its schedule as referred to in paragraph (3).

- (5) If a Contracting Party which is also a contracting party to the GATT modifies or withdraws a concession under Article XXV.111 of the GATT and such modification or withdrawal has a substantial effect on the trade in Energy Materials and Products of a Contracting Party which is not a contracting party to the GATT, the former Contracting Party shall consult the latter and the two Contracting Parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade in Energy Materials and Products than that existing before such modification or withdrawal.
- (6) [The Governing Council] shall review the provisions of this Article from time to time and, in the first instance, no later than three months after the conclusion of the Uruguay Round negotiations.

ANNEX G

NON-APPLICABLE PROVISIONS OF THE GATT AND RELATED INSTRUMENTS

II	Schedule of Concessions
IV	Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXV	Joint Action by CPs
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	Modification of Schedules
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.

Arrangement Regarding Bovine Meat

International Dairy Arrangement

The Multifiber Arrangement

Agreement on Trade in Civil Aircraft

[Agreement on Government Procurement.](1)

General comments

(1) Some Contracting Parties may need to invoke a transitional period before they can comply with the provisions of Article 41 BIS. Such invocation shall be subject to the provisions of Article 42 of transitional arrangements.

(2) A procedure may be needed in the final act governing the provision of schedules of tariff rates under para (3) above.

Specific comments

5.G.1: N reserve.

ARTICLE 41 TER

[RESOLUTION OF TRADE DISPUTES]⁽¹⁾

(Conceptual approach)

1. An initial provision would exclude from the procedures of this Article any dispute which is covered by the dispute settlement provisions of the GATT or its related instruments. This provision would prevent forum shopping by CPs that are also parties to the GATT or its related agreements.
2. A similar provision might also exclude any dispute which is covered by the dispute settlement provisions of a bilateral or regional trade agreement, to the extent such provisions would be applicable in the absence of the BA.
3. Trade disputes not excluded from coverage by operation of paragraphs 1 and 2 would be settled under the provisions of this Article. Such disputes would include (i) those between CPs where both are not also parties to GATT, the relevant GATT-related agreement, or a bilateral or regional agreement, and (ii) those concerning subject matter covered by the BA but not by GATT or its related agreements, or by a bilateral or regional agreement.
4. Dispute settlement under this Article could examine issues involving the application or interpretation of the trade provisions of the BA, including questions of whether a measure or practice was inconsistent with the trade obligations of the BA. It might be necessary to agree which obligations of the BA would be considered to give rise to trade disputes, as only disputes concerning trade would be settled under the procedures of this Article.⁽¹⁾⁽²⁾
5. Provision for consultations between the parties to a dispute should be included. If consultations did not resolve the dispute within a fixed time, either party to the dispute could request that a panel be established.

6. Formation of panels should be easily accomplished. One approach would be to provide that each party to the dispute appoint one panelist, with the two so appointed selecting a third to serve as chairman. It would also be necessary to designate an "appointing authority" or include some other method for establishing a panel should a party to the dispute refuse to appoint a panelist or if the two panelists appointed could not agree on the third member.

7. While not essential, it would seem desirable to maintain a roster of highly qualified individuals to serve as panelists. It could be explored whether the GATT roster, or appropriate individuals from that roster, might be made available for purposes of this Article. If this proves possible, the BA roster would need to add potential panelists from CPs that are not members of GATT.

8. Rules to govern the conduct of the panel proceedings could be handled in a number of ways. Procedural issues could be left to agreement between the parties to the dispute or to the discretion of the panelists, subject to any specific directions that might be included in this Article. An alternative would be to append to the BA an annex of rules to guide the panelists on fundamental issues.⁽³⁾ A further alternative would be to incorporate by reference, mutatis mutandis, appropriate procedural provisions from established rules for international arbitration.⁽⁴⁾

9. The balance of this Article would contain provisions that have been found appropriate and effective for the resolution of trade disputes. These could include:
 - (i) an opportunity for the parties to the dispute to comment on a preliminary draft of the panel findings (and perhaps the proposed recommendations);

 - (ii) an opportunity for the parties to the dispute to consult following the panel proceeding to reconsider settlement in the light of the panel findings and recommendations;

(iii) a provision indicating that resolution of the dispute should normally conform with the recommendations of the panel, including a preference for elimination of measures found by the panel to be inconsistent with the obligations of the BA;

(iv) as a first alternative, compensation; and

(v) as a final option, retaliation through the suspension of equivalent benefits under the BA.

10. A provision could be included to provide that, in the event of a dispute over the level or nature of retaliation taken, final and binding arbitration would be available solely on that issue. It would be most efficient if the panel that reviewed the original dispute served also to arbitrate the dispute over retaliation.

Notes

1. While this issue requires further consideration, the initial assumption is that coverage would be limited to disputes arising under Article 5. This also assumes adoption of the proposal for incorporation of GATT and its related agreements by reference, under which provisions such as Article 6 (Government Procurement) and Article 10 (State Aid) would be subsumed by Article 5.

Difficult questions of whether a dispute should properly be considered a trade dispute, and accordingly subject to dispute settlement under this Article, or an investment or other dispute, and therefore subject to binding arbitration, could be left to the discretion of the panelists. In other words, panels could be given authority to determine their own jurisdiction under the BA. Also, if coverage of this Article were broadened (e.g. - to cover trade-

related disputes respecting intellectual property under Article 7), it might be necessary to provide that procedures under this Article be non-exclusive if the dispute also has an investment dimension.

2. Trade disputes could also arise under provisions of the Protocols. It would seem desirable also to settle trade disputes under the Protocols through the procedures of this Article. Expansion of the terms of this provision to anticipate coverage of such disputes should not be difficult.
3. Rudimentary Model Rules (three pages) have been developed for certain basic procedures under Article 1807 of the U.S. - Canada FTA.
4. For example, Section III. Arbitral Proceeding of the UNCITRAL Arbitration Rules addresses many procedural issues that might arise in the course of a panel proceeding.

General comments

An ad hoc Sub-Group under the chairmanship of Mr. C. Bamberger and composed of A, CH, CDN and RUF has undertaken to translate the Conceptual Approach represented in paragraphs (1) to (10) into concrete dispute settlement provisions. The Sub-Group has promised completion of works by 2 November for circulation in advance of next WG-II meeting.

Specific comments

41.TER.1: General scrutiny reserve.

[ARTICLE 42]⁽¹⁾

TRANSITIONAL ARRANGEMENTS

(1) [It is recognised that due to differences in the way in which Contracting Parties have managed the matters [the subject of this Agreement]⁽²⁾ some Contracting Parties [will]⁽³⁾ be unable to comply with [all the]⁽⁴⁾ provisions of this Agreement immediately upon entry into force thereof]⁽⁵⁾⁽⁶⁾. [Therefore, a transitional period of up to []⁽⁷⁾⁽⁸⁾ years may, subject to approval by the Governing Council, be invoked by [any]⁽⁹⁾ Contracting Party, provided that a Note setting out the provisions with which it cannot fully comply [together with]⁽¹⁰⁾ a timetable for the implementation of measures to effect complete compliance is deposited with its instrument of ratification, acceptance or approval in accordance with Article 34 above]⁽¹¹⁾⁽¹²⁾.

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

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

(b) of the need for any revision to the list of measures⁽¹³⁾ for which the transitional period has been invoked;

(c) of any application to the Governing Council to extend the timetable for achieving compliance in respect of any particular provision⁽¹⁴⁾.

(3) The Secretariat shall circulate to all Contracting Parties every six months⁽¹⁵⁾ the Notes referred to in para (1) above [revised as appropriate]⁽¹⁶⁾ to take account of any notification made under sub-paragraphs (2)(a) and (b) above, and at the same time notify all Contracting Parties of any applications under subparagraph (2) (c).

(4) The Governing Council shall review annually the progress by Contracting Parties towards implementation in accordance with Article 29 (4), at the same time as it reviews progress under (17) Article 16 (6). It may take steps to assist Contracting Parties in facilitating implementation. Applications under subparagraph (2)(c) above shall be subject to approval by the Governing Council.

General comments

This draft of Article 42 is based on document 37/92, BA-15.

The Chairman of the Transitional Sub-Group presented a new draft and had its first reading on 14 October 1992. This version taking also into account the comments made by delegations during this reading follows after this Article.

Note that the Chairman of WGII will conduct future discussions on the basis of the Transitional Sub-Group draft.

Specific comments

42.1: J reserved its position and noted that if retained, transitional periods should be kept as short as possible, and that progress toward fulfilment of Charter commitments should be regularly monitored and evaluated.

42.2: EC suggests replacing with: "to which this Agreement relates".

42.3: EC asks for substituting with "may".

42.4: EC asks for substituting with "some".

- 42.5: CDN pointed out that first sentence quotes the Charter and seems to be redundant. RUF argues for retaining first sentence in the Article.
- 42.6: EC requests for adding after thereof: "due to their need to adapt their economies to a market system".
- 42.7: RUF raises possibility of different durations of transitional period for different countries.
- 42.8 : USA requests filling in "one" year instead of a blank square-bracketed place.
- 42.9 : EC suggests substituting with "such".
- 42.10: EC asks for replacing with: ",the reasons for its inability to comply and".
- 42.11: RO reserved position with regard to the conditions required for approval of a transitional period.
- 42.12: USA asks for adding a new sentence: "The Governing Council may decide, in acting on a request to invoke transitional arrangements, to offer the invoking Contracting Party revised terms on the implementation of measures needed to achieve compliance with this Agreement".
- 42.13: EC asks for inserting: "for the implementation of provisions".
- 42.14: EC suggests adding: ",subject to the maximum period in paragraph (1) above".
- 42.15: EC asks for inserting: "revisions to".
- 42.16: EC suggests deletion.
- 42.17: EC suggests adding: "Article 5 and".

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 those provisions 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 Governing Council 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⁾

- (c) of any application to the Governing Council 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)
- (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 Governing Council 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)].(4)

General comment

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

Specific comments

42.1: 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 other appropriate international fora which deal with those issues in detail and effectiveness.
- 42.4: 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 Depositary.
- (2) Any such withdrawal shall take effect upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
- (3) [The provisions of this Agreement and any relevant Protocol shall continue to apply to investments made in the 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⁾.
- (4) Any Contracting Party which withdraws from this Agreement shall be considered as also having withdrawn from all Protocols to which it is Party.

Specific comments

- 43.1: N suggests deleting para (3) pointing out that if a country has taken a step of withdrawing from the Charter system, that country will not consider it of a great importance to see to it that the provisions of the BA and Protocols are adhered to after the withdrawal.

ARTICLE 44

DEPOSITARY

- (1) The Government of the Portuguese Republic shall assume the functions of Depositary of this Agreement.

- (2) The Depositary shall inform the Contracting Parties, in particular, of:
 - (a) the signature of this Agreement, or Association Agreement and the deposit of instruments of ratification, acceptance, approval or accession in accordance with Articles 34 and 36;

 - (b) the date on which the Agreement, or Association Agreement will come into force in accordance with Article 39;

 - (c) notification of withdrawal made in accordance with Article 43;

 - (d) amendments adopted with respect to the Agreement, or Association Agreement, their acceptance by the Contracting Parties thereto and their date of entry into force in accordance with Article 37;

 - (e) any other declaration or notification concerning this Agreement.

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 Portugal.](2)

In witness whereof the undersigned, being duly authorised to that effect, have signed this Agreement⁽³⁾.

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: D suggests deletion.
- 45.3: D, subject to the footnote 42.2, suggests adding : "in English, French, German, Italian, Russian and Spanish language, of which every text is equally authentic, in one original, which will be deposited with the Government of Portugal."