

9 April 1992

BASIC AGREEMENT FOR THE EUROPEAN ENERGY CHARTER

PREAMBLE

The Parties to this Agreement,

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

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

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

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

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

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

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

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

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

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

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

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;
- (2) "Contracting Party" means a party to this Agreement;
- (3) "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 | 2612
[2845 10](1)
2844 10 - 2844 50
(uranium, thorium, plutonium and
their combinations) |
| - Coal, natural gas,
petroleum and
petroleum products,
electric energy | Chapter 27 (except 2712) |

	HS or CN
- Acyclic and cyclic hydrocarbons	2901 2902
- Renewable energy	2207 20 2905 11 [4401] ⁽¹⁾ [4402] ⁽¹⁾

(2)

(4) "Investment" means every kind of asset⁽³⁾, which has been used or is used in connection with the implementation of the principles of the Charter [and in accordance with the provisions of this Agreement]⁽⁴⁾⁽⁵⁾. In particular, though not exclusively, includes any of the following:

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

(b) shares in, and stock, bonds and debentures of, and any other form of participation including minority forms in, a company or business enterprise⁽⁶⁾;

(c) claims to money, and claims to performance under contract having [a financial]⁽⁷⁾ value;

(d) intellectual property as defined in item (12);

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

A change in the form in which assets are invested does not affect their character as investments [and the term]⁽⁸⁾ "Investment" includes all investments, whether existing at or made after the date of entry into force of this Agreement [(hereinafter referred to as the "effective date")]⁽¹⁰⁾ 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]⁽⁹⁾.

(5) "Activities Associated with Investments" means activities such as the organization, control, operation, maintenance and disposition of legal entities or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports.

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

(a) natural persons having the citizenship or [nationality of that Contracting Party in accordance with its laws]⁽¹¹⁾;

(b) any legal entities incorporated or constituted under the law in force in the Territory of that Contracting Party whether or not organised for pecuniary gain or privately or governmentally owned or controlled and having real economic activities within the Territory of that Contracting Party ;

(c) any legal entities controlled by nationals of that Contracting Party or by legal entities incorporated or constituted under the law in force in the Territory of that Contracting Party;

provided that that natural persons or legal entities are not prohibited by the laws of that Contracting Party from making

Investments in the Territory of another Contracting Party in connection with [Energy Materials and Products], [or to trade in [Energy Materials and Products] or equipment or services related to the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products] in or to the Territory of another Contracting Party]⁽¹²⁾.

- (7) "Make Investments" means establishing a new Investment, acquiring all or part of an existing Investment, and expanding an existing Investment.
- (8) "Returns" means the amounts yielded by an Investment (in pecuniary form or in kind) and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees, unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment.
- (9) ["Territory" means in respect of a Contracting Party the territory under its sovereignty, and the sea [and submarine]⁽¹³⁾ areas over which that Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights or jurisdiction. With respect to a regional economic integration organisation which is or becomes a Party to this Agreement the term Territory shall be construed as meaning the respective territories of those member states of such organisation which are also Parties to this Agreement, to the extent of that organisation's competence in the matters which are the subject of this Agreement in those territories]⁽¹⁴⁾.
- (10) "GATT" means GATT, its related instruments, applicable term schedules and relevant jurisprudence including reports of dispute settlement Panels, agreements and decisions of the Contracting Parties.
- (11) "GATT-related instrument" means an agreement, arrangement, decision, understanding, declaration, or other joint action pursuant to the General Agreement on Tariffs and Trade.

- (12) ["Intellectual property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967]⁽¹⁵⁾.
- (13) "Energy cycle" means the entire energy-chain including prospecting for, exploration, production, conversion, storage, transport, waste disposal and distribution and consumption of the various forms of energy and the decommissioning and treatment of energy-related physical structures.
- (14) ["Environmental impacts" means any effects of activities in the energy field (national or transboundary) on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures]⁽¹⁶⁾.
- (15) "Protocol" means an agreement⁽¹⁷⁾ 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.
- (16) "Freely convertible currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

General comment

- References of GATT and GATT-related instruments as currently drafted in items (10) and (11) are overlapping and will be reworked after the discussion on Article 5 A (document BA-11).

Specific comments

- 1.1: J asks for deletion. Refers to a heavy water, woods and charcoal.
- 1.2: USA suggests incorporating hydropower and geothermal energy which are not covered here but are important from the energy point of view even if not tradable. An appropriate definition will be sent by USA to the Secretariat by 7 April 1992.
- 1.3: USA, AUS and CH suggest inserting : "owned or controlled, directly or indirectly, by Investors of one Contracting Party in the Territory of another Contracting Party".
- 1.4: USA suggests deletion and instead adding : "in the energy field".
- 1.5: CH reserve.
- 1.6: EC suggests adding: "having its principal place of business within the Territory of a Contracting Party".
- 1.7: N asks for substituting with : "an economic".
- 1.8: A suggests replacing with: "provided that the reinvestments are undertaken in accordance with the laws of the Party concerned. The term..."
- 1.9: A suggests deletion.

1.10: J argues that "effective date" should be the date when the Investor's country or the country where its Investment is made, enter into the BA, whichever is the latest. Deferred to a later stage dependant on discussions on Article 39.

1.11: AUS asks for replacing with "or whose residence in that Contracting Party is not limited as to time under its laws". Due to strong reservations by other countries AUS comes up with a compromise text by 7 April 1992.

1.12: A suggests deletion.

1.13: J suggests replacing with "its bed and subsoil" in accordance with the expression used in UN Convention on the Law of the Sea.

1.14: CH suggests replacing with :

"Territory" shall be taken to mean, as regards a Contracting Party, the land territory under its sovereignty as well as the marine spaces and airspace in which it exercises sovereignty, sovereign rights or jurisdiction in conformity with international law. The term "Territory" shall be taken to mean, as regards an organisation of regional economic integration which is or becomes a Party to this Agreement, the Territories of its member states which are Parties to this Agreement, to the extent of the organisation's competence, on those Territories, over matters covered by this Agreement.

1.15: AUS suggests adding : "and shall also include confidential information (including trade secrets and knowhow) circuit layouts and semi-conductor chips and unregistered trade marks".

1.16: USA suggests revised text of the following wording :

"Environmental impacts" means any major actions significantly and adversely affecting the quality of the human environment due to the effects of activities in the energy field (national or transboundary).

1.17: CDN suggests insertion of "or instrument whether or not legally binding".

ARTICLE 2

OBJECTIVE OF THE AGREEMENT

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

Specific comments

2.1: EC suggests alternative text:

"The objective of this Agreement is to establish the legal framework in order to implement the principles of the Charter".

ARTICLE 3

PRINCIPLES

Alternative A

This Agreement shall realize this objective by establishing in the energy sector the principles for the development and implementation of an economic and legal framework based on market principles [and state sovereignty and sovereign rights over energy resources]⁽¹⁾, so as to encourage investment and joint actions which contribute to the development of trade and security of supply, ensure optimum management and more efficient use of energy resources, protecting the environment and enhancing safety.

Note

Text moved from Article 2 para (2) of BA-6 following EC recommendation.

Specific comments

3.A.1: USA requests deletion.

ARTICLE 3

PRINCIPLES

Alternative B

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

- (6) In order to promote efficiency in production, distribution and consumption of [Energy Materials and Products], Contracting Parties agree to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission and distribution) or supply of [Energy Materials and Products] in relevant markets. In particular all prices should be determined by market competition.
- (7) Each Contracting Party shall grant Investors of another Contracting Party non-discriminatory access to capital markets for energy investments and shall support the operations and expertise of relevant international institutions in mobilising private investments.
- (8) The Contracting Parties shall promote transfer of technology by eliminating any administrative or legal obstacles for such transfer, subject to protection of intellectual property rights.
- (9) The Contracting Parties shall develop energy policies designed to minimize negative environmental consequences in a cost-effective way, in particular through market-oriented energy prices which more fully reflect environmental cost and benefits.
- (10) The Contracting Parties recognize the specific circumstances facing some states of Eastern Europe and the Commonwealth of Independent States and accept the possibility of a stage by stage transition in those countries for the implementation of those provisions of this Agreement which they are unable to implement immediately and in full.

ARTICLE 4

[SOVEREIGNTY OVER ENERGY RESOURCES]⁽¹⁾

[The Contracting Parties recognise state sovereignty and sovereign rights over energy resources]⁽¹⁾. [In accordance with and subject to its international legal rights and obligations each State, in particular holds the rights to decide within its Territory the areas to be made available for exploration and exploitation of its natural resources and the optimisation of their recovery, the rate at which they shall be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation and to regulate the environmental and safety aspects of such exploration and exploitation within its Territory]⁽²⁾.

Specific comments

4.1 : USA requests the deletion of this Article. Scrutiny reservation by some delegations.

4.2 : CH suggests replacing with:

"Subject to its international obligations, particularly regarding the protection and preservation of the natural environment, each Contracting Party shall decide which areas within its Territory are open for activities of exploration and exploitation of natural resources, the terms and conditions of such activities, and the taxes, royalties or other fees to be paid therefore. In so deciding, Contracting Parties shall duly take into account the imperatives of rational management of natural resources and of avoiding waste".

ARTICLE 4A

ACCESS TO RESOURCES

The Contracting Parties shall facilitate access to and development of energy resources by Investors. They shall avoid in particular imposing on Investors discriminatory rules governing the ownership of resources and shall guarantee the Investors that they may dispose of the resources which they are developing in accordance with the applicable national legislation.

Note

Text taken from Article 3, para (3) of BA-6. New wording suggested by EC in previous stages of negotiations. The latest position of the EC on wording is as follows :

"The Contracting Parties shall facilitate access to and development of resources by Investors, by formulating transparent rules regarding the exploration, development and acquisition of energy resources. They shall apply such rules on a non-discriminatory basis in accordance with this Agreement and/or Protocols hereto".

ACCESS TO MARKETS

- (1) The Contracting Parties shall ensure that access to local and export markets for disposal of [Energy Materials and Products] can be attained on commercial terms and that Investors are not excluded on grounds of nationality or country of origin from entering a market.
- (2) In order to promote efficiency in all aspects of the Energy Cycle, Contracting Parties agree to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission and distribution) or supply of [Energy Materials and Products] in relevant markets. In general, price-formation shall be based on market principles.
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Note

Text taken from Article 3, paras (5) and (6) of BA-6.
New wording suggested by EC.

ARTICLE 4B

Alternative B

ACCESS TO MARKETS

The Contracting Parties shall, through laws, regulations, administrative rulings or general applications, give access to domestic markets for disposal of [Energy Materials and Products] on commercial terms. Investors of, and [Energy Materials and Products] originating from, one Contracting Party shall be given the same market access as Investors of or [Energy Materials and Products] originating from any other Contracting Party or third state, including the Contracting Party in whose market [Energy Materials and Products] is disposed of. Such access should be provided through the operation of market forces and through elimination of barriers to trade. In particular:

- (a) laws, regulations, administrative rulings or general applications should not exclude or limit any Investor on grounds of nationality or country of origin from entering or operating in a market for [Energy Materials and Products];
- (b) any laws, regulations, administrative rulings or general applications applying to foreign Investors with regard to entering and operating in markets for [Energy Materials and Products], shall apply equally to national Investors.

Note

New Article proposed by N.

PART II

MARKETS

[ARTICLE 5]⁽¹⁾ Alternative A

LIBERALISATION AND NON-DISCRIMINATION

- (1) (2) Contracting Parties undertake to remove progressively the barriers to trade with each other in [Energy Materials and Products] and [related equipment and services]⁽³⁾ in a manner consistent with their other international obligations so as to achieve the [greatest possible degree of]⁽⁴⁾ liberalisation in the market⁽⁵⁾.
- (2) In particular, Contracting Parties [undertake]⁽⁶⁾ in relation to [Energy Materials and Products] and [related equipment and services]⁽³⁾:
- (a) (7) not to [increase]⁽⁸⁾ custom duties and other charges nor to introduce new quantitative restrictions or measures having similar effect on imports or exports as [from the date of entry into force]⁽⁹⁾ of this Agreement;
- (b) (10) not to apply any customs duties, charges or other regulations relating to importation or exportation in a discriminatory manner as between other Contracting Parties, provided that Contracting Parties may take action according to established international criteria against unfair trading practices;
- (c) not to apply internal laws, taxes, charges, standards or other regulations in such a manner as to treat domestic products or services more favourably than similar products of other Contracting Parties.

General comments

Since many delegations, including RUF considered in particular drafting of para (2) inadequate, the Chairman suggested two alternative approaches to be discussed at the next meeting:

- alternative A: the current draft with added footnotes;
- alternative B: based on USA draft which would implicitly replace a number of other BA provisions.

Specific comments

5.1 : CDN, J, N general reserve on whole Article.

5.2 : AUS reserve, SF scrutiny reserve.

5.3 : Subject to Definitions.

5.4 : N delete.

5.5 : N supported by RUF asks for adding: "observing in particular the principles contained in the Article 11".

5.6 : Deferred to later discussion.

5.7 : PL asks for balance by introducing a "restructuring clause" permitting to reintroduce tariffs or charges in case of restructuring industries or heavy unemployment. Points out that transitional arrangements provisions are not clearly sufficient here.

5.8 : N suggests replacing with "institute or maintain".

5.9 : N asks for similar language as used in Article 16, suggests replacing with: "after the signature".

5.10: PL reserve pending the discussion on Article 27.

ARTICLE 5

Alternative B

RULES GOVERNING TRADE IN
[ENERGY MATERIALS AND PRODUCTS]

- (1) For Contracting Parties who are parties to the GATT, trade in [Energy Materials and Products] between them shall be governed by the GATT.
- (2) The GATT existing as of 1 May 1992 will govern trade in [Energy Materials and Products] between Contracting Parties who are not parties to the GATT upon entry into force of this Agreement, as well as trade between such non-parties to the GATT and Contracting Parties who are also parties to the GATT.
- (3) All Contracting Parties agree to meet not less frequently than every two years in order to consider whether to amend this Agreement to take into account GATT rules and codes adopted after 1 May 1992.
- (4) The above provisions shall not affect the applications of Articles 5, 6, 7, 11, (15), 24 and 27 and Article(s) on Competition.

ARTICLE 6 (1)

PROCUREMENT POLICIES

(1) (6) Each Contracting Party shall ensure that non-governmental entities with exclusive rights and government entities (hereinafter referred to as "Awarding Bodies") responsible for the award of contracts for the supply of works, equipment [or services] with respect to any matter the subject of this Agreement with the exception for energy delivered to energy entities apply criteria in awarding such contracts which are [objective and]⁽²⁾ transparent [and do not discriminate on grounds of nationality]⁽³⁾. [In particular, the conditions regarding eligibility or invitations to tender for contracts for the supply of works above five million ECU in value and of equipment above 400,000 ECU in value shall not be such as to place suppliers or contractors of one Contracting Party at a disadvantage when compared to suppliers or contractors from any other Contracting Party [including the Contracting Party in whose Territory the contract is to be performed]⁽³⁾]⁽⁴⁾. Except in circumstances which are objectively justifiable, [such]⁽⁵⁾ contracts shall be awarded on the basis of open competition, to which end each such Awarding Body shall give effective publicity to, and allow such time as is reasonable in the circumstances for the submission of tenders for, such contracts by suppliers or contractors from the other Contracting Parties.

(2) Contracting Parties shall not permit the relevant entities to circumvent this Article by splitting contracts or using special methods of calculating the value of contracts.

Note

Subject to USA alternative redraft (see general comments in Article 5).

General comments

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

- 6.1: CDN, USA, J, AUS reserved position on whole Article.
- 6.2: EC suggests deletion.
- 6.3: RUF reserved position.
- 6.4: EC suggests deletion.
- 6.5: EC suggests replacing with: "under national rules or international obligations, major".
- 6.6: Left for later discussion as the procurement policies are still under negotiation at the GATT.

[ARTICLE 7](1)

[INTELLECTUAL PROPERTY](2)

- (1) [Each Contracting Party shall, subject to paragraphs (2) and (3) below, afford protection under its domestic laws no less favourable than the protection it applies to its own nationals or to the nationals of any [Contracting Party](3) with respect to Intellectual property entailed in or created as a result of all activities carried out pursuant to this Agreement in its Territory by Investors of other Contracting Parties.](4)
- (2) [Without prejudice to paragraph (3), Contracting Parties who are not parties to the Paris Convention on the Protection of Industrial Property (1967 Stockholm revision) ("the Paris Convention") or the Berne Convention on the Protection of Literary and Artistic Works (1971 Paris revision) ("the Berne Convention") agree to apply protection equivalent to at least the minimum(5) required by those Conventions to the matters subject of this Agreement.](6)
- (3) [In the event of the adoption of an agreement, within the framework of the Uruguay Round of the General Agreement on Tariffs and Trade, on the Trade Related Aspects of Intellectual Property (hereinafter referred to as the "TRIPS Agreement"), the level of protection to be afforded under paragraphs (1) and (2) above shall in the case of Contracting Parties who are signatories of the TRIPS Agreement equal at least the minimum level provided for by this where the TRIPS Agreement provides for a higher minimum level of protection than that afforded under the Paris and Berne Conventions under paragraphs (1) and (2) above. [In the case of Contracting Parties not party to the TRIPS Agreement, proposals shall, in the event of its adoption, be considered for ensuring an equivalent level of protection for Intellectual property covered by the terms of this Article in the Territories of such Contracting Parties](7)(8)](9).

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

General comment

J argues that para (3) and (4) should be discussed after the conclusion of TRIPs negotiations. "Secret information" in para (4) should be clarified and defined in the text.

Specific comments

7.1: CDN general reserve pending review of the relevant conventions to which CDN does not adhere.

7.2 : EC suggests replacing the whole Article with following shortened text:

"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)".

7.3 : AUS suggests replacing with "other country" to strengthen this non-discrimination clause.

7.4: USA suggests deletion of para (1).

7.5 : CH suggests inserting "level".

7.6: AUS argues that the Paris and Berne Conventions are silent or deficient on some issues which would seem to be important in the Energy Charter context (e.g. patent terms, exclusions from patentability, protection of computer programs and integrated circuits, enforcement of intellectual property rights). This could be addressed in an Annex (max 2 pages) of key standards for the protection of intellectual property (e.g. patents, copyright, incl. computer programs, integrated circuits, designs, trade secrets and trade marks).

7.7: CH suggests replacing with the following text:

"Contracting Parties who are not party to the TRIPS Agreement shall accord, in the field of Intellectual property covered by this Article, a level of protection equivalent to the level provided for by the TRIPS Agreement where it provides for a higher minimum level of protection than that accorded under the Paris and Berne Conventions".

7.8: AUS suggests replacing with the wording :

"Contracting Parties not party to the TRIPS Agreement shall comply with the substantive provisions of that Agreement".

7.9: Discussion on para (3) was deferred. Chairman suggests that the substance might be moved to an accompanying document which could be negotiated by Contracting Parties.

ARTICLE 8

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 and distribution)⁽¹⁾ or supply of [Energy Materials and Products] in relevant markets, insofar as they may affect trade between Contracting Parties.

(2) Contracting Parties [shall]⁽²⁾ ensure that within their jurisdiction they have and implement laws, addressing unilateral and concerted anti-competitive conduct ⁽³⁾ in the areas covered by this Agreement. [Where Contracting Parties already have such laws they ⁽⁴⁾ shall not be affected by this Article].

Contracting Parties which have not yet adopted such legislation shall see to it that new legislation does not conflict with the contents of this Agreement.

(3) Contracting Parties with experience in applying competition rules may provide upon request and within available resources, technical assistance on the development and implementation of competition rules to those Contracting Parties who have not yet adopted such rules.

(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 concludes that any specified anti-competitive practice carried out within the Territory of another Contracting Party is adversely affecting an [important]⁽⁵⁾ interest, the Contracting Party may notify and request consultations with the other Contracting Party. Such notice and consultations shall include sufficient [non-confidential]⁽⁶⁾ 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 action within its national jurisdiction including, where appropriate, additional or expanded enforcement activities]⁽⁷⁾ to remedy the anti-competitive activities identified in the notification.

Note

Delegates are asked to forward written comments by 27 April, in order to enable the Secretariat to prepare a Room-document.

General comments

N will propose an alternative text for whole para 2, which will be circulated prior to 27 April meeting.

Specific comments

8.1: N suggests inclusion of "marketing".

8.2: USA suggests "should".

8.3: EC suggests insertion of "and exploitative abuses".

8.4: USA asks for insertion of "their scope, [interpretation or implementation]".

8.5: N suggests deletion.

8.6: EC expressed its doubts on this wording.

8.7: N suggests replacing with "shall seek".

ARTICLE 9

[MONOPOLIES]⁽¹⁾

The Contracting Parties undertake to minimize the scope and powers of monopoly or [dominant enterprises]⁽²⁾ except to the extent that that would obstruct the economic and secure transmission and distribution of energy⁽³⁾.

General comments

The Chairman invites EC to forward a new text for next WG II meeting on 27 April 1992. The delegations are asked to send comments to EC by 15 April 1992.

Specific comments

9.1: USA, J, AUS reserve.

9.2: A and J ask for need of definition in Article 1.

9.3: N proposes an addition of a new sentence:

"Contracting Parties shall make their best endeavours to reduce the opportunities for monopoly pricing, discrimination among the countries and cross subsidies".

ARTICLE 10

[STATE AID]⁽¹⁾

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

General comments

The further discussion pending a new drafting of the "Reference Approach".

Specific comments

10.1: A suggests elimination of this Article and substance to be moved to Article 8.

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

10.3: KIR suggests replacing para(1) with :

"State aid to energy industries shall be granted in a manner which minimizes the distortion of competition in trade among the Contracting Parties".

PART III

OTHER PROSPECTIVE

[ARTICLE 11]⁽¹⁾

TRANSPORT AND TRANSIT

- (1) Each Contracting Party [[undertakes]⁽²⁾ to facilitate]⁽³⁾ the transit through its Territory of [Energy Materials and Products] between two or more Contracting Parties, without distinction as to the origin, destination or ownership of such [Energy Materials and Products] or discrimination as to the pricing on the basis of such distinction, and without imposing any unreasonable delays, restrictions or charges.
- (2) Contracting Parties shall encourage relevant entities to cooperate in:
- (a) modernising transit networks necessary to the supply of [Energy Materials and Products] while complying with specific previous obligations;
 - (b) the development and operation of transport infrastructure serving the Territory of more than one Contracting Party;
 - (c) measures to mitigate the effects of the interruption in the supply of [Energy Materials and Products].
- (3) Each Contracting Party [undertakes]⁽²⁾ that its provisions relating to transport of [Energy Materials and Products] by rail, [road]⁽⁴⁾⁽⁵⁾, [harbour facilities]⁽⁶⁾ and to the use of high-pressure pipelines or high-voltage transmission grids shall, if capacity is available, not be less favourable than those which would have been accorded to such materials and products wholly or partly originating in or destined for its own Territory or the Territory of another Contracting Party, except if otherwise provided for in an existing international agreement.

- (4) In the event that access to existing high-pressure pipelines or high-voltage transmission grids 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.
- (5) In the event of a dispute over the terms and conditions of existing transit of energy through high-pressure pipelines or high-voltage transmission grids in the Territory of a Contracting Party to the Territory of another Contracting Party or to or from port facilities for loading or unloading, a Contracting Party through which the energy transits shall not interrupt nor permit [any entity subject to its jurisdiction]⁽⁷⁾ to interrupt the existing flow of energy [until after the dispute has been referred to the Governing Council and the Governing Council has had adequate time to seek conciliation between the parties in dispute]⁽⁸⁾.
- (6) The provisions of this Article shall not require a Contracting Party to take action which endangers its [security of energy supply]⁽⁹⁾, quality of service and the most efficient development and operation of all parts of its electricity and gas systems.

General comments

On a basis of the first reading of this Article at the WG II meeting on 9 april 1992, the Chairman invited delegations of A, AUS N, RUF and USA chaired by the Secretariat for redrafting. The working sub-group will meet as soon as possible.

Specific comments

11.1: CDN general reserve on whole Article.

11.2: J asks for substituting with "shall".

11.3: N suggests replacing with : "shall permit".

11.4: A considers road transport undesirable.

11.5: AUS requests for inserting : "inland waterways".

1.6: USA reserve.

11.7: SF scrutiny reserve.

11.8: General reserve by J, N, USA and A as they see no need for the
Governing Council to reconcile the disputes.

11.9: AUS suggests deletion.

ARTICLE 12

[TRANSFER OF TECHNOLOGY]⁽¹⁾

- (1) The Contracting Parties agree to promote access to and transfer of technology on a commercial and non-discriminatory basis to assist effective trade and investment and to implement the objectives of the Charter, subject to the provisions of Article 7⁽²⁾.
- (2) Accordingly the Contracting Parties shall eliminate existing and create no new administrative or legal obstacles for transfer of technology, and related [Energy Materials and Products], equipment and services between investors, subject to non-proliferation and other international obligations.
-

Note

New text based on EC proposal.

Specific comments

12.1: USA requests deletion of this Article.

12.2: J argues that exceptions provided in Article 27 should apply also to this proposal.

[ARTICLE 13]⁽¹⁾

ACCESS TO CAPITAL

- (1) ⁽²⁾Each Contracting Party shall accord to Investors of another Contracting Party treatment no less favourable than that accorded in like situations to its own Investors or to Investors of any other Contracting Party or of any third state with respect to the borrowing of funds and the purchase, insurance, and sale of equity shares and other securities in connection with extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products]⁽³⁾.
- (2) Each Contracting Party shall provide ⁽⁴⁾⁽⁵⁾ the fullest possible access consistent with this Agreement to public credit, guarantee or insurance agreement to Investors, in connection with extraction, production, conversion, treatment, carriage and supply of [Energy Materials and Products].
- (3) ⁽²⁾The Contracting Parties shall seek to the greatest extent possible to take advantage of and to support the operations and expertise of relevant international financial institutions in mobilising private investments in connection with the subject matter of this Agreement.
-

General comments

Article based on RUF suggestion.

The Chairman is concerned to ensure that the current wording of this Article does not jeopardize national provisions to protect private investors or hamper the ability of lenders to demand appropriate security for loans. EC and J stressed the need to clarify the objective of these provisions, as well as the criteria and appreciation modalities which are referred to. EC points out that guarantee mechanism for political risks cannot be globally provided by other Parties.

Specific comments

13.1: Scrutiny reserve by many delegations.

13.2: J asks for deletion of paragraphs (1) and (3).

13.3: USA asks for adding a new clarifying sentence:

"Nothing in this Article is intended to impair the ability of private institutions to establish and apply their own lending practices based on market principles".

13.4: J suggests inserting: "in the framework of its domestic systems".

13.5: EC suggests inserting: "in accordance with its laws and regulations".

[ARTICLE 14](1)

ENVIRONMENTAL ASPECTS

- (1) The Contracting Parties shall strive to minimise harmful effects on the environment of all aspects of the Energy Cycle in an economically and environmentally sound manner in order to move towards sustainable development . To this end they shall :
- (a) take account of environmental concerns throughout the formulation and implementation of their energy policies, including an appropriate mix of policy instruments;
 - (b) promote market-oriented price-formation including a fuller reflection of environmental cost and benefits;
 - (c) promote an energy mix that minimises in an economically acceptable way the negative Environmental Impacts of the Energy Cycle having particular regard to the encouragement of renewable sources;
 - (d) promote the dissemination of information on environmentally sound energy policies, practices and technologies to promote public awareness among consumers on Environmental Impacts of their behaviour in relation to energy use and consult with each-other on how to promote such awareness most effectively. Such promotion may include labelling schemes for informing the public about comparative environmental effects of energy consuming products available on the market;
 - (e) encourage favourable conditions for the transfer and dissemination of technology which will reduce harmful Environmental Impacts of all aspects of the Energy Cycle;

- (f) promote the use of best available energy technologies not entailing excessive costs;
 - (g) promote the transparent assessment of Environmental Impacts of energy Investments projects at an early stage and ensure transparency in their legal and administrative requirements;
 - (h) implement appropriate research and development activities including with respect to renewable sources and the internalisation of environmental cost in the energy prices;
 - (i) promote internationally awareness and information exchange on Contracting Parties' environmental programmes and standards that relate to the energy sector and on the implementation of these programmes and standards.
- (2) Actions of the Contracting Parties relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay.
- (3) The Contracting Parties shall ensure consistency between their energy policies and international environmental agreements to which they are parties.

Specific comments

14.1: The whole Article is pending considerations in capitals.

ARTICLE 15

TRANSPARENCY

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

Note

Subject to USA alternative redraft (see general comments in Article 5).

General comments

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

Specific comments

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

15.2 : USA asks for inserting "and Investment".

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, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Territory. Such conditions shall include a commitment to accord at all times to Investments⁽¹⁾ [and Returns]⁽²⁾ of Investors of any Contracting Party fair and equitable treatment. Such Investments [and Returns]⁽²⁾ [shall also enjoy full protection and security]⁽³⁾ [and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal]⁽⁴⁾. [In no case shall such Investments [and Returns]⁽²⁾ be accorded treatment less than that required by international law, including relevant international obligations].⁽⁵⁾ [Each Contracting Party shall observe any [other agreements and]⁽⁶⁾ obligations it may have entered into with regard to Investments of Investors of any other Contracting Party].⁽⁷⁾
- (2) ⁽³⁾Each Contracting Party shall permit Investors of other Contracting Parties to make Investments⁽⁸⁾ in its Territory⁽⁹⁾ on a basis no less favourable than that accorded⁽¹⁰⁾ [to its own Investors]⁽¹¹⁾ 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) ⁽³⁾Notwithstanding paragraph (2) above Contracting Parties may maintain limited exceptions to the obligations of paragraph (2) which correspond to their domestic legislation⁽¹²⁾ 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]⁽¹³⁾ are available publicly in line with Contracting Parties' obligations under Article 15 of this Agreement [and are provided in summary form in Annex [A] hereto attached]⁽¹⁴⁾.

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

[(4)⁽³⁾For the avoidance of doubt, the provisions of this Article do not affect the application of a Contracting Party's laws, regulations [and policies]⁽¹³⁾ as listed in Annex (A) concerning the participation of Investors of another Contracting Party in any particular activity or possible investment under the terms of this Agreement, whether or not such Investors have already made other investment in the Territory of that Contracting Party]⁽¹⁵⁾.

(5) (3)⁽¹⁶⁾The Contracting Parties agree not to introduce any changes to measures notified under Annex [A] which would have the effect of adding to any discrimination thereby maintained between the right and ability of their own Investors and Investors of any other Contracting Party or third state, whichever is the most favourable, to Make Investments in their Territory after [their signature of this Agreement]⁽¹⁷⁾. Contracting Parties may, however, add any relevant measures to Annex [A] [which may result from the ending]⁽¹⁸⁾ of any monopolies maintained by them in the field of activities covered by this Agreement after [their signature of this Agreement]⁽¹⁷⁾. Once notified, any such measures shall also be subject to the other provisions of this paragraph.

(6) The Contracting Parties agree to make every effort to eliminate existing restrictions listed at Annex [A] to this Agreement which affect the ability of Investors of other Contracting Parties to make Investments in their Territory. [The Governing Council shall review progress in this direction periodically and, in the first instance, no later than 3 years following the entry into force of this Agreement](19).

(7) (20) In addition each Contracting Party shall in its Territory accord to Investments [and their Returns](2) and Activities Associated with Investment of Investors of another Contracting Party treatment no less favourable than that [which it accords(10) to Investments [or Returns](2) and Activities Associated with Investment of [its own Investors or](11)](21) the Investors of any other Contracting Party or any third state, whichever is the most favourable.

(8) (22) 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 Territory of the first Contracting Party to employ within its Territory 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 Territory for the purpose of engaging in activities connected with relevant Investments.

(23)

General comment

CDN has a general reservation on whole Article.

Specific comments

- 16.1: A suggests insertion of "admitted".
- 16.2: USA requests deletion.
- 16.3: N reserve.
- 16.4: General reserve, pending the definition of associated activity.
- 16.5: RUF reserve.
- 16.6: GB suggests deletion.
- 16.7: General scrutiny reserve.
- 16.8: Based on USA suggestion the Chairman proposed and Working Group provisionally agreed to use the following definition on "making Investment":
To "make Investments" includes establishing a new Investment, acquiring all or part of an existing Investment, and expanding an existing Investment.
- 16.9: AUS supported by CDN wishes insertion: "subject to its right to exercise power conferred by its law and investment policies".
RUF would support unless it is clear that the obligations of this Article are to be implemented through national legislation.
- 16.10: USA suggests insertion of "in like circumstances" - deferred to next meeting.
- 16.11: AUS reserve.
- 16.12: CS asks for inserting: "and to international commitments".

- 16.13: USA, EC scrutiny reserve.
- 16.14: N reserve.
- 16.15: USA suggests deletion of whole para (4).
- 16.16: EC scrutiny reserve on para (5).
- 16.17: J asks for replacement with "its entry into force of this Agreement by each Contracting Party".
- 16.18: USA suggests replacing with "considered necessary to effect the dissolution".
- 16.19: Deferred to discussion on Article 29.
- 16.20: J reserve on para (7).
- 16.21: Deferred to next meeting.
- 16.22: J, A reserve on para (8).
- 16.23: USA proposes adding new para, which would read:
"No Contracting Party shall impose trade-related performance requirements as a condition for the making or the operation of an investment. Such requirements include commitments to export goods produced, or commitments that goods or services must be purchased locally, or other similar commitments".

ARTICLE 17

COMPENSATION FOR LOSSES

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

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

(a) [requisitioning of their property by the latter's forces or authorities, or]⁽³⁾

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

shall be accorded restitution and/or prompt, adequate and effective compensation. Resulting payments shall be made without [undue]⁽²⁾ delay in freely convertible currency and be freely transferable.

General comment

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

Specific comments

17.1: J, GR, RUF, EC reserved positions.

17.2: EC, S reserved position.

17.3: A 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 Territory of any other Contracting Party except where such expropriation is:

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

Such compensation shall amount to the fair market value of the Investment expropriated [immediately before the expropriation or before the impending expropriation became⁽²⁾ known, (hereinafter referred to as "the expropriation date") whichever is the earlier]⁽¹⁾. The fair market value shall be the amount a willing buyer would pay a willing seller⁽³⁾. Where no market exists, determination of what constitutes full compensation in a given case of expropriation shall [be in accordance with generally recognised principles of valuation]⁽⁴⁾, taking into account all factors which in the particular circumstances of the case are relevant to the valuation of the property interests involved. Such compensation shall be made without delay and be freely transferable to a freely convertible currency⁽⁵⁾ in accordance with Article 19; such compensation shall be calculated on the basis of the prevailing rate of exchange on the expropriation date of that freely convertible currency and shall include interest at a [comercially reasonable]⁽⁶⁾ rate⁽⁷⁾ from the expropriation date 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 the legal applicability to the Investments of the act of expropriation, of the payment of compensation and of the valuation of its Investment[,](8) 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 Territory, and in which Investors of any other Contracting Party have a shareholding, the provisions of paragraph (1) above shall apply to the extent necessary to guarantee prompt, adequate and effective compensation for those Investors](9).

- (4) [Without prejudice to Article 19, the provisions of this Article shall also apply to Returns.](10)

- (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.

Specific comments

18.1: J suggests replacing with : "at the time when the expropriation was publicly announced or when that measure was taken, whichever is the earlier, without reduction in that value due to the prospect of the very seizure which ultimately occurs".

18.2 : RUF asks for inserting : "officially".

18.3 : RUF suggests adding : "for the particular investment in question".

18.4 : RUF requests deletion.

18.5 : RUF suggests insertion of : ", in case it was obtained in such currency, ".

18.6 : RUF requests deletion.

18.7 : RUF suggests adding : "in force in respective Contracting Party".

18.8 : USA, GB and AUS examine which parts last part of sentence should apply to.

18.9 : General reservation pending the appropriate definition of investment.

18.10: RUF reserve.

ARTICLE 19

TRANSFER OF PAYMENTS RELATED TO INVESTMENTS

- (1) Each Contracting Party shall in respect to Investments by Investors of any other Contracting Party⁽¹⁾ in its Territory guarantee the freedom of transfers related to these Investments into⁽²⁾ and out of its Territory. In particular such transfers include :
- (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 [made]⁽³⁾ under a contract, including amortisation of principal and accrued interest payment [made]⁽³⁾ pursuant to a loan agreement;
 - (e) compensation pursuant to Articles 17 and 18;
 - (f) proceeds from the sale of liquidation of all or any part of an Investment.
- (2) Transfers under paragraph (1) above shall be effected without [undue] delay [within such period as is normally required for the completion of transfer formalities] and in a [freely convertible currency]⁽⁴⁾.

(3) Unless otherwise agreed by the Investor with the Contracting Party concerned, transfers shall be made at the rate of exchange applicable on the date of transfer. The rate of exchange shall be either the spot rate or, where there is no such spot rate, shall not substantially differ from the cross rate obtained from those rates which would be applied by the International Monetary Fund on the rate of payment for conversion of the currencies concerned into Special Drawing Rights.

(5)(6)

Specific comments

19.1: AUS asks for insertion of "and subject to its right in exceptional balance of payments difficulties to exercise equitably and in good faith powers conferred by its laws".

19.2 : RUF suggests insertion of : ", subject to terms and conditions of the present Agreement,".

19.3 : RUF asks for deletion.

19.4 : RUF requests substituting with : "currency, they were obtained or invested".

19.5: USA proposes a new para (4) of the following wording : "Notwithstanding the provisions of paragraphs 1, 2, and 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. Furthermore, a Contracting Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its law".

19.6: CDN requests the addition of a new para : "Transfers shall be subject to consistency within any measure

of general application relating to :

- bankruptcy, insolvency or protection of rights of creditors,
- issuing, trading or dealing in securities,
- criminal or penal offences".

ARTICLE 20

[TAXATION]⁽¹⁾

The provisions [of Part IV]⁽²⁾ of this Agreement shall not be construed so as to [oblige any one Contracting Party to extend to the [Investors]⁽³⁾ of any other Contracting Party the present or future benefit of any treatment, preference or privilege resulting⁽⁴⁾ from any international agreement or arrangement or any domestic legislation relating wholly or mainly to taxation, provided that such domestic legislation does not constitute a means of arbitrary or unjustifiable discrimination between Investors of any other Contracting Party or a disguised restriction on the benefits accorded to such Investors.

General comments

- A drafting group consisting of trade investment and tax experts will be convened at an appropriate time to consider the provisions of this Article.
- Delegations were invited to provide the Secretariat with further information on the kind of agreements in existence in their countries. If necessary, the Japanese delegation indicated that the Article should be amended to limit its application to agreements concerning double taxation and tax evasion.
- The provisions of Article 20, including the dispute settlement procedures of the Basic Agreement, should be considered in the context of existing tax treaty provisions and of other statutory taxing regimes.

Specific comments

20.1: General scrutiny reserve.

20.2: In view of the difficulty in differentiating between direct and indirect taxation, the Chairman has decided that the scope of exclusion in Article 20 shall be decided on an Article by Article basis.

20.3: USA ad referendum.

20.4: CDN requests replacing with :

"prevent any one Contracting Party from providing a different treatment to the Investors of any other Contracting Party that results".

ARTICLE 21

ASSIGNMENT OF RIGHTS

(1) If a Contracting Party, its designated agency or a company or enterprise incorporated in a Contracting Party other than an Investor (the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment in the Territory of another Contracting Party (the "Host Party") or acquires the rights and claims to such an Investment, as the result of the complete or partial default of the Investor, 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.

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

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

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

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

ARTICLE 22

RELATIONSHIP TO OTHER AGREEMENTS

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of [Part IV]⁽¹⁾ of this Agreement, these terms shall prevail to the extent that they are not less favourable to the Investor.

General comment

After considering the questions raised by some delegations the Chairman will propose a new draft of this Article for the discussion at the next meeting.

Specific comments

22.1: USA asks for adding to Part IV also Parts V and VI.

PART V

DISPUTE SETTLEMENTS

[ARTICLE 23](1)

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 Investement of the latter⁽³⁾ in the Territory of the former shall, if possible, be settled amicably.
- (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date at which either Party to the dispute requested amicable settlement, the dispute shall, subject to paragraph 3 below, at the request of the Investor concerned be submitted to international arbitration or conciliation.
- (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) 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 (3), the dispute may, at the choice 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 International Chamber of Commerce, Stockholm; or

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

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.

(6) [A legal person which has the nationality of one Contracting Party and which before such a dispute arises is controlled by Investors of another Contracting Party shall for the purpose of article 25 (2)(b) of the Convention referred to in paragraph (5)(a) above be treated as an Investor of that other Contracting Party](3)(4).

(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](5).

(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.

General comments

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

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".

23.3: EC doubts on the need for this para.

23.4: 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 Territory of one 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 or the latter Contracting Party".

23.5: In the light of current wording of para (2) the Secretariat will need to consider whether this para should have been retained.

ARTICLE 24

Alternative A

DISPUTES BETWEEN CONTRACTING PARTIES

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

General comments

CDN cannot agree that disputes regarding tax matters be referred to an international tribunal nor that they can be discussed through diplomatic channels.

F raised a question on para (2) in relation to automatic arbitration.
GR asks whether the Hague Convention allows an unilateral approach.

Specific comments

24.1: CDN reserve with respect to the Hague Convention.

24.2: USA requests substituting with:"the United Nations Commission on International Trade Law "(UNCITRAL)".

ARTICLE 24

Alternative B

DISPUTES BETWEEN CONTRACTING PARTIES

- (1) Where a dispute arises between GATT members or parties to a GATT-related instrument in circumstances where GATT or such instrument applies, such dispute(s) shall be settled according to the procedures of GATT or the GATT-related instrument in question.
- (2) Disputes concerning the application or interpretation of this Agreement between Contracting Parties who are not parties to the GATT or relevant GATT-related instrument, or between parties where one is and the other is not party to the GATT or GATT-related instrument, should, if possible, be settled bilaterally through diplomatic channels.
- (3) In the case of a dispute between Contracting Parties, as described in paragraph 2 above, which cannot be settled bilaterally through diplomatic channels, it shall upon the request of any Contracting Party to the dispute be submitted to an arbitral tribunal constituted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules). The decision of the tribunal shall be final and binding on the parties to the dispute.
- (4) Notwithstanding paragraphs 2 and 3 above, where bilateral trade agreements between Contracting Parties exist, the dispute settlement mechanisms of such bilateral agreements, if any, shall prevail to the extent that such mechanisms would be applicable to the dispute in question in the absence of this Agreement.

(5) Should a Contracting Party, who is not a party to the GATT but who is party to a dispute settlement process under paragraph 3 or 4 above, become a party to the GATT, such dispute(s) shall be resolved in accordance with paragraphs 3 or 4 above.

Note

New draft on Article 24 proposed by USA delegation.

The intent on para (5) is to prevent switching dispute settlement fora mid-stream in a dispute simply because a party to the dispute becomes a party to the GATT.

ARTICLE 24

Alternative C

DISPUTES BETWEEN CONTRACTING PARTIES

(1) (a) If a dispute has arisen between Contracting Parties over the interpretation or application of this Agreement, and if that dispute has not been settled within [six] months, any party may submit it to the arbitration procedure provided for in this paragraph by a written modification addressed to the other party to the dispute.

(b) Unless otherwise agreed by the parties to the dispute, the Arbitral Tribunal shall be constituted as follows:

(i) When making the notification referred to in paragraph (1)(a), the party instituting the proceedings shall appoint one member, who may be its national.

(ii) Within [30] days of the receipt of that notification, the other party to the dispute shall, in turn, appoint one member, who may be its national. If the appointment is not made within the time-limit prescribed, the party having instituted the proceeding may, within [30] days of the expiry of that time-limit, request that the appointment be made in accordance with clause (iv).

(iii) A third member, who may be a national of a party to the dispute, shall then be appointed between the parties to the dispute. That member shall be the President of the Tribunal. If, within [six months] of the receipt of the notification referred to in paragraph (1)(a), the parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with clause (iv), at the request of any party submitted within [30] days of the expiry of the [six] month period provided for in the present clause.

- (iv) Appointments pursuant to clauses (ii) and (iii) shall be made by the President of the International Court of Justice within [30] days of the receipt of the request. If he is prevented from discharging this task or is a national of a 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 of a party, the appointments shall be made by the most senior Judge of the Court who is not a national of a party.
- (v) The Tribunal shall establish its own rules of procedure, unless otherwise agreed by the parties to the dispute, and shall take its decisions by a majority vote of its members.
- (vi) The arbitral award shall be final and binding upon the parties to the dispute.
- (vii) The expenses of the Tribunal, including the remuneration of its members, shall be borne in equal shares by the parties to the dispute.
- (2) If a dispute has arisen between Contracting Parties which are members of GATT or parties to a GATT-related instrument, and if GATT or the GATT-related instrument is applicable, that dispute shall be settled according to the procedure set forth by GATT or the instrument in question.

Note

New draft on Article 24 proposed by CH delegation.

PART VI

[CONTEXTUAL]

[ARTICLE 25]⁽¹⁾

GOVERNMENT CONTROLLED ENTITIES

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.

ARTICLE 26

[OBSERVANCE BY SUB-FEDERAL AUTHORITIES]⁽¹⁾

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

Note

New text as suggested by AUS is based on CDN proposal and amended by the Chairman. Original CDN wording read: "Each Contracting Party shall take [such reasonable] measures [as may be] available...".

Specific comments

26.1: USA reserve.

ARTICLE 27

EXCEPTIONS

- (1) The provisions of this Agreement shall not preclude any Contracting Party from taking any action [which it considers]⁽¹⁾ necessary for the purposes of protecting its public order, or [human, animal or plant life or health, [or conservation of exhaustible natural resources]⁽²⁾]⁽³⁾, or from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security, or its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and [of international nuclear safeguards obligations, provided that such prohibitions shall not constitute disguised restrictions on trade⁽⁴⁾ or arbitrary discrimination as between Contracting Parties]⁽⁵⁾⁽⁶⁾. Such actions shall be duly motivated and shall not be disproportionate to this end.
- (2) A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential [defence]⁽⁷⁾ interests.
- (3) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the ⁽⁸⁾ benefit of any treatment, preference or privilege resulting from
- (a) ⁽⁹⁾the membership to [or association with] ⁽¹⁰⁾ any existing [or future] ⁽¹⁰⁾ customs [or economic] ⁽¹⁰⁾ union or a free trade area [or similar international agreement] ⁽¹⁰⁾ to which any of the Contracting Parties concerned is or may become a party, or

(b) [any regulation to facilitate frontier traffic] ⁽¹¹⁾.

Specific comments

27.1 : N reserve.

27.2 : N reserve as paraphrasing of Art. XX (g) of GATT code is used here in a different context. Should be replaced rather with "energy purposes".

27.3 : CH suggests deletion subject to the purview of Part IV of this Agreement. USA supports deletion.

27.4 : USA asks for adding "and Investment".

27.5 : J suggests deletion, and replacement with: "obligations under other nuclear non-proliferation regimes".

27.6 : RUF asks for addition of subpara. (J) of Art. XX and Art XII of GATT.

27.7 : USA asks for substituting with "security".

27.8: USA suggests inserting: "most favoured nation".

27.9 : 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.

27.10: Should be left for later discussion. USA suggests deletion.

27.11: For consideration at next meeting.

PART VII

STRUCTURAL AND INSTITUTIONAL

ARTICLE 28

RELATIONSHIP BETWEEN THE AGREEMENT AND ITS PROTOCOLS

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

Chairman's note

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

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: D asks for deletion.

[ARTICLE 29]⁽¹⁾

GOVERNING COUNCIL

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

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

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

General comments

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

Specific comments

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

29.2: J reserve on the grounds that there is no need for subsidiary bodies.

29.3: EC reserved position on subpara (a).

29.4: AUS, EC, USA, J, reserve; an open-ended commitment.
RUF supports retaining this subpara.

29.5: D suggests the addition of the following new paragraph :
"The Governing Council should delegate the tasks of the Secretariat as far as possible to other organisations or institutions on a contracting basis against restitution of costs."

ARTICLE 30

VOTING

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

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

(9) [For the purposes of this Article a regional economic integration organisation shall, when voting, do so in the following manner:

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

(b) notwithstanding paragraph (3) above, in votes concerning a Protocol such organisation shall have a number of votes equal to the number of its member States which are Parties to that Protocol].(4)

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

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 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

ARTICLE 33

[SIGNATURE]⁽¹⁾

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

General comments

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

Specific comments

33.1: A reserve.

ARTICLE 34

RATIFICATION, ACCEPTANCE OR APPROVAL

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

ARTICLE 35

APPLICATION TO OVERSEAS TERRITORIES

- (1) Any Contracting Party may at the time of signature, ratification, acceptance, approval or accession declare that the Agreement shall extend to all the Territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Agreement enters into force for that Contracting Party.

- (2) Any Contracting Party may at a later date, by a declaration addressed to the Depositary, extend the application of this Agreement to other Territory specified in the declaration. In respect of such Territory the Agreement shall enter into force on the ninetieth day following the receipt by the Depositary of such declaration.

- (3) Any declaration made under the two preceding paragraphs may, in respect of any Territory specified in such declaration, be withdrawn by a notification addressed to the Depositary. The withdrawal shall, subject to the applicability of Article 43(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depositary.

ARTICLE 36

ACCESSION

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

Specific comments

36.1: J asks that this date should be specified.

ARTICLE 37

AMENDMENT

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

Specific comments

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

ARTICLE 38

ASSOCIATION AGREEMENTS

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

ARTICLE 39

ENTRY INTO FORCE

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

[ARTICLE 40]⁽¹⁾

PROVISIONAL APPLICATION

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

Specific comments

40.1: J, CDN reserve.

[ARTICLE 41]⁽¹⁾

RESERVATIONS

No reservations may be made to this Agreement.

Specific comments

41.1: AUS, RO, CDN 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 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.
-

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.

ARTICLE 43

WITHDRAWAL

- (1) At any time after five years from the date on which this Agreement has entered into force for a Contracting Party, that Party may withdraw from this Agreement by giving written notification to the 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 Territory of a Contracting Party as of the date when that Party's withdrawal from this Agreement takes effect for a period of twenty years from such date]⁽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 Republic of Portugal shall assume the functions of depositary of this Agreement.

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

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

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

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

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

ARTICLE 45

AUTHENTIC TEXTS

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

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

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

Specific comments

45.1: 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).