

Brussels, 31 October 1991

NOTE FROM THE SECRETARIAT

Subject: Basic Agreement

1. It has been decided to use the terminology Basic Agreement instead of Basic Protocol⁽¹⁾.
2. Working Group II had an effective second reading discussion of the draft Basic Protocol (doc. 8/91 BP2) in Brussels on 16-18 October. The results of the first reading, (doc. 14/91 BP3) were also taken into account.
3. The meeting on 16-18 October was split into three parts - general and energy policy issues (Part II of the draft Agreement), the promotion and protection of investments (Part III) and organisational and institutional issues (Parts IV-VI), with one day devoted to each of these parts.
4. On the basis of these discussions a revised draft text has been prepared under the authority of the Group Chairman. This is attached as Annex I to this note. New wording is underlined and the text is accompanied by explanatory notes and footnotes recording delegations' positions.
5. Delegations should also note that:-
 - Articles 2 to 4 have been extensively revised and now include also the concepts from the former Article 38;
 - Article 13 has been deleted and covered in part in the new text of Article 14;
 - Article 19 has been transferred to Part III.
6. A note on the definition of "Energy Materials and Products" is in Annex II. Observers comments are in Annex III.
7. Redrafts of Articles 7 and 10 will be circulated as soon as possible.

(1) The BP document series for WG II has therefore been changed to a BA series.

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

21/91

Annex I

BA 4

RESTRICTED

DRAFT

31 October 1991

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 ()
on ();

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:

Note: New texts suggested by Chairman on basis of AUS proposal.

PART I

DEFINITIONS

Article 1

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" - [Ref. Annex I I]
- (4) "Investment" means every kind of asset⁽¹⁾, and in particular, though not exclusively, includes any of the following:
 - (a) [movable and immovable]⁽²⁾ property and any other related property rights such as mortgages liens or pledges;
 - (b) shares in, and stock, bonds and debentures of, and any other form of participation in, a company or business enterprise;
 - (c) claims to money, and claims to performance under contract having a financial value;
 - (d) Intellectual⁽³⁾ property rights, goodwill, technical processes, know-how and any other benefit or advantage attached to a business;
- (e) [rights]⁽⁴⁾, conferred by law or under contract, to undertake any commercial activity, including the search for, or the cultivation, extraction or exploitation of natural resources;⁽⁵⁾

which are used in connection with the implementation of the principles of the Charter and in accordance with the provisions of this Agreement.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

(5) "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]⁽⁶⁾;

(b) any corporations, companies, firms, enterprises, organisations and associations incorporated or constituted under the law in force in the Territory of that Contracting Party;

provided that that natural person, corporation, company, firm, enterprise, organisation or association is competent, in accordance with the laws of that Contracting Party;

(i) make investments in the Territory of another Contracting Party in connection with Energy Materials and Products, or

(ii) 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.

(6) "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(7) "Territory" means in respect of a Contracting Party the territory under its sovereignty, and the sea and submarine 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 the subject of this Agreement in those territories.

(8) "GATT-related Instrument" means an agreement, arrangement, decision, understanding, declaration, or other joint action pursuant to the General Agreement on Tariffs and Trade.

Note: New texts in para (4), (5) and (8) based on suggestion of Chairman; in para (7) on basis of AUS proposal.

Specific comments

1.1 (AUS): Insert "owned or controlled by investors of one Contracting Party and admitted by one of the other Contracting Parties subject to its laws and investment policies".

1.2 (AUS): replace by "tangible and intangible".

1.3 (AUS): Insert "and industrial".

1.4 (AUS): replace by "business concessions and other rights required to conduct economic activity and having economic value".

1.5 (AUS): add a new wording: "and to manufacture, use and sell products; and

(f) activities associated with investments, such as the organisation and operation of business facilities, the acquisition, exercise and disposition of property rights including intellectual property rights, the raising of funds and the purchase and sale of foreign exchange."

1.6 (AUS): replace by "or whose residence in that Contracting Party is not limited as to time under its laws";

General comments

(RO): clarification of other notions mentioned in Basic Agreement is needed.

(US): - the term "non-discrimination" appears often in the text. Some type of definition would be useful, preferably one that includes both national and MFN treatment.

- an alternative approach to the problem of definition might be similar to the form used in Chapter Nine of the US-Canada Free Trade Agreement.

PART II

GENERAL OBLIGATIONS

ARTICLE 2

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 legally binding Protocols to this Agreement on certain matters comprised within its scope. Any Contracting Party may enter into any Protocol provided that such Protocol confirms or supplements or expands or applies the provisions of this Agreement, except as otherwise provided in this Agreement.

(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.

(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.

(4) A Protocol shall be binding only on the Parties to it, and decisions concerning such Protocol shall be taken only by those Parties.

Note

To para (1):

The first sentence attempts to explain the relationship between the Agreement and the Protocols in terms of fulfilment of the principles of the Charter which, as currently drafted, envisages Protocols in different energy sectors or categories of activity. By the second sentence any or all Contracting Parties can enter into any or all Protocols but only if the Protocol in question is one which confirms, supplements, expands or applies the Agreement (this formula comes from the 1963 Vienna Convention on Consular Relations and is, therefore, a tried and tested one) unless otherwise specified such as in the case of nuclear materials where detractors may have to be allowed. These

exceptions need to be specified in other Articles in Part II; when this is done the final clause could be replaced with the following "except as provided in Articles [x, y and z] of this Agreement.

To para (2):

Secures primacy of the Agreement over its Protocols and its added protection to Parties not wishing to sign up to a particular Protocol; their interests cannot be undermined. Exception language again necessary in case of a permissible detraction which all Parties will be aware of in advance once we have formulated these for other articles in Part II as mentioned with respect to paragraph (1).

To para (3):

Old para (1) from Article 38

To para (4):

New wording based on A suggestion plus old para (3) from Article 38.

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ARTICLE 3

Relationship to Other Agreements

(1) Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case conflict with those of Part III of this Agreement, the more favourable of the conflicting provisions from the point of view of the investor shall in all circumstances prevail.

(2) In the event of any inconsistency between the provisions of this Agreement and the General Agreement on Tariffs and Trade (hereinafter referred to as "GATT") or a GATT-related instrument the provisions of the GATT or the GATT-related instrument concerned shall prevail as between Contracting Parties who are also parties to the GATT or the GATT-related instrument concerned to the extent of the inconsistency, except as otherwise provided in this Agreement.

Note: New text suggested by Chairman, in para (2) based on CAN proposal.

ARTICLE 4

Protocols

"Protocol" means an agreement entered into by any of the Contracting Parties in order to confirm, supplement, expand or apply the provisions of this Agreement to specific sectors or categories of activity comprised within the scope of this Agreement, including a protocol referred to in Title III of the Charter.

Note: New text suggested by Chairman.

ARTICLE 5

Sovereignty over Natural Resources

The Contracting Parties recognise the principle of the sovereignty of States over natural resources. In particular, each State holds the right subject to its international legal obligations 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 or royalties payable by virtue of such exploration and exploitation and to regulate the environmental, safety and other aspects of such exploration and exploitation within its Territory.

Note: New text and its arrangement suggested by Chairman on basis of AUS, US and USSR proposals. The former para (2) has been dropped at the request of a number of federal states.

General comments

- (JPN): clarification sought on differences between "State" and "Contracting Party".
- (EC): asks for more clarification of State responsibility in environmental and safety aspects.
- (CAN): draws attention to cases in which sovereignty might be associated with private property rights.
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ARTICLE 6

Energy Policies

Each Contracting Party recognises that its governmental policies concerning matters which are the subject of this Agreement are linked to the energy policies of other Contracting Parties. In carrying out their energy policies, Contracting Parties shall strive to liberalise and improve access to markets, to improve [security of supply and to reduce damage to the environment](1)

[(2) The Governing Council referred to in Article 28 below shall meet at such regular intervals as it may specify to review the energy policies of the Contracting Parties and to discuss matters of mutual interest relating to such policies.](2)

Note: New text suggested by EC, N, CH and USSR.

Specific comments

6.1 (AUS): is concerned that the formulation "improve security of supply" is ambiguous and could be used to justify restrictive trade policies designed to ensure security of domestic energy supply. If this concept is retained, suggests referring to "security of supply in an environmentally consistent manner".

6.2 (EC, US): delete.

General comments

~~(N): asks for a better balance between security of supply and security of markets.~~

(USSR): wishes to enlarge the scope of this Article and to make it more balanced.

Some delegations expressed views on moving it to the Preamble.

ARTICLE 7

Energy Markets

In order to promote efficiency in production, distribution and consumption of [Energy Materials and Products] free market principles shall apply. In particular,

(a) Where a monopoly or dominant position does not prevail, prices shall be determined by the market;

(b) Where there is a monopoly or dominant position in the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products], the Contracting Parties agree to, In subsequent Protocols, work to alleviate market distortions;

(c) [Where there is a monopoly or dominant position]⁽¹⁾, there shall be transparency of pricing and other conditions on operations of extraction, production, conversion, treatment, carriage and supply of [Energy Materials and Products], so as to reduce the opportunities for monopoly pricing, discrimination and cross-subsidy.

Note: New wording suggested by Chairman in light of EC, JPN and US comments.

Specific comments

7.1 (EC): wishes deletion.

General comments:

(US): the scope of the Article is unbalanced. Energy Materials and Products in square brackets dependant on the Definitions.

Many delegations pointed out the problem of distinguishing between monopoly and dominant position.

ARTICLE 8

Standards

(1) Contracting Parties shall ensure that energy standards or specifications, and operating procedures required to be met by investors, are objectively justifiable and non-discriminatory and that they are published and readily available to investors;

(2) In establishing such energy standards or specifications and operating procedures, Contracting Parties shall have regard but not be confined to the provisions of the Agreement on Technical Barriers to Trade negotiated within the framework of the General Agreement on Tariffs and Trade;

(3) Contracting Parties shall discuss and implement procedures for ensuring compatibility of energy standards or specifications where this is to be seen to be necessary for the purposes of this Agreement.

Note: New text suggested by Chairman on basis of EC and NZ comments.

General comments

(JPN): clarify para (1), in particular "objectively justifiable", "non-discriminatory", "published and readily available to investors".

ARTICLE 9

Procurement Policies

1. 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]⁽¹⁾ with respect to any matter the subject of this Agreement⁽²⁾ apply criteria in awarding such contracts which are objective and transparent and do not discriminate on grounds of nationality. 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 from 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. Except in circumstances which are objectively justifiable, such 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. If, subsequent to the signature of this Agreement, a GATT-related Instrument is agreed which supplements or expands upon the obligations under this Article and so long as not all Contracting Parties are Parties to that Instrument, amendments will be proposed to this Article to supplement or expand it in accordance with that GATT-related Instrument.

Specific comments

9.1 (EC): suggests deletion.

9.2 (Chairman): exception for fuel bought by fuel entities.

General comments

(US, JPN, EC): clarification of first sentence needed, in particular "non-governmental entity".

(CH): If we include services a more evolutive clause should be adopted.

(JPN, PL): ask for clarification of "objectively justifiable".

(US): circumstances which are "objectively justifiable": elements of judgement in this article should be eliminated. All contracts to be awarded on the basis of open competition. GATT Government Procurement Code may apply to parastatals.

(JPN): as Procurement Policies are still under negotiation at the GATT, it should not be discussed until the conclusion of the negotiations.

ARTICLE 10

Non-Discrimination

Each Contracting Party undertakes to administer its own laws, regulations and requirements affecting production of and trade in [Energy Materials and Products] with regard to the provisions and criteria of the General Agreement on Tariffs and Trade and its related Agreements as renegotiated from time to time, and in particular:

(a) To apply any customs duties or charges imposed in connection with importation or exportation immediately and unconditionally in the same way to [Energy Materials and Products] originating in or destined for any other Contracting Party;

(b)(1) To apply laws, regulations and requirements and charges governing the internal production, conversion, treatment, sale, offering for sale, purchase, transportation, distribution or use of [Energy Materials and Products] without discrimination as between domestic and imported production or on the basis of nationality of origin of an investor;

(c) To permit an investor based in another Contracting Party

(i) freedom of establishment, and

(ii) once established, access to energy resources,

without discrimination against such investor on the basis of its nationality or origin.

Note: New text suggested by Chairman taking into account remarks of many delegations. Former subpara (c) deleted.

Specific comments

10.1 (EC): the wording of subpara (b) could create a potential conflict with Article 5.

ARTICLE 11

Freedom of Movement

(1) Each Contracting Party undertakes:

(a) To facilitate by the most convenient means⁽¹⁾ the transit through its Territory of [Energy Materials and Products] between two or more other Contracting Parties, without distinction as to the origin, destination or ownership of such [Energy Materials and Products] or discrimination as to pricing on the basis of such distinction, and without imposing any unnecessary or unreasonable delays, restrictions or charges. Transit of electricity under this Article shall not impede the optimisation of local electricity grids. Details will be specified in an appropriate Protocol;

(b) To limit the amount of any fees and charges (other than import and export duties and internal taxes) imposed in connection with the importation or exportation of [Energy Materials and Products] including the use of facilities necessary for such purposes to the approximate cost of services rendered, including a reasonable commercial rate of return, [and to avoid indirect protection of domestic products or taxation of imports or exports for fiscal purposes]⁽²⁾;

(2) The provisions of this Article shall not require a Contracting Party to take action which reduces substantially its security of energy supply.

Note: New text based on A and EC suggestions. Former subpara (c) deleted and subpara (d) renumbered as para (2).

Specific comments

11.1 (CH): Insert in subparagraph (a) after "the most convenient means", the wording "consistent with environmental protection".

11.2 (NZ): supported by S, reserved its position on the need for this wording in subpara (b).

General comments

- (JPN): reserved position on the whole Article.
- (AUS): wants clarification as to whether it is the intention of subparagraph (a) to extend to all Contracting Parties to the Basic Agreement, the tariff benefits from existing customs unions or free trade arrangements.
- (US): The relationship between subpara (c) and Articles 20 and 21 should be clarified.
- (CAN): clarify "discrimination" in subpara (c).
- (EC, CAN, US): definition of Energy Products and Materials needed.
- (JPN): It should be clearly provided in subpara (b) and (c) that the regulations and arrangements of Contracting Parties in line with existing international agreements should be valid in this Agreement.
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General comments

(JPN): provisions of paragraph (2) have wider implications than this Article, and would be better covered elsewhere.

ARTICLE 12

Transparency

(1) Each Contracting Party undertakes that laws, regulations, judicial decisions and administrative rulings of general application which are made effective by any Contracting Party and which relate to the production, distribution or use of [Energy Materials and Products] shall be published 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.

(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 30 below](1).

(4) The Contracting Parties shall endeavour to promote the financial transparency of the separate activities of entities in monopoly or dominant positions in areas the subject of this Agreement where such action would reduce the potential for monopoly pricing, discrimination, subsidy and cross-subsidy. Appropriate Protocols will make detailed provision to implement this principle.

Note: former paragraphs (4) and (5) dropped. New para (4) suggested by Chairman. The paragraph has been retained to meet the sentiment expressed in the Charter text on such transparency while removing any immediate detailed obligation. Contracting Parties will return to the question in appropriate Protocols.

Specific comments

12.1 (JPN): suggests deletion.

General comments

(JPN): "published promptly" in (1) should be more clearly specified.

(CH): the information should be available to the private sector.

(US): should include a commitment to provide an opportunity for investors to comment before the adoption of additional regulations having general effect.

ARTICLE 13

State Aid

(1) State aid should not be granted when it would distort competition in trade between the Contracting Parties. Detailed provisions implementing the principles and defining the circumstances in which state aid is permitted, shall be included in appropriate Protocols.

ARTICLE 14

Unfair Trade and subsidisation

The Contracting Parties undertake that in cases of alleged dumping or subsidisation of [Energy Materials and Products] any complaint by a Contracting Party against another Contracting Party or against an investor located in the Territory of another Contracting Party shall⁽¹⁾ be dealt with according to the criteria and procedures set out in Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade as amended, interpreted, applied or implemented.

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 from a third party in similar circumstances.

Note: New text suggested by Chairman on basis of discussion in WG II meeting of 16-18 October. The second para replaces Article 13.

Specific comments

14.1 (EC): suggests insertion "unless they agree otherwise".

ARTICLE 15

Government Controlled Entities

Each Contracting Party undertakes that if it establishes or maintains a government-controlled entity wherever located, or grants to any such entity formally or in effect, exclusive or special privileges, such investor shall conduct its activities in a manner consistent with this Agreement.

Note: New text proposed by Chairman on basis of AUS, EC, JPN and US suggestions.

ARTICLE 16

Avoidance of double taxation

The Contracting Parties shall, as far as is necessary to give effect to the principles of the Charter and the provisions of this Agreement, enter into bilateral [negotiations with each other with a view to securing for the benefit of their investors the avoidance of double taxation at least with respect to the matters the subject of this Agreement.](1)

Note: New text suggested by Chairman, EC and CAN.

Specific comments

16.1 (US): If this article is found necessary, revise to refer to "negotiation of tax agreements which provide for avoidance of double taxation by negotiating parties".

ARTICLE 17

Observance by Sub-Federal Authorities

[Any Contracting Party which has a federal structure undertakes that this Agreement shall apply to all provisions such as duties, charges, laws, regulations and requirements which are imposed by authorities at the sub-federal level.]⁽¹⁾⁽²⁾

Specific comments

17.1 (CAN): with reference to Article XXIV/12 of GATT suggests the same language by replacing Article 17 as follows:

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

17.2 (AUS): draws attention to the following text put forward during the Uruguay Round negotiations:

"The application of the provisions of the Agreement is not limited to countries with a federal system of government but applies in all instances where observance of its provisions is the direct responsibility of regional or local governments and authorities other than the central government of the Contracting Party."

General comments

(US): this can be a Constitutional Issue in the US (separation of powers between federal and state).

ARTICLE 18

Exceptions

The provisions of this Agreement shall not preclude any Contracting Party from taking any action which it considers necessary for the purposes of protecting its essential security interests, public order, or human, animal or plant life or health, [or conservation of exhaustible natural resources], 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 or restrictions shall not constitute disguised restrictions on trade or arbitrary discrimination as between Contracting Parties.](1)

Note: New text based on US, CAN, A, GR, AUS, JPN suggestions.

Specific comments

18.1 (JPN): suggests deletion and replacement with: "obligations under other nuclear non-proliferation regimes".

General comments

(JPN): asks for clarification of "essential security interests".

PART III

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 19

Intellectual Property

(1) Each Contracting Party shall, subject to paragraphs (2) and (3) below, afford protection under its domestic laws [at least]⁽¹⁾ equal to and to the same extent as the protection it applies to its own nationals with respect to any industrial, commercial or intellectual property (hereinafter referred to as "Intellectual property") entailed in or created as a result of the activities carried out and investments made in its Territory by investors of other Contracting Parties.

(2) Where a Contracting Party has not acceded to or ratified, or has not yet implemented, the Paris Convention on the Protection of Industrial Property (1967 Stockholm revision) (the "Paris Convention") or the Berne Copyright Convention (1971 Paris revision) (the "Berne Convention") the level of protection to be afforded under paragraph (1) above shall equal at least the minimum protection required by those Conventions to be afforded the intellectual property rights which are the subject matter of those Conventions.

[(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.]⁽²⁾

[(4) In relation to any information of industrial or commercial value, whether intellectual property or not, which is secret information, and in respect of which reasonable steps have been taken to maintain such secrecy, whether or not it falls inside the scope of the protection afforded by virtue of paragraphs (1) to (3) above, each Contracting Party shall ensure that its domestic laws in respect of such information:

(a) recognise its existence; and

(b)(3) grant rights of ownership in it; and

provide means for the prevention of its disclosure, acquisition or use, and provide both remedies and access to remedies for disclosure, acquisition or use of the same, where this is to be or is without the owner's consent and contrary to honest practices.](2)

(5) The Contracting Parties may agree such additional provisions as they see fit to ensure fully adequate protection of intellectual property covered by this Agreement.

Note: New text as suggested by US and A.

Specific comments

19.1 (CH): suggests deletion.

19.2 (JPN): the whole para (3) and (4) in square brackets. As this concept is still under negotiation in the GATT, it should not be discussed until the conclusion of the negotiations.

19.3 (AUS): with support of CAN suggests insertion: "to the extent possible".

General comments

(JPN): asks for clarification of "intellectual property" - does it mean any industrial, commercial or intellectual property?

(FIN): no reference to the TRIPS agreement should be taken into account since it is under negotiation.

ARTICLE 20

Promotion and Protection of Investments

(1) Each Contracting Party shall in accordance with the 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, and [shall in accordance with its relevant international obligations and subject to its domestic laws] (1)(2) admit such investments.

(2) Investments whether made before or after the coming into force of this Agreement of investors of any Contracting Party shall at all times be accorded fair and equitable treatment in accordance with the principles of international law and the relevant international obligations and shall enjoy full protection and security in the Territory of any other Contracting Party. No Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its Territory of investors of any other Contracting Party. [Each Contracting Party shall observe any obligation it may have entered into consistently with this Agreement with regard to investments of investors of any other Contracting Party.](3)

Note: New text based on CAN, US suggestions. Former para (3) is deleted, the substance is moved to Article 3. Some consequences come up to this from redrafted Article 1, in particular para (4).

Specific comments

20.1 (AUS): suggests replacing with: shall in accordance with its laws and investment policies.

20.2 (CAN): suggests replacing with: "subject to its laws, regulations and published policies, shall".

20.3 (CAN): supported by AUS, EC, CH wishes deletion of the last sentence in para (2).

ARTICLE 21

Treatment of Investments

(1)(2) Each Contracting Party shall in its Territory accord to Investments..or Returns of Investors of another Contracting Party treatment no less favourable than that which it accords to Investments or Returns of [its own Investors]⁽¹⁾ or the Investors of any other Contracting party or any third State.

(2)(2) Each Contracting Party shall in its Territory accord to Investors of another Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their Investments, treatment no less favourable than that which it accords to [its own Investors]⁽¹⁾ or the Investors of any other Contracting Party or any third State.

(3)

(3) Contracting Parties shall make every effort to liberalise further the conditions enjoyed by the Investments and Investors of other Contracting parties by virtue of this Agreement.⁽⁴⁾ In particular they undertake:

(a) (5) To limit any restrictions on the nature, form or size of an Investment made by an Investor of another Contracting Party which would otherwise be permitted under the Charter or the provisions of this Agreement;

(b) Without prejudice to [Article 25 below]⁽⁶⁾, not to introduce changes in tax regimes having the effect of discriminating between the Investors or Investments of any Contracting Party in like circumstances or otherwise preventing or impeding the normal operation of their Investments by Investors of any other Contracting Party.

(c) Not to apply any conditions with regard to the management, maintenance, use, enjoyment or disposal of Investments of other Contracting Parties which would be inconsistent with their obligations under Part II of this Agreement;⁽⁷⁾

- (d) To consider whether there are further steps which could be taken consistent with the provisions of this Agreement to improve conditions for the investments and investors of other Contracting Parties.

(8)

Note: New text based on A, CAN, N, US suggestions.

Specific comments

21.1 (CAN): suggests deletion.

21.2 (AUS): suggests unification of para (1) and (2) with the text reading as follows:

"(1) No Contracting Party shall in its Territory subject investments or returns of investors of another Contracting Party, or investors of another Contracting Party as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investments or returns of its own investors or the investors of any other Contracting State or third state, provided that a Contracting Party shall not be obliged to extend to investments any treatment, preference or privilege resulting from:

(a) any customs union, economic union, free trade area or regional economic integration agreement to which the Contracting Party belongs; or

(b) the provisions of a double taxation agreement with a third country.

21.3 (CAN): suggest a new para 2(bis) of the following wording:

In addition to the provisions of paragraphs (1) and (2) of this Article, each Contracting Party shall to the extent ~~possible and in accordance with its laws and regulations~~ grant to investments or returns of investors of other Contracting Parties a treatment no less favourable than it grants to investments or returns of its own investors.

21.4 (EC): supports only the first sentence of para (3). Second sentence and all subparagraphs a-d should be deleted. In this respect supported by (A) (inconsistency in an introductory part and subparagraphs, somewhat repeating Art. 23).

21.5 (USSR) need for clarification of subpara (a) as there are no restrictions of that kind in draft Charter.

21.6 (AUS): wishes to replace by "... paragraph (1) of this Article

....".

21.7 (CH): asks if this subparagraph is necessary.

21.8 (AUS): suggests insertion of new para (4) which could read as follows:

(4) A Contracting Party shall, subject to its laws relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of another Contracting Party and personnel employed by companies of that Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments, and permit nationals of another Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key personnel and managerial personnel of their choice regardless of citizenship.

General comments

The Chairman suggests to follow the Australian suggestion in 21.2 when policy agreement has been reached on the scope and drafting of the subject matter of Article 25.

(US): Para (1) needs the OECD reference to persons "in the same circumstances" and a cross reference to Article 23.

Further, (1)'s requirement of national treatment for returns sets an unacceptably low standard that in addition conflicts with Article 24. This paragraph should be deleted.

(2) might be reworked as a blanket provision for non-discriminatory treatment to which narrow exceptions can be noted in an annex.

3(a) appears to restrict Contracting Parties on such matters as revision of tax rates, regulations concerning anti-trust, environment, safety, working conditions, social insurance, etc...

3(b) is too vague. The section needs reference to persons in the "same circumstances". Rule out retroactive application of tax changes. Consider providing that "where a tax treaty is in effect, the non-discrimination provision does not apply".

Consider including in this Article language regarding an investor's right to appoint key personnel and to be free from performance requirements.

Suggests also a footnote to Article 21 as follows:

"The provisions of this Article do not apply to international agreements on taxation and/or administrative assistance in tax matters."

ARTICLE 22

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⁽¹⁾, a state of national emergency or civil disturbances 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]⁽²⁾ the Investors of any other Contracting Party or any third State. [Resulting payments shall be made without delay and be freely transferable]⁽³⁾.

(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

(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 or adequate compensation. [Resulting payments shall be freely transferable]⁽³⁾.

Specific comments

22.1 (GR): wishes to add earthquakes or other natural disasters or hostile actions by non-Charter countries.

22.2 (AUS): delete.

22.3 (CH): wishes to replace last sentences in both paragraphs by: "Resulting payments shall be made without delay in a freely convertible currency and be freely transferable". Support by A, US. USSR reserved position.

General comments

(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.

ARTICLE 23

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 and (b) not discriminatory and (c) carried out under due process of law and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, (hereinafter referred to as "the expropriation date") whichever is the earlier. Where that market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognised principles of valuation and equity taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors. In addition such compensation shall include interest at a normal commercial rate from the expropriation date until the date of payment [and such payment shall be made without delay in a freely convertible currency and be freely transferable]⁽¹⁾. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment in accordance with the principles set out in this paragraph.

(2) 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.

Note: Changes suggested by Chairman based on comments from A, US, CH, EC, AUS and CAN.

Specific comments

23.1 Square brackets - see footnote 22.3.

ARTICLE 24

Repatriation of Investments and Returns⁽¹⁾

(1) Each Contracting Party shall in respect of [Investments]⁽²⁾ made in its Territory by investors of any other Contracting Party⁽³⁾ guarantee to such investors the unrestricted transfer⁽⁴⁾ without delay beyond its Territory of their Investments and Returns⁽⁵⁾⁽⁶⁾⁽⁷⁾.

(2) Transfers under paragraph (1) above shall be effected without delay in freely convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. 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 pursuant to the exchange⁽⁸⁾ regulations in force of the Contracting Party in whose Territory the investment was made.

Note: New text based on AUS, US, EC, and CS suggestions.

Specific comments

24.1 (CH): suggests modifying the title as follows:

"Repatriation of Investments and payments related to Investments".

24.2 (AUS): suggests replacing "Investments" by "all funds".

24.3 (AUS) wishes to insert after word Party following text:

~~"... and subject to its right in exceptional balance of payments difficulties to exercise equitably and in good faith powers conferred by its laws"~~

24.4 (EC): suggests inserting after transfer the following text:

" ... of payments in connection with an investment, in particular

- a) of the returns;
- b) in repayment of loans;
- c) of the proceeds from the liquidation or the sale of the whole or any part of the investment."

and delete the rest of para (1).

24.5 (AUS): suggests continuing this paragraph by adding a new text:

"Such funds include the following:

a) the initial capital plus any additional capital used to maintain or expand the investment;

b) returns;

c) proceeds from the sale or partial sale or liquidation of the investment;

d) payments made pursuant to a loan agreement or for losses referred to in Article 22;

e) unspent earnings and other remuneration of personnel engaged from abroad in connection with that investment."

24.6 (RO): suggests adding after word Returns the following wording "... subject to national legislation and international provisions".

24.7 (CH): suggests modifying the last words of para (1) as follows: "... their investments, returns and other payments related to an investment."

24.8 (AUS) suggests to insert after exchange the words "...laws and...;".

ARTICLE 25

Exceptions⁽¹⁾

The provisions of [Part III of] this Agreement shall not be construed so as to oblige any one Contracting Party to extend to the investors of any other Contracting Party the benefit of any treatment, preference or privilege resulting from

- (a) ⁽²⁾⁽³⁾any existing or future customs union⁽⁴⁾, organisation [for mutual economic assistance]⁽⁵⁾ or similar international agreement, whether multilateral or bilateral, to which any of the Contracting Parties concerned is or may become a party, or
- (b) ⁽⁶⁾⁽⁷⁾any international agreement or arrangement [or any domestic legislation]⁽⁸⁾ relating wholly or mainly to taxation.

Note: Change based on Chairman's suggestion.

Specific comments

25.1 (AUS): suggests to delete whole of Article as the provisions of this Article have been incorporated into their proposed revised Article 21 (para 1).

25.2 (JPN): wishes to exclude subpara (a) pointing out 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, mutual economic assistance agreement, etc., should not be included.

25.3 (EC): suggests replacing the whole of subpara (a) by the following wording:

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

25.4 (US): suggests inserting after words customs union of " ... free trade agreement ...".

25.5 (A): suggests replacing by "for economic cooperation".

25.6 (JPN): has no objection to leaving this para unchanged provided that the conventions for the avoidance of double taxation

and the prevention of fiscal evasion with respect to taxes and agreements concerning the avoidance of double taxation on income and/or capital in respect of the operation in international traffic are treated as exceptions.

25.7 (US), (JPN): ask for clarification of subpara (b).

25.8 (EC), (CH): wish to delete.

General comments

(JPN): will comment on this Article at a later stage.

(CH): a general exception to be limited to "Public Order and Security" and specific exceptions to MFN regarding arrangements involving harmonisation or mutual recognition.

ARTICLE 26

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]⁽¹⁾ given in respect of an investment in the Territory of another Contracting Party, (the "Host Party") or otherwise acquires the rights and claims to such an investment, the Host Party shall recognise

(a) the assignment to the Indemnifying Party by law or by legal transaction of all the rights and claims arising 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⁾

(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) (4) Any payments received in non-convertible currency⁽³⁾ 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.

Specific comments

26.1 (USSR): asks for replacement by "... in accordance with the guarantee ...".

Points out the need that this paragraph should deal with the subrogation of damage from non-commercial risks.

26.2 (GR): would like some sort of qualification to be inserted in this paragraph, so that the end of para (1) after subpara (b) should continue in reading as follows:

"provided that such indemnification has been approved by the Host Party on grounds of economic adequacy and national security".

26.3 (US): recommends inserting after the word currency the text as follows: " ... according to the choice of an investor ..".

26.4 (A): suggest incorporation of language similar to that proposed in Art. 24.

ARTICLE 27

Investment Transparency

For the avoidance of doubt, the provisions of Article 12 above shall also apply to laws, regulations, judicial decisions and administrative rulings of general application affecting the Investments and Investors of any Contracting Party in the Territory of another Contracting Party.

General comments

(AUS, N): the problems should arise with regard to confidentiality.

PART IV

ORGANISATION AND MANAGEMENT

ARTICLE 28

Governing Council

(1) A Governing Council of representatives of the Contracting Parties is hereby established. The first meeting of the Governing Council shall be convened [by the Secretariat designated on an interim basis under Article 30 below]⁽¹⁾ not later than one year after signature of this Agreement. 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]⁽¹⁾, 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, as well as the staff matters referred to in Article 30(2) below and the financial provisions governing the functioning of the Secretariat.]⁽¹⁾

(4) The Governing Council, while taking care to avoid unnecessary 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 Parts II and III of this Agreement the coordination of appropriate policies, strategies and measures to carry out the principles of the Charter and the provisions of this Agreement, and make recommendations on any other measures relating to this Agreement;

- (b) Consider and adopt, in accordance with Parts II and III of this Agreement programmes of work to be carried out [by the Secretariat].(1)
- (c) Monitor the implementation of measures undertaken pursuant to transitional arrangements according to Article 43 with a view to assisting any Contracting Party in meeting the timetable approved by the Governing Council as its transitional period, as well as evaluating the fulfilment of commitments undertaken by the Charter signatories;
- (d) Consider and adopt, as required, in accordance with Part VI of this Agreement, amendments to this Agreement;
- (e) Consider and adopt Protocols together with amendments thereto;
- [(f) Consider and undertake any additional action that may be required for the achievement of the purposes of this Agreement.](2)

(3)

Note: New text based on suggestions of US, EC and JPN.

Specific comments

28.1 (JPN): wishes to exclude references to a Secretariat.

28.2 (AUS, EC, NZ, US): reserve, should not be open-ended.

28.3 (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 29

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)(1) The adoption of amendments to this Agreement shall be by consensus.

(3) The adoption of Protocols shall be by consensus provided that, where the text of a draft protocol which is fully in accordance with this Agreement has been proposed to the Governing Council for adoption as a Protocol, any Contracting Party not wishing to become a Party to such Protocol shall not exercise its vote in such a manner as to prevent the legitimate adoption of such Protocol by the Governing Council.

(4)(1) 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 31 below.

(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) For the purposes of this Article a regional economic integration organisation shall, in matters within its competence, exercise its right to vote 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) In votes concerning a Protocol such organisation shall have a number of votes equal to the number of its member States which are Parties to that Protocol;

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

Note: New texts prepared by the Chairman on the basis of suggestions from EC and US delegations.

Specific comments

29.1 (JPN): requests to delete whole paragraph. See also footnote 37.1.

29.2 (AUS): wishes to delete.

ARTICLE 30⁽¹⁾

Secretariat

(1) The functions of the Secretariat shall be:

- (a) to review, assist in, report on and act as a Centre for Information concerning the Implementation by the Contracting Parties of the principles of the Charter and the provisions of this Agreement;
- (b) with respect to Parts II and III of this Agreement, to facilitate access to Information on the legislation applicable in the Territory, or any part thereof, of each Contracting Party, and to provide upon request by any Contracting Party's Investor, Information on obtaining access to such legislation;
- (c) to arrange for and service meetings of the Governing Council;
- (d) to coordinate the preparation of draft Protocols for presentation to the Governing Council;
- (e) to perform the functions assigned to it by any Protocol;
- (f) to [facilitate the preparation of reports]⁽²⁾ on its activities carried out in Implementation of its functions under this agreement and present them to the Governing Council;
- (g) to prepare annual accounts and budget estimates in respect of its administrative costs for submission to the Governing Council for approval before the beginning of the respective budgetary year.
More detailed rules will be fixed in the financial regulation to be adopted by the Governing Council.
- (h) [to seek to the]⁽³⁾ extent possible]⁽⁴⁾ the services of competent international or other bodies, to make use of the resources, work and expertise of these bodies and to enter into such administrative or contractual arrangements as may be required for the effective discharge of its functions;

(1) to carry out the programmes of work referred to in Article 28 (4)(b) and other functions assigned to it by the Governing Council pursuant to the Charter, this Agreement or any Protocol.

(2) The Secretary General shall be appointed under the provision of Article 29(5) for a term of [5] years initially from among candidates proposed by Contracting Parties at the first meeting of the Governing Council.

(3) The structure, staff levels and standard terms of employment of officials and employees of the Secretariat shall be approved by the Governing Council.

(4) The terms of any headquarters agreement, including privileges and immunities necessary for the Secretariat to carry out its functions under this Agreement shall be approved by the Governing Council.

(5) The Secretary General shall propose candidates, for senior executive posts reporting directly to him, for appointment by the Governing Council for terms of 2 to 5 years. All other appointments to the Secretariat shall be made by the Secretary General or under his authority(5). The Secretary General shall propose or appoint members of the Secretariat taking care to keep the number of members of the Secretariat to the minimum consistent with efficiency.

(6) The paramount consideration in the appointment of the Secretary General and other personnel of the Secretariat shall be the necessity of ensuring the highest standards of integrity, competence and efficiency.

(7) 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 40 and the appointment of a permanent Secretariat under this Article.

(8) The headquarters of the Secretariat shall be located in [city].

Note: Changes in text based on suggestions of AUS, D, EC, N, US and USSR.

Specific comments

30.1 (JPN): wishes to delete the whole Article.

30.2 (US): suggests replacing this phrase by "report".

30.3 (AUS): and other delegations suggest inserting the word "maximum".

30.4 (US): wishes to modify this point as follows: "to rely to the extent possible on".

30.5 (D): suggests adding: "In the framework of the schedule of employment annexed to the budget".

General comments

Some delegations reserved their position on the whole Article.

ARTICLE 31⁽¹⁾

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 of the Secretariat shall be met by the Contracting Parties by contributions payable in the same proportion and on the same terms as assessments for the annual budget of the Conference on Security and Cooperation in Europe are made for each Contracting Party, adjusted to take account of contributions by those Contracting Parties which do not contribute to the annual budget of that Conference.

Note: Last 22 words of para (3) deleted on basis of AUS and US suggestions.

Specific comments

31.1 (JPN): suggests deletion of this Article.

PART V

DISPUTE RESOLUTION

ARTICLE 32

Disputes between an Investor and a Contracting Party

(1) Disputes between an Investor of one Contracting Party and any other Contracting Party concerning an obligation of the latter under Part III of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if either Party to the dispute so wishes.

(2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to the Secretariat by either party to the dispute. The Secretariat shall use its good offices to attempt a conciliated resolution of the dispute within a further period of three months. If at the end of the latter period no solution has been found then paragraph (1) above shall apply.

(3) Where the dispute is referred to international arbitration, the Investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington D.C. on 15 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after nine months from written notification of the claim there is no agreement to any of the alternative procedures described above, the parties to the dispute shall be bound to submit it to the International Centre for the Settlement of Investment Disputes.

Note: New wording suggested by Chairman on basis of an extensive discussion in WG II meeting of 16-18 October.

For further discussion Chairman suggests 3 possible versions of this Article.

1. Mandatory Inclusion of Secretariat
(Wording as suggested above).
2. Parallel reference to Secretariat for Amicable Settlement.
(This version replaces para (2) as follows:

(2) In order to facilitate amicable settlement either party to a dispute may submit it to the Secretariat which shall use its good offices to attempt a conciliated resolution of the dispute within the three month period referred to in paragraph (1) above.

3. Secretariat excluded

Full exclusion of para (2). Para (3) becomes para (2).

In all three versions para (1) is now extended to deal with all investment disputes occurring out of the application of Part III as requested by several delegations.

All versions accord primacy to ICSID, as requested by several delegations, with the retention of several alternatives. In the event that the parties to the dispute cannot agree on which method to choose, namely, ICSID, ad hoc arbitrator/tribunal with or without UNCITRAL, then ICSID applies.

ARTICLE 33

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 paragraphs (3) and (4) 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. The decision of the tribunal shall be final and binding on the parties to the dispute.

(3) Subject to paragraph (4) below, 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.

(4) In the event of a dispute arising in relation to any of the matters referred to in Article 14 such dispute shall be dealt with as specified in Article 14 and not under this Article regardless of whether or not the parties to the dispute are also members of the GATT.

(5) The provisions of this Article shall apply with respect to any Protocol except as otherwise provided in the Protocol concerned.

Note: New wording suggested by Chairman on basis of discussion in WG II meeting of 16-18 October, in particular on AUS, CAN, US proposals.

To para (3):

Where a dispute arises between GATT members or parties to a GATT-related instrument in circumstances where GATT or such instrument overrides the Agreement then the dispute must be settled according to the procedures of GATT or the instrument

In question. This is to prevent both forum-shopping and the possibility of parallel jurisprudence being developed in GATT areas. This leaves open the possibility of different jurisprudence arising from GATT member/GATT member disputes as compared with GATT member/non-GATT member disputes but there is no way of avoiding this until all Parties to the Agreement are GATT members. There is also the question of differentials in the membership of a GATT-related instrument; it is conceivable that a dispute may arise in the GATT area which is provided for in a related instrument between two parties to GATT which are not both also parties to the instrument. In such circumstances the dispute could be settled under Article 33 of the Agreement until such time as a general dispute resolution mechanism is agreed for GATT; this is under discussion in the Uruguay Round.

To para (4):

This provides for the exceptional case where in Article 14 are incorporated certain GATT articles into the Agreement by reference. In this special case those provisions are as applicable to non-GATT members (who are party to the Agreement) as they are to GATT members (party to the Agreement) by virtue of that incorporation. The point about differential application of related instruments may also be applicable here.

General comments

(CAN): suggests taking into consideration the possibility of transferring Articles 32 and 33 under Part III.

PART VI

FINAL PROVISIONS

ARTICLE 34

Signature

This Agreement shall be open for signature by the States and regional economic integration organisations signatory to the Charter at [United Nations Headquarters in New York] from [] to [].

General comments on Part VI

(JPN) points out that a further and careful study would be necessary on Part VI 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.

ARTICLE 35

Ratification, Acceptance or Approval

(1) 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.

[(2) In their Instruments of ratification, acceptance or approval, the organisations referred to in paragraph (1) above shall declare the extent of their competence with respect to the matter governed by the Agreement or the relevant Protocol. These organisations shall also inform the Depositary of any substantial modification in the extent of their competence].(1)

Specific comments

35.1 (EC): may propose to amend this text to reflect the legal situation regarding the relationship between the Community and its Member States.

ARTICLE 36

Accession

This Agreement and any Protocol shall with the agreement of all the existing Contracting Parties thereto, subject to Article 29 above, be open for accession by States and regional economic integration organisations from the date [on which the Agreement or the Protocol concerned is closed for signature]⁽¹⁾. The Instruments of accession shall be deposited with the Depositary.

Note: New text based on JPN suggestion.

Specific comments

36.1 (JPN): suggests replacing by: "to be specified under Article 34".

ARTICLE 37

Amendment

(1) Any Contracting Party may propose amendments to this Agreement, or any Protocol, to which it is a Party.

(2) Amendments to this Agreement shall be adopted by consensus at a meeting of the Governing Council⁽¹⁾. Amendments to any Protocol shall be adopted at a meeting of the Contracting Parties to the Protocol in question. [The text of any proposed amendment to this Agreement or to any Protocol, except as may otherwise be provided in such Protocol, shall be communicated to the Contracting Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate proposed amendments to the signatories to this Agreement for information.]⁽²⁾

(3) Amendments which have been adopted by the Contracting Parties shall be submitted by the Depositary to all Contracting Parties for ratification, approval or acceptance.

(4) Ratification, approval or acceptance of amendments shall be notified to the Depositary 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 Depositary of notification of their ratification, approval or acceptance by at least three-fourths of the Contracting Parties to this Agreement or by at least two-thirds of the Parties to the Protocol concerned, except as may otherwise be provided in such Protocol. 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.⁽³⁾

Specific comments

37.1 (JPN): suggests adopting the majority or three fourths rule on adoption of amendments pointing out that if amendments are made by consensus, it will be extremely difficult to make an amendment.

37.2 (JPN): requests deletion.

37.3 (GR): suggests that consideration be given to the need for time limits between signature and amendment.

ARTICLE 38

Relationship between the Agreement and its Protocols

Deleted - see Article 2.

ARTICLE 39

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 Contracting Parties to permit a State, international organisations or regional economic integration organisations to associate itself with this Agreement or any Protocol, an Association Agreement shall be [drawn up by the Secretariat for the approval of]⁽¹⁾ the Contracting Parties. Such Association Agreement shall set out clearly the rights, responsibilities and limitations of associate status for that State, international organisation or regional economic integration organisation, it being understood that differing limitations may be applicable to different States, international organisations or regional economic integration organisations depending upon the number of Protocols with which a State wishes to be associated, the nature of such Protocols and the level of association envisaged by the associating State, international organisation or regional economic integration organisation and permitted by the Contracting Parties.

Note: New text based on discussion in WG II meeting of 16-18 October.

Specific comments

39.1 (JPN): supported by US wishes to replace by "approved by".

ARTICLE 40

Entry Into Force

(1) This Agreement shall enter into force on the ninetieth day after the date of deposit of the [fifteenth] Instrument of ratification, acceptance, approval or accession thereto.

(2) Any Protocol, except as otherwise provided in such Protocol, shall enter into force on the ninetieth day after the date of deposit of the [] Instrument of ratification, acceptance or approval of such Protocol or accession thereto.

(3) For each Party which ratifies, accepts or approves this Agreement or accedes thereto after the deposit of the [fifteenth] 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.

(4) Any Protocol, except as otherwise provided in such Protocol, shall enter into force for a Party that ratifies, accepts or approves that Protocol or accedes thereto after, its entry into force pursuant to paragraph (2) above, on the ninetieth day after the date on which that Party deposits its Instrument of ratification, acceptance, approval or accession, or on the date on which the Agreement enters into force for that Party, whichever shall be the later.

(5) For the purposes of paragraphs (1) and (2) 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 41

Provisional Application

The signatories agree to apply this Agreement 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 Article 40 above.

Note: New text suggested by US, CAN and N.

ARTICLE 42

Reservations

No reservations may be made to this Agreement.

ARTICLE 43

Transitional Arrangements

It is recognised that due to differences in the way in which Contracting Parties have managed the matters the subject of this Agreement some Contracting Parties will be unable to comply with all the provisions of this Agreement immediately upon entry into force thereof. Therefore, a transitional period of [] years may, subject to approval by the Governing Council, be invoked by any Contracting Party, provided that a Note setting out the provisions with which it cannot fully comply together with 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 35 above.

General comments

(JPN, US): reserved their positions 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.

ARTICLE 44

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) Except as may be provided in any Protocol at any time after five years from the date on which such Protocol has entered into force for a Contracting Party thereto that Party may withdraw from the Protocol by giving written notification to the Depositary.

(3) 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.

(4) Following the withdrawal of any party to this Agreement, the obligations of the Agreement will continue to apply with respect to investments in the withdrawing party at the time of withdrawal for a period of 20 years from the date of withdrawal.

(5) Any Contracting Party which withdraws from this Agreement shall be considered as also having withdrawn from all Protocols to which it is Party.

Note: New text based on suggestions of US and EC, supported by other delegations.

ARTICLE 45

Depositary

(1) The [Secretary-General of the United Nations] shall assume the functions of depositary of this Agreement and any Protocols.

(2) The Depositary shall inform the Contracting Parties, in particular, of:

(a) The signature of this Agreement and of any Protocol⁽¹⁾ and the deposit of instruments of ratification, acceptance, approval or accession in accordance with Articles 35 and 36;

(b) The date on which the Agreement and any Protocol will come into force in accordance with Article 40;

(c) Notification of withdrawal made in accordance with Article 44;

(d) Amendments adopted with respect to the Agreement and any Protocol, their acceptance by the Contracting Parties thereto and their date of entry into force in accordance with Article 37.

(e) Any other notification concerning this Agreement

Note: New subpara (e) suggested by S.

Specific comments

45.1 (S): wishes to add after Protocol "or Association Agreement".

ARTICLE 46

Authentic Texts

The original of this Agreement of which the English, French, German, Italian, Russian and Spanish 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 [].

General Comments

(JPN): 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).

RESTRICTED

**Draft paper for further discussion in WG II
on definition of Energy Materials and Products**

There are two approaches for defining Energy Materials and Products:

1. Alternative A is the US idea for defining energy goods as tabled following the first meeting of Working Group II.
2. Alternative B is a UK Department of Energy suggestion to use the EC Combined Nomenclature as a basis for developing a definition of Energy Materials and Products.

The relevant experts will need to decide the actual content of a definition based on these precedents or similar ones which other delegations may wish to offer. Given the desire for specificity the Chairman see no alternative to this type of enumerative approach.

EUROPEAN ENERGY CHARTER

21/91 ADD(1)

CONFERENCE SECRETARIAT

BA 4

RESTRICTED

Brussels, 5 November 1991

Addendum 1

Subject: Basic Agreement

As noted in paragraph 7 of the note from the Secretariat Doc. 21/91 BA 4 of 31 October 1991, enclosed please find the new redraft of Articles 7 and 10 of the Basic Agreement for discussion in the next WG II meeting.

ARTICLE 7

Energy Markets

(1) 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:

- (a) Where a monopoly or dominant position does not prevail, prices shall be determined by the market;
- (b) CPs undertake to prohibit agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, unless such behaviour can be justified as significantly contributing to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- (c) CPs undertake to minimise the scope and powers of monopoly or dominant enterprises to those necessary to ensure the economic and secure transmission and distribution of energy;
- (d) Where there is a monopoly or dominant position in the extraction, production, conversion, treatment, carriage or supply of [Energy Materials and Products], the Contracting Parties agree to ensure that enterprises do not abuse such a position. In particular by:
 - (i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (ii) limiting production, markets or technical development to the prejudice of consumers;
 - (iii) applying dissimilar conditions to equivalent

transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Detailed provisions to implement these principles will be made in the appropriate Protocols.

Note: New wording suggested by Chairman in light of extensive discussion in WG II meeting of 16-18 October.

General comments

Many delegations pointed out the problem of distinguishing between monopoly and dominant position.

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ARTICLE 10

Non-Discrimination

- (1) Each Contracting Party undertakes in the administration of its own laws, regulations and requirements affecting production of and trade in [Energy Materials and Products]:
- (a) to apply any customs duties or charges imposed in connection with importation or exportation immediately and unconditionally in the same way to [Energy Materials and Products] originating in or destined for any other Contracting Party;
 - (b) (1) to apply laws, regulations and requirements and charges governing the internal access to resources, production, conversion, treatment, sale, offering for sale, purchase, transportation, distribution or use of [Energy Materials and Products] without discrimination as between domestic and imported production or on the basis of nationality of origin of an investor.
- (2) In applying the provision of this Article Contracting Parties who are also members of GATT shall have regard to the provisions and criteria of the GATT and relevant GATT-related instruments as amended or otherwise applied or implemented from time to time. Contracting Parties who are not members of GATT shall have regard to the GATT Articles and GATT-related instruments appended to this Agreement. If subsequent to the signature of this Agreement amendments are made to the Articles or instruments appended to this Agreement or a further GATT-related instrument is agreed which supplements or expands upon the obligations of this Article and so long as all CPs are not parties to GATT or the relevant instruments, amendments will be proposed to this Article to supplement or expand it in accordance with that GATT-related instrument.

Note: New text suggested by Chairman taking into account remarks of many delegations. Former subparas (c) and (d) deleted.

Specific comments

10.1 (EC): the wording of subpara (1b) could create a potential conflict with Article 5.

General comments

(JPN): reserved position on the whole Article.

(AUS): wants clarification as to whether it is the intention of subparagraph (a) to extend to all Contracting Parties to the Basic Agreement, the tariff benefits from existing customs unions or free trade arrangements.

(EC, CAN, US): definition of Energy Products and Materials needed.

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EUROPEAN ENERGY CHARTER
conference secretariat

21/91 COR (1)

BA 4

Brussels, 4 November 1991.

Corrigendum

Please delete :

1. From the cover note :

point 5, 2nd tiret :

- "Article 13 has been deleted and covered in part in the new text of Article 14".

2. From Annex 1, Article 14, Note :

the 2nd sentence :

"The second para replaces Article 13".

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

21/91

Annex III

BA 4

RESTRICTED

OBSERVERS COMMENTS

The following observations concern only those issues regarding Part III of the Basic Protocol that did not appear to be raised by the delegates during the meeting of Working Group II on Friday, 18 October 1991.

General

- o The Protocol never appears to establish expressly the necessary relationship between the "investor" and its "investment".
 - Throughout Part III, the Protocol confers rights on "investments of investors". This formulation could leave an investor uncertain whether its investment would benefit from the protections of the Protocol if, for example, the investment were owned through a subsidiary in a country that is not a party to the Protocol. This uncertainty could be eliminated by replacing the expression "investments of investors" with the expression "investments *owned or controlled, directly or indirectly, by investors*" wherever it occurs in the Protocol. Alternatively, the definition of "investment" might be amended to read:

"investment" of an investor means every kind of asset owned or controlled, directly or indirectly, by the investor, including . . .
 - When the Protocol confers rights on "investors", rather than on "investments", there appears technically to be no requirement that the "investors", defined only as natural or legal persons of a Contracting Party, actually own or control an "investment" in the territory of another Party. A clarification in the definitional section that "investors" must "own or control, directly or indirectly, investments in the Territory of another Party" would address this problem.
- o The definition of "investment" in Article 1(e)(iii) appears to create another kind of significant uncertainty for the investor by limiting the *definition* of an "investment" to those assets that are "used in connection with the implementation of the principles of the Charter and in accordance with the provisions of the Agreement." The meaning of these ambiguous conditions would be crucial for the investor because *none* of the protections of the Protocol would apply to an investment that failed to satisfy them. For example, an investor might quite legitimately fear that a Contracting Party could refuse to enter into arbitration under the Protocol by claiming that the relevant investment was not "used in connection with the implementation of the Charter." We would suggest that the Working Group consider the removal of this language.

Comments of the EBRD
European Energy Charter
Part III
18 October 1991

Article 20

- o As a number of delegations observed, the clause "subject to its right to exercise powers conferred by its laws" in paragraph (1) removes the force of this provision by allowing Contracting Parties not only to maintain in place laws and regulations that discriminate against foreign investors with respect to the initial establishment of investments but also to enact new, more burdensome restrictions in the future. Especially since investments in the energy sector tend to be long-term projects involving multiple investments over the course of many years, the failure of the Protocol at least to give assurances that no future barriers to the entry of investment would be erected may limit the effectiveness of the Protocol in promoting investment. We would suggest that the Working Group consider inserting a prohibition against such future barriers to investment.

Article 23

- o We understand that the intention of paragraph (2) is ensure that investors are compensated for the decrease in value of their shares in a company whose assets are expropriated. It appears, however, that this provision may be unnecessary, because of the express inclusion of stocks and shares in the definition of "investment", and may in fact create an unfavorable implication regarding the broad scope of the definition of "investment".

Article 26

- o An issue similar to the one raised in connection with paragraph (2) of Article 23 also arises in connection with this Article. Again, we understand that the intention of this Article is to ensure that investment guarantee agencies succeed to the rights of the original investor under the Protocol. Given the broad definition of "investor", it is, however, unclear why this provision is necessary, since the Indemnifying Party, *i.e.*, the subrogee, would seem to become an "investor" upon taking over the claim of the original "investor". By including this express provision, one creates the inference that normal transfers of ownership, such as the sale of shares in an investment, would like normal subrogations require express recognition in the Protocol. This interpretation would limit the effectiveness of the Protocol in promoting investment by appearing to limit the marketability of the very investments that the Protocol seeks to encourage.

ON
THE ORGANIZATION OF THE SECRETARIAT

Location of Secretariat

- o Placing the proposed Secretariat in an existing international institution avoids the duplication of start-up and operating costs, and facilitates adjustment of the size of the Secretariat as the needs of the members change. For example, the Secretariat could avoid negotiating a headquarters agreement and duplicating administrative machinery, which could be provided on a reimbursable basis by the existing organization.
- o The placement of the Secretariat in an existing international institution need, however, place *no restrictions on the location, functional organization, or participation of other international, governmental, or private entities* of the Secretariat.
 - The EBRD, for instance, may establish agencies or branch offices in the territory of any member. The Secretariat could be located at any such agency or branch office and still benefit from the administrative, financial, legal, and other support services provided by the headquarters in London.
 - The Secretariat could organize itself functionally independently of the internal structure of the host institution so as to carry out its functions as efficiently as possible.
 - Secretariat personnel could be seconded both from the host organization and from other competent organizations and hired directly so as to provide the greatest possible expertise with the least possible duplication.

Organization and Personnel

- o A number of international organizations have specialized, deep knowledge in fields relevant to the European Energy Charter. No organization, including the EBRD, unites all the relevant expertise.
- o The current draft of the Basic Protocol suggests that the Secretariat might have a role to play in, at least, the following areas:
 - liberalization of trade in energy goods and services;
 - removal of discriminatory technical barriers to the provision of energy goods and services;

Working Group II: Basic Protocol

EBRD Comments

16 October 1991

- protection of intellectual property rights associated with energy;
 - liberalization of investment regimes and protection of investments;
 - mobilization of investment and promotion of private sector development in the energy sector;
 - regulation of anti-competitive behaviour by monopoly providers or purchasers and by dominant entities; and
 - supply management and policy coordination.
- o To avoid duplication, facilitate access to the expertise of existing international institutions, and avoid institutional rigidity, the Secretariat should be composed almost entirely of personnel seconded by the specialized agencies and international institutions represented here and by others with clear competence in the relevant fields. Such personnel could report directly to the Secretary-General yet rely on the expertise and strengths of their home institutions, who could provide services to the Secretariat on a reimbursable basis.

Proposed Amendment

- o The EBRD would thus like to renew its previous proposal for an amendment to Article 28, paragraph (4)(b) to replace the text after the second comma with "taking care to avoid any duplication and to integrate the work of competent international bodies, conferring upon them membership in the Governing Council or associated status with it."
- o Although Article 30 would require no amendment to permit the kind of organization we propose, it may be preferable to clarify in Article 30, paragraph (5), that the Secretary-General should look first to seeking seconded personnel from competent international organizations, perhaps for limited terms.