

Brussels, 18 September 1992

NOTE FROM THE SECRETARIAT

Subject: Trade and trade related Articles.

Trade and trade-related Articles are on the agenda for the next Working Group II meeting on 12-14 October 1992. For the key Articles there are presently three alternatives.

To facilitate negotiations the Secretariat has prepared a document (see Annex) composed of all the Articles relevant to trade including key definitions for each option:

option A - current draft as in BA-15

option B - first alternative of USA's proposal as in BA-17

option C - second alternative of USA's proposal as in BA-17

BA-18 systematizes the trade parts of BA-15 and Room Documents 1, 7 and 9 from September session. The only completely new proposal made by AUS is to be found in footnote 27.19. USA note on trade disputes is annexed to Article 24. There is not sufficient information for completion of Article 24 in three options.

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

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40/92 - ANNEX

BA-18

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RESTRICTED

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Brussels, 18 September 1992

TRADE AND TRADE RELATED ARTICLES

PREAMBLE A - 5th tiret

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

PREAMBLE B, C - 5th tiret

Having regard to the objective of progressive liberalization of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the GATT and its related instruments and as otherwise provided for in this Agreement;





Chapter 27

Coal, Natural Gas, Petroleum and Petroleum products, Electrial Energy	Mineral fuels, mineral oils and products of their distillation; bituminous substances; mineral waxes.
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- 27.01 Coal, briquettes, ovoids and similar fuels manufactured from coal.
- 27.02 Lignite, whether or not agglomerated, excluding jet.
- 27.03 Peat (including peat litter), whether or not agglomerated.
- 27.04 Coke and semi-coke or coal, of lignite or of peat, whether or not agglomerated; retort carbon.
- 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.
- 27.06 Tar distilled from coal, lignite or peat and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.
- 27.07 Oils and other products of the distillation or high temperature coal tars, whether or not dehydrated or partially distilled, including reconstituted tars (e.g. benzoles, toluoles, xyloles, naphtalenes, other aromatic hydrocarbon mixtures, phenoles, creosote oils and others).

27.08 Pitch and pitch coke obtained from coal tar or from other mineral tars.

27.09 Petroleum oils and oils obtained from bituminous minerals, crude.

27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.

27.11 Petroleum gases and other gaseous hydrocarbons liquified:

- natural gas
- propane
- butane
- ethylene, propylene, butylene, butadiene
- other

in gaseous state:

- natural gas
- other

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

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

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

27.16 Electrical energy.

- Acyclic and  
Cyclic  
Hydrocarbons
- 29.01 Acyclic hydrocarbons (saturated or non saturated as ethylene, propylene, butylene and its isomeres, butadiene and its isomeres and others).
- 29.02 Cyclic hydrocarbons (e.g. cyclohexane, benzene, toluene, xylenes and their mixtures, styrene, ethylbenzene and others).
- Renewable Energy
- 22.07.20 Ethylalcohol and any forms or denaturated spirits.
- 29.05.11 Methanol (methylalcohol).
- 44.01 Firewood, logs, twigs, bundles of firewood and similar forms; woodboards and particles; sawdust, wastes and fragments of wood, whether or not agglomerated, in the form of logs, briquettes, balls or similar forms.
- 44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

(9) "GATT and related instruments" means:

(a) the General Agreement on Tariffs and Trade, signed at Geneva October 30, 1947;

(b) Agreements, arrangements, decisions, understandings, or other joint action pursuant to the General Agreement on Tariffs and Trade.

and any successor agreement or agreements thereto.

- (10) Deleted.
- (11) ["Intellectual Property" is as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, done at Stockholm, July 1967]<sup>(7)</sup>.
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Specific comments

- 1.1 : General scrutiny reserve.
- 1.2 : CDN suggests inclusion of uranium ore and concentrates (2612 10), heavy water (2845 10) and from subcharter 28.44 only those with respect to uranium compounds (e.i. 2844 10 and 2844 50 fully, and 2844 20 and 2844 30 partially).
- 1.3 : J asks for deletion.
- 1.4 : CDN wants to petroleum products include energy products only and not petrochemicals (chapter 27 except 2707 (destillates from coal tar) up to 2711 13).
- 1.5 : CDN suggests deletion.
- 1.6 : CH asks for deletion.
- 1.7 : AUS supported by USA suggests adding : "and shall also include confidential information (including trade secrets and knowhow) circuit layouts and semi-conductor chips and unregistered trade marks".



[ARTICLE 5A]<sup>(1)</sup>

LIBERALISATION AND NON-DISCRIMINATION

- (1) <sup>(2)</sup>Contracting Parties undertake to remove progressively the barriers to trade with each other in [Energy Materials and Products] and [related equipment and services]<sup>(3)</sup> in a manner consistent with their other international obligations so as to achieve the [greatest possible degree of]<sup>(4)</sup> liberalisation in the market<sup>(5)</sup>.
- (2) In particular, Contracting Parties [undertake]<sup>(6)</sup> in relation to [Energy Materials and Products] and [related equipment and services]<sup>(3)</sup>:
- (a) <sup>(7)</sup>not to [increase]<sup>(8)</sup> custom duties and other charges nor to introduce new quantitative restrictions or measures having similar effect on imports or exports as [from the date of entry into force]<sup>(9)</sup> of this Agreement;
- (b) <sup>(10)</sup>not to apply any customs duties, charges or other regulations relating to importation or exportation in a discriminatory manner as between other Contracting Parties, provided that Contracting Parties may take action according to established international criteria against unfair trading practices;
- (c) not to apply internal laws, taxes, charges, standards or other regulations in such a manner as to treat domestic products or services more favourably than similar products<sup>(11)</sup> of other Contracting Parties.

Specific comments

- 5.1 : CDN, J, N general reserve on whole Article.
- 5.2 : AUS reserve, SF scrutiny reserve.
- 5.3 : Subject to Definitions.
- 5.4 : N delete.
- 5.5 : N supported by RUF asks for adding: "observing in particular the principles contained in the Article 11".
- 5.6 : *Deferred to later discussion.*
- 5.7 : PL asks for balance by introducing a "restructuring clause" permitting to reintroduce tariffs or charges in case of restructuring industries or heavy unemployment. Points out that transitional arrangements provisions are not clearly sufficient here.
- 5.8 : N suggests replacing with "institute or maintain".
- 5.9 : N asks for similar language as used in Article 16, suggests replacing with: "after the signature".
- 5.10: PL reserve pending the discussion on Article 27.
- 5.11: EC suggests insertion of "or services".

**ARTICLE 5B**

**TRADE IN ENERGY MATERIALS AND PRODUCTS**

(1) Except as otherwise specifically provided in this Agreement.

(a) Trade in [Energy Materials and Products] between Contracting Parties that are also contracting parties to the GATT shall be governed by the provisions of the GATT and related instruments as such provisions apply to the Contracting Parties in question.

(b) Trade in [Energy Materials and Products]

(i) between Contracting Parties to this Agreement, both of which are contracting parties to the GATT and relevant related instruments but which do not apply the GATT or such related instrument between themselves;

(ii) between a Contracting Party to this Agreement that is a contracting party to the GATT and relevant related instruments and a Contracting Party that is not; and

(iii) between Contracting Parties to this Agreement, neither of which is a contracting party to the GATT and relevant related instruments

shall be governed by provisions of the GATT and relevant related instruments as in effect of July 1, 1992 except as listed in ANNEX G.

(2) (a) Any Contracting Party to this Agreement encountering a problem concerning its existing domestic legal authority to carry out any obligation arising under this Article, in relation to another Contracting Party under circumstances described in Article (5)(1)(b), shall request immediate consultations with such other Contracting Party. The Contracting Party receiving such a request shall enter into such consultations as soon as possible.

(b) Should the Contracting Party requesting consultations pursuant to subparagraph (a) determine that it does not have the domestic legal authority to carry out in relation to the other Contracting Party the obligation with respect to which such consultations arose, either Contracting Party may suspend performance of such obligation in relation to the other Contracting Party. In such event the Contracting Parties concerned will, to the extent practicable and consistent with their respective laws, seek to minimize disruption in trade in [Energy Materials and Products] between them during the time in which performance of the obligation in question is suspended.

(3) Tariffs: Each Contracting Party shall provide to all other Contracting Parties a schedule of tariff rates for [Energy Materials and Products] prior to entry into force of this Agreement.

ANNEX G

**NON-APPLICABLE PROVISIONS OF THE GATT AND RELATED INSTRUMENTS**

II	Schedule of Concessions
IV	Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXV	Joint Action by CPs
XXII	Consultations
XXIII	Nullification and Impairment
XXVI	Acceptance, Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules
XXVIII bis	Modification of Schedules
XXIX	The relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXIII	Accessions
XXXVI-XXXVIII	Trade and Development
Appendix H	
All ad articles in Appendix I related to above GATT Articles.	
Arrangement Regarding Bovine Meat	
International Dairy Arrangement	
The Multifiber Arrangement	
Agreement on Trade in Civil Aircraft	

ARTICLE 5C

TRADE IN ENERGY MATERIALS AND PRODUCTS

- (1) Contracting Parties recognize that the rules and disciplines as embodied in the GATT and its related instruments are as relevant to the efficient functioning of international trade in [Energy Materials and Products] as other internationally traded items. All Contracting Parties to this Agreement will make best efforts to apply provisions of the GATT and related instruments to trade in [Energy Materials and Products] among themselves.
- (2) Contracting Parties that are contracting parties to the GATT re-affirm that in [Energy Materials and Products] among them are governed by the rules and disciplines of the GATT and its related instruments as such provisions apply to the Contracting Parties in question. Those Contracting Parties are committed to the improved application of existing rules and disciplines to trade in [Energy Materials and Products] and recognize the improvement to those disciplines which could emerge from the Uruguay Round of Multilateral Trade Negotiations.
- (3) Recognizing that full integration into the international trading community will ultimately provide the most secure application of the rules and disciplines of the GATT and its related instruments, Contracting Parties that are not also contracting parties to the GATT commit to accede to the GATT at the earliest appropriate time. These Contracting Parties further recognize the importance of adopting a domestic economic and legal framework which embodies free market principles to establishing confidence in the value of the commitments undertaken in this Agreement.
- (4) Trade in [Energy Materials and Products] between Contracting Parties that are also contracting parties to the GATT shall be governed by the provisions of the GATT and related instruments as such provisions apply to the Contracting Parties in question.

(5) Any Contracting Party to this Agreement encountering a problem concerning energy trade relations under this Article may request consultations with the other Contracting Party. The Contracting Party receiving such a request shall enter into such consultations as soon as possible. In such an event, the Contracting Parties concerned should to the extent practicable and consistent with their respective laws, seek to minimize the disruption in trade in [Energy Materials and Products] between them.

[ARTICLE 6A] <sup>(1)</sup>

PROCUREMENT POLICIES

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

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

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General comments

(USA, J, EC): Clarification of first sentence needed, in particular "non-governmental entity".



(CH): If services are included a more evolutive clause should be adopted.

(USA): The reference to circumstances which are "objectively justifiable" introduces elements of judgement into this Article which should be eliminated. All contracts shall be awarded on the basis of open competition. GATT Government Procurement Code may apply to parastatals.

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Specific comments

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

**ARTICLE 6B, 6C**

**PROCUREMENT POLICIES**

Deleted.

[ARTICLE 7A, 7B, 7C]<sup>(1)</sup>

[INTELLECTUAL PROPERTY]<sup>(2)</sup>

- (1) [Each Contracting Party shall, subject to paragraphs (2) and (3) below, afford protection under its domestic laws no less favourable than the protection it applies to its own nationals or to the nationals of any [Contracting Party]<sup>(3)</sup> with respect to Intellectual property entailed in or created as a result of all activities carried out pursuant to this Agreement in its Domain by Investors of other Contracting Parties.]<sup>(4)</sup>
- (2) [Without prejudice to paragraph (3), Contracting Parties who are not parties to the Paris Convention on the Protection of Industrial Property (1967 Stockholm revision) ("the Paris Convention") or the Berne Convention on the Protection of Literary and Artistic Works (1971 Paris revision) ("the Berne Convention") agree to apply protection equivalent to at least the minimum<sup>(5)</sup> required by those Conventions to the matters subject of this Agreement.]<sup>(6)</sup>
- (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 Domain of such Contracting Parties]<sup>(7)(8)</sup>]<sup>(9)</sup>.

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

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#### General comment

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

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#### Specific comments

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

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

"Each Contracting Party shall ensure effective and adequate protection of intellectual, industrial and commercial property rights according to the applicable international conventions, and particularly the Berne Convention for the protection of literary and artistic works (Paris Act of 24 July 1971) and the Paris Convention for the protection of industrial property (Stockholm Act of 14 July 1967)".

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

7.4: USA suggests deletion of para (1).

7.5 : CH suggests inserting "level".

- 7.6: AUS argues that the Paris and Berne Conventions are silent or deficient on some issues which would seem to be important in the Energy Charter context (e.g. patent terms, exclusions from patentability, protection of computer programs and integrated circuits, enforcement of intellectual property rights). This could be addressed in an Annex (max 2 pages) of key standards for the protection of intellectual property (e.g. patents, copyright, incl. computer programs, integrated circuits, designs, trade secrets and trade marks).
- 7.7: CH suggests replacing with the following text:  
"Contracting Parties who are not party to the TRIPs Agreement shall accord, in the field of intellectual property covered by this Article, a level of protection equivalent to the level provided for by the TRIPs Agreement where it provides for a higher minimum level of protection than that accorded under the Paris and Berne Conventions".
- 7.8: AUS suggests replacing with the wording :  
"Contracting Parties not party to the TRIPs Agreement shall comply with the substantive provisions of that Agreement".
- 7.9: Discussion on para (3) was deferred. Chairman suggests that the substance might be moved to an accompanying document which could be negotiated by Contracting Parties.

[ARTICLE 8A, 8B, 8C]<sup>(1)</sup>

**COMPETITION**

(1) The Contracting Parties agree, subject to their existing international rights and obligations, to work to alleviate market distortions and barriers to competition in the extraction, production, conversion, treatment, carriage (including transmission, distribution and marketing) and supply of [Energy Materials and Products] in relevant markets, insofar as they may affect trade between Contracting Parties.

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

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

(3) (5) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.

(4) Contracting Parties may co-operate in the enforcement of their competition rules by consulting and exchanging information, subject to limitations imposed by laws regarding disclosure of information, confidentiality and business secrecy.

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

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

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

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Specific comments

8.1 : N scrutiny reserve on whole Article.

8.2 : USA scrutiny reserve.

8.3 : ~~EC, GB suggest insertion of "and exploitative abuses".~~

8.4 : Contingency reserve by J and USA. USA is considering, if necessary, to submit a particular wording to the Secretariat.

8.5 : Article 42 could contain an appropriate reference to the notion of paragraph 8.3. To the attention of the Transitional Subgroup.

- 8.6 : AUS proposes inserting of "legitimate".
- 8.7 : N suggests replacing with "shall seek". EC will propose a compromise text incorporating N suggestion and current text.
- 8.8 : General scrutiny reserve on new para (6).

[ARTICLE 10A]<sup>(1)</sup>

STATE AID

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

- 10.1: A suggests elimination of this Article and substance to be moved to Article 8. Furthermore the current wording requires redrafting e.g. along the lines of the recent EC and EFTA free trade agreements with some Eastern European countries.
- 10.2: N suggests replacing with "when preventing the use of environmentally more benign energy sources".



10.3: KIR suggests replacing para(1) with :

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

**ARTICLE 10B, 10C**

**STATE AID**

**Deleted**

ARTICLE 15A, 15C

TRANSPARENCY

- (1) Each Contracting Party undertakes that laws, regulations, judicial decisions and administrative rulings and standards of general application which are made effective by that Contracting Party and which relate to the production, import, export, conversion, distribution<sup>(1)</sup> or use of [Energy Materials and Products] shall be made public promptly in such a manner as to enable other Contracting Parties and Investors to become acquainted with them. Agreements made between governments or governmental agencies of two or more Contracting Parties which affect international trade in [Energy Materials and Products] between Contracting Parties shall also be published.
  
- (2) [The provisions of paragraph (1) above shall not require any Contracting Party to disclose confidential information in such a way as to impede law enforcement or otherwise be contrary to the public interest or to law, or to prejudice the legitimate commercial interests of particular public or private enterprises]<sup>(2)</sup>.
  
- (3) Each Contracting Party undertakes to nominate [and publish details concerning a central]<sup>(3)</sup> enquiry point to which requests for information about relevant laws, regulations, judicial decisions and administrative rulings may be addressed and to communicate [these details]<sup>(4)</sup> to the Secretariat established under Article 31, for provision by the Secretariat to any Investor on request.

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General comments

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

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Specific comments

- 15.1 : USA asks for inserting "and investment".
- 15.2 : CDN would prefer wording closer to GATT provisions if possible.
- 15.3 : EC suggests deletion.
- 15.4 : EC in relation to footnote 15.3 proposes replacing with "promptly the location of this enquiry point".
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ARTICLE 15B

TRANSPARENCY

- (1) Laws, regulations, judicial decisions and administrative rulings and standards of general application which are covered by Article 5 of this Agreement will be subject to transparency disciplines of Article X of the GATT.
- (2) Each Contracting Party undertakes that other laws, regulations, judicial decisions and administrative rulings and standards of general application which are made effective by that Contracting Party, which relate to the production, import, export, conversion, distribution, Investment, or use of [Energy Materials and Products], shall be made public promptly in such a manner as to enable other Contracting Parties and Investors to become acquainted with them.
- (3) The provisions of paragraph (1) above shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
- (4) Each Contracting Party undertakes to nominate [and publish details concerning a central]<sup>(1)</sup> enquiry point to which requests for information about relevant laws, regulations, judicial decisions and administrative rulings may be addressed and to communicate [these details]<sup>(2)</sup> to the Secretariat established under Article 31, for provision by the Secretariat to any Investor on request.

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Note

New text against Article 15 of BA-15 is underlined.

Specific comments

15.1 : EC suggests deletion.

15.2 : EC in relation to footnote 15.1 proposes replacing with  
"promptly the location of this enquiry point".

[ARTICLE 24]<sup>(1)</sup>

SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES

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

- (b) Within 30 days of the receipt of notification of that appointment, the other party to the dispute shall, in turn, appoint one member, who may be its national or citizen. If the appointment is not made within the time limit prescribed, the Party having instituted the proceedings may, within a further period of 30 days request that the appointment be made in accordance with sub-paragraph (d) below;
- (c) A third member, who may not be a national or citizen of a party to the dispute, shall then be appointed between the parties to the dispute. That member shall be the President of the Tribunal. If, within 180 days of the receipt of the request referred to in paragraph (3) above, the parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with sub-paragraph (d) below, at the request of any party submitted within 30 days of the expiry of the 180 day period provided for in this paragraph;
- (d) Appointments pursuant to sub-paragraphs (b) or (c) above shall be made by the President of the International Court of Justice within 30 days of the receipt of a request to do so. If he is prevented from discharging this task or is a national or citizen of a party to the dispute, the appointments shall be made by the Vice-President. If the latter, in turn, is prevented from discharging this task or is a national or citizen of a party, the appointments shall be made by the most senior judge of the Court who is not a national or citizen of a party;
- (e) Appointments made in accordance with sub-paragraphs (a), (b), (c) and (d) above shall have regard to the qualifications and experience, particularly in matters covered by this Agreement, of the members to be appointed;
- (f) The Tribunal shall establish its own rules of procedure, unless otherwise agreed by the parties to the dispute, and shall take its decisions by a majority vote of its members;

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

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General comments

- CDN believes that consideration should be given to measures for :
- a) settlement of disputes involving more than one Contracting Party;
  - b) intervention in dispute settlement by a Contracting Party not party to the dispute; and



- c) ensuring the consistency of interpretation given to provisions of the Basic Agreement in dispute resolution.
  
- USA submits for the consideration of WG II the conceptual proposal for the settlement of trade disputes between Contracting Parties to the Basic Agreement (see ANNEX to Article 24) with the following introduction.

The dispute settlement model generally adopted for the resolution of international trade disputes differs a great deal from the model frequently used for international investment disputes. Investment disputes very often are referred to international arbitration, under agreement that the arbitral award will be "final and binding" on the parties to the dispute. Once the tribunal decides, the parties are simply left to carry out the award.

While arbitration has been considered appropriate for the resolution of international investment disputes, it is not a method that has gained wide acceptance for trade disputes. International trade agreements typically provide for resolution of disputes by reference of the issue to a dispute settlement panel. The panel is asked to make findings or determinations, and is usually asked to make recommendations for resolution of the dispute. Often, the panel report is used as the basis for further consultations.

While trade agreements generally favor elimination of measures found by the panel to be inconsistent with the trade agreement, if removal of those measures proves impractical, alternative remedies are provided. The first alternative is usually compensation, with retaliation through suspension of concessions as a last resort.

For these reasons, USA considers that the Basic Agreement (BA) requires a distinct dispute settlement system for resolution of trade disputes. The BA would retain separately the procedures for resolving (i) disputes between an Investor and a Contracting Party (CP), and (ii) non-trade disputes between CPs.

In annexed conceptual form are the basic elements of a dispute settlement system suitable for trade disputes under the BA. Also attached is the general trade dispute settlement provision of the U.S.-Canada Free Trade Agreement (Article 1807) which illustrates the procedures for such a system in the bilateral context.

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

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Specific comments

- 24.1: Subject to scrutiny by all delegations. CDN scrutiny reserve also concerns relationship between this Article and Article 27.
- 24.2: EC and RO reserve.
- 24.3: Finalisation of this paragraph awaits consideration of the trade related provisions. USA delegation notes that it may be preferable to address the trade disputes through a dispute settlement procedure as indicated in Room Document 18 of 16 June 1992.
- 24.4: AUS asks for deletion.

ANNEX to Article 24

Conceptual approach for Article on  
RESOLUTION OF TRADE DISPUTES

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

6. Formation of panels should be easily accomplished. One approach would be to provide that each party to the dispute appoint one panelist, with the two so appointed selecting a third to serve as chairman. It would also be necessary to designate an "appointing authority" or include some other method for establishing a panel should a party to the dispute refuse to appoint a panelist or if the two panelists appointed could not agree on the third member.
  
7. While not essential, it would seem desirable to maintain a roster of highly qualified individuals to serve as panelists. It could be explored whether the GATT roster, or appropriate individuals from that roster, might be made available for purposes of this Article. If this proves possible, the BA roster would need to add potential panelists from CPs that are not members of GATT.
  
8. Rules to govern the conduct of the panel proceedings could be handled in a number of ways. Procedural issues could be left to agreement between the parties to the dispute or to the discretion of the panelists, subject to any specific directions that might be included in this Article. An alternative would be to append to the BA an annex of rules to guide the panelists on fundamental issues.<sup>(3)</sup> A further alternative would be to incorporate by reference, mutatis mutandis, appropriate procedural provisions from established rules for international arbitration.<sup>(4)</sup>
  
9. The balance of this Article would contain provisions that have been found appropriate and effective for the resolution of trade disputes. These could include:
  - (i) an opportunity for the parties to the dispute to comment on a preliminary draft of the panel findings (and perhaps the proposed recommendations);
  
  - (ii) an opportunity for the parties to the dispute to consult following the panel proceeding to reconsider settlement in the light of the panel findings and recommendations;

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

(iv) as a first alternative, compensation; and

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

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

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Notes

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

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

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

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

## US.-CANADA FTA

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## Article 1807: Panel Procedures

1 The Commission shall develop and maintain a roster of individuals who are willing and able to serve as panelists. Wherever possible, panelists shall be chosen from this roster. In all cases, panelists shall be chosen strictly on the basis of objectivity, reliability and sound judgment and, where appropriate, have expertise in the particular matter under consideration. Panelists shall not be affiliated with or take instructions from either Party.

2. If a dispute has been referred to the Commission under Article 1805 and has not been resolved within a period of 30 days after such referral, or within such other period as the Commission has agreed upon, or has not been referred to arbitration pursuant to Article 1806, the Commission, upon request of either Party, shall establish a panel of experts to consider the matter. A panel shall be deemed to be established from the date of the request of a Party.

3. The panel shall be composed of five members, at least two of whom shall be citizens of Canada and at least two of whom shall be citizens of the United States. Within 15 days of establishment of the panel, each Party, in consultation with the other Party, shall choose two members of the panel and the Commission shall endeavour to agree on the fifth who shall chair the panel. If a Party fails to appoint its panelists within 15 days, such panelists shall be selected by lot from among its citizens on the roster described in paragraph 1. If the Commission is unable to agree on the fifth panelist within such period, then, at the request of either Party, the four appointed panelists shall decide on the fifth panelist within 30 days of establishment of the panel. If no agreement is possible, the fifth panelist shall be selected by lot from the roster described in paragraph 1.

4. The panel shall establish its rules of procedure, unless the Commission has agreed otherwise. The procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and rebuttal arguments. The proceedings of the panel shall be confidential. Unless otherwise agreed by the Parties, the panel shall base its decision on the arguments and submissions of the Parties.

5. Unless the Parties otherwise agree, the panel shall, within three months after its chairman is appointed, present to the Parties an initial report containing findings of fact, its determination as to whether the

measure at issue is or would be inconsistent with the obligations of this Agreement or cause nullification and impairment in the sense of Article 2011, and its recommendations, if any, for resolution of the dispute. Where feasible, the panel shall afford the Parties opportunity to comment on its preliminary findings of fact prior to completion of its report. If requested by either Party at the time of establishment of the panel, the panel shall also present findings as to the degree of adverse trade effect on the other Party of any measure found not to conform with the obligations of the Agreement. Panelists may furnish separate opinions on matters not unanimously agreed.

6. Within 14 days of issuance of the initial report of the panel, a Party disagreeing in whole or in part shall present a written statement of its objections and the reasons for those objections to the Commission and the panel. In such an event, the panel on its own motion or at the request of the Commission or either Party may request the views of both Parties, reconsider its report, make any further examination that it deems appropriate and issue a final report, together with any separate opinions, within 30 days of issuance of the initial report.

7. Unless the Commission agrees otherwise, the final report of the panel shall be published along with any separate opinions, and any written views that either Party desires to be published.

8. Upon receipt of the final report of the panel, the Commission shall agree on the resolution of the dispute, which normally shall conform with the recommendation of the panel. Whenever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Article 2011 or, failing such a resolution, compensation.

9. If the Commission has not reached agreement on a mutually satisfactory resolution under paragraph 8 within 30 days of receiving the final report of the panel (or such other date as the Commission may decide), and a Party considers that its fundamental rights (under this Agreement) or benefits (anticipated under this Agreement) are or would be impaired by the implementation or maintenance of the measure at issue, the Party shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute.



MODEL RULES OF PROCEDURE  
FOR CHAPTER 18 PANELS  
CONVENED PURSUANT TO THE  
UNITED STATES-CANADA FREE-TRADE AGREEMENT

PART I - GENERAL

1. These rules are intended to be used by a panel constituted under Article 1807 of the Agreement unless otherwise decided by the Commission, and may be used for panels constituted under Article 1806. These rules supplement the provisions of the Agreement

2. In these rules:

"Agreement" means the Free Trade Agreement between the Government of Canada and the Government of the United States of America;

"Commission" means the Canada-United States Trade Commission constituted pursuant to Article 1802 of the Agreement

"Panel" means panel established pursuant to Article 1806 or 1807 of the Agreement;

"Party" means the Government of Canada or the Government of the United States of America;

"Responsible Secretary" means the Secretary of the Party in whose territory the panel proceeding takes place;

"Secretary" means the Canadian Secretary or the United States Secretary appointed pursuant to Article 1909 of the Agreement.

**PART II - CONSTITUTION OF PANELS**

1. In the case of the death, retirement, disqualification or disability of one of the panel members, that place shall be filled in the same manner in which the panel member was appointed pursuant to the provisions of Article 1807(3) of the Agreement.

**PART III - OPERATION OF THE PANEL**

1. The panel proceeding commenced at the request of one Party shall take place in the capital of the other Party, unless the Parties otherwise agree.
2. The chairman of the panel shall preside at all its meetings.
3. The chairman of the panel shall fix the date and hour of its sittings in accordance with these rules and following consultations with other panel members and the Responsible Secretary.
4. Panel meetings involving purely administrative matters may be conducted by means of telephone call.
5. The Responsible Secretary shall expeditiously forward to the other Secretary copies of all official letters, documents, records or other papers received or filed with the Responsible Secretary pertaining to any proceeding before a panel.

**PART IV - WRITTEN SUBMISSIONS**

1. The initial written submission by the Party that requested the panel shall be filed with the Responsible Secretary no later than (10) days following the date upon which the chairman of the panel is appointed.
2. A written counter-submission by the other Party shall be filed no later than (20) days after the filing of the first submission.
3. The panel should fix the time for any further written submissions. The Parties shall be accorded the opportunity to make an equal number of written submissions, subject to the time limitations imposed by the panel under Chapter 18.

**PART V - ORAL PROCEEDINGS**

1. The panel shall fix dates for oral proceedings.
2. All panelists must be present during the oral proceedings.
3. In the case of the death, retirement, disqualification or disability from any cause of one of the panel members after oral argument has begun, the Chairman may order that the matter be reheard on such terms as are appropriate after the selection of a substitute panelist pursuant to Part II:2 above.
4. The oral proceedings shall be conducted in the following manner ensuring that each Party has the opportunity of equal time:
  - a) Argument of the Party commencing the proceeding.
  - b) Argument of the other Party.
  - c) Reply of the Party commencing the proceeding.
  - d) Counter-reply of the other Party.
5. At the request of a Party, or at the initiative of the panel, the panel may call upon any person to provide information concerning the matter in dispute, provided that both Parties so agree and subject to such terms and conditions as both parties may agree.

**PART VI - CONFIDENTIALITY AND EX PARTE CONTACTS**

1. The proceedings and deliberations of the panel shall be confidential. It is the responsibility of each Party to ensure that those persons attending the oral proceedings on its behalf maintain the confidentiality of the proceedings.
2. The panel shall not meet or contact one Party in the absence of the other. No panel member shall discuss the matter before the panel with a Party or Parties in the absence of other panel members.

**PART VII - TRANSLATION AND INTERPRETATION**

1. The written and oral proceedings may be in either English or French or both.
2. The Responsible secretary shall provide for interpretation and translation as the case may be of written and oral proceedings if a Party or panelist so requests.
3. The report of a panel issued in one language shall be promptly translated into the other.

PART VIII - REPORT

1. The deliberations of the panels shall take place in private and remain confidential. Only panelists may take part in the deliberations. Assistants to the panelists and any necessary support staff may be present by permission of the panel.
  
2. In accordance with Article 1807(5) and unless the Parties otherwise agree, the panel shall present to the Parties an initial report no later than three months after the Chairman is appointed.

[ARTICLE 25A](1)

[GOVERNMENT CONTROLLED ENTITIES](2)(3)

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

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Specific comments

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

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

"EXCLUSIVE OR SPECIAL PRIVILEGES

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

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

**GOVERNMENT PARTICIPATION**

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

**ARTICLE 25B, 25C**

**GOVERNMENT CONTROLLED ENTITIES**

Not needed for trade Articles.

[ARTICLE 26A]<sup>(1)</sup>

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

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

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Specific comments

26.1: USA, CDN, EC and RUF reserve.

ARTICLE 26B, 26C

OBSERVANCE BY SUB-FEDERAL AUTHORITIES

Not needed for trade Articles.

[ARTICLE 27A, 27C](20)(21)

EXCEPTIONS

- (1) [The provisions of this Agreement shall not preclude any Contracting Party from taking any action [ [which it considers]<sup>(1)</sup> necessary for the purposes of protecting its public order, or [human, animal or plant life or health, [or conservation of exhaustible natural resources]<sup>(2)</sup>]<sup>(3)</sup>, or from taking any action in pursuance of]<sup>(4)</sup> its obligations under the United Nations Charter for the maintenance of international peace and security, [or]<sup>(5)</sup> 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]<sup>(6)</sup> shall not constitute disguised restrictions on trade<sup>(7)</sup> or arbitrary discrimination as between Contracting Parties]<sup>(8)</sup><sup>(9)</sup>. Such actions shall be duly motivated and shall not be disproportionate to this end.]<sup>(10)</sup>
- (2) [A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential [defence]<sup>(11)</sup> interests.]<sup>(12)</sup>
- (3) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the <sup>(13)</sup><sup>(14)</sup> benefit of any treatment, preference or privilege resulting from
  - (a) <sup>(15)</sup> the membership to [or association with]<sup>(16)</sup> any existing [or future]<sup>(16)</sup> customs [or economic]<sup>(16)</sup> union or a free trade area [or similar international agreement]<sup>(16)</sup> to which any of the Contracting Parties concerned is or may become a party, or



(b) [any regulation to facilitate frontier traffic]<sup>(17)</sup>.

(18)(19)

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Specific comments

27.1 : N reserve.

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

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

27.4 : EC suggests substituting with: "justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of intellectual, industrial and commercial property, or the protection of national treasures, possessing artistic, historic or archaeological value,".

27.5 : EC in context with footnote 27.4 suggests deletion.

27.6 : EC suggests substituting with: "its international nuclear safeguards obligations or in pursuance of other issues of nuclear proliferation. Such actions".

27.7 : USA asks for adding "and Investment".

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

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

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

"( ) This Agreement shall not apply to a natural person who is not a citizen or national of a Contracting Party (the first Contracting Party) but who is a permanent resident of that Contracting Party, if :

(a) that person has already invoked the provisions of this Agreement against the Contracting Party in which that person has made an investment (the second Contracting Party), provided that this has occurred in respect of the same matter or,

(b) the person is a citizen or national or permanent resident of the second Contracting Party."

Note

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

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

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

a) necessary to protect its public [order/morals];

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

c) relating to the conservation of exhaustible energy resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

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

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

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

(2) Nothing in this Agreement shall be construed :

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

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

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

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

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

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

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

- (3) If a Contracting Party considers that any measure taken by another Contracting Party pursuant to paragraph (2) constitutes a disguised restriction on trade or investment or otherwise nullifies or impairs any benefit reasonably expected under this Agreement, it may request consultations with the Contracting Party taking the measure. Such consultations shall be held promptly, and the Contracting Party whose measure is the subject of the consultations shall give full and sympathetic considerations to the views of the other Contracting Party and shall explain, in as much detail as is consistent with its security interests, the reasons for the measure.
- (4) No Contracting Party may invoke the provisions of this Article to derogate from the requirements to pay compensation pursuant to Articles 17 and 18 or to permit the transfer of an investment or returns in accordance with Article 19.

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

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

(b) any regulation to facilitate frontier traffic.

27.21: N suggests substituting whole Article with the following:

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

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

[ARTICLE 27B](20)(21)

EXCEPTIONS

- (1) General and security exceptions to trade provisions are addressed in Article 5 via reference to Articles XX and XXI of the GATT. In addition, nothing in Article 5 of this Agreement shall preclude any Contracting Party from taking any action in pursuance of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelinew and other international nuclear safeguards obligation provided any such action shall not constitute disguised restrictions on trade or arbitrary discrimination between Contracting Parties.
  
- (2) Other provisions of this Agreement shall not preclude any Contracting Party from taking any action [ [which it considers]<sup>(1)</sup> necessary for the purposes of protecting its public order, or [human, animal or plant life or health, [or conservation of exhaustible natural resources]<sup>(2)</sup>]<sup>(3)</sup>, or from taking any action in pursuance of]<sup>(4)</sup>its obligations under the United Nations Charter for the maintenance of international peace and security, [or]<sup>(5)</sup>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]<sup>(6)</sup>shall not constitute disguised restrictions on trade<sup>(7)</sup>or arbitrary discrimination as between Contracting Parties]<sup>(8)</sup><sup>(9)</sup>.Such actions shall be duly motivated and shall not be disproportionate to this end.]<sup>(10)</sup>
  
- (3) [A Contracting Party shall neither be obliged to supply information nor be precluded from taking such measures as it considers necessary in order to protect its essential [defence]<sup>(11)</sup> interests.]<sup>(12)</sup>

(4) The provisions of this Agreement shall not be construed so as to oblige any one Contracting Party to extend the (13)(14) benefit of any treatment, preference or privilege resulting from

(a) (15)the membership to [or association with](16) any existing [or future](16) customs [or economic](16) union or a free trade area [or similar international agreement](16) to which any of the Contracting Parties concerned is or may become a party, or

(b) [any regulation to facilitate frontier traffic](17).

(18)(19)

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Specific comments

Remain the same as in options 27A and 27C.