

cc: Directors  
Mr. Vlaanderen  
Mrs. Dredde  
Mr. Pierson  
Mr. Hirota

## MEMORANDUM

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To: Mrs. Steeg  
Mr. Ferriter

De  
From: Craig Bamberger

Objet  
Subject: Final Plenary Session of the Energy Charter Treaty Negotiations,  
7-11 June 1994 13 June 1994

Reference: IEA/OLC(94)158

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The Final Plenary concluded with the issuance of the following "Common Declaration":

The heads of delegations participating in the European Energy Charter Conference decided at the end of their 7-11 June meeting, subject to confirmation by their capitals, that in view of the very wide measure of agreement reached on the Energy Charter Treaty the multilateral negotiations should be now regarded as having reached a successful conclusion with only a very few issues remaining for clarification. Then, after technical and legal review, the text of the Treaty will be submitted to governments for approval. Once this week's agreement is confirmed, it is expected that the Treaty will be ready in time for signature in September or October this year.

Negotiation of the remaining issues will be conducted informally. Regardless whether the results of those negotiations prove satisfactory to all participants, Conference Chairman Rutten will at the end of July transmit an Energy Charter Treaty text to delegations for their approval by a two-thirds vote under a written procedure. On the uncertain premise that one can judge from attitudes expressed in the Conference, it would appear that the Treaty is likely to be acceptable to the EU countries, Russia and most of the other transitional countries, and that it may also be acceptable to most of the other OECD countries, including Japan. Of the major participants in the Conference it is the US which continues to have the greatest difficulties with the current text. Indeed, even before this Plenary began, the Conference

### Decisions Taken

The amendment to the Treaty text to implement the EC-Russia deal on nuclear materials exempts this trade from the GATT provisions that will be applied to trade with non-GATT countries, and instead allows it to be governed by the as-yet unsigned EC-Russia "Agreement on Partnership and Co-operation."

The EC-Norway deal referred to above resulted in the adoption of several amendments to the Treaty text, most significantly in Article 21 on "Sovereignty Over Energy Resources" where their thrust is to affirm state authority over the disposal of energy resources. Included is the following provision:

Without prejudice to the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty does not affect the rules in Contracting Parties governing the system of property ownership in energy resources.

When these amendments were adopted Russia's Deputy Minister Shatalov spoke in support; the US voiced objections to being asked to "take or leave" proposals on fundamental issues; Japan reserved pending consultation with its legal experts; and Prof. Fatouros of Greece, speaking for the EU Presidency, asserted (while staring in my direction) that the Legal Sub-Group was not to examine the "legal policy reasons" behind the amendments.

The Conference decided not to impose an import and export duty standstill on energy goods. Russia's request for a transition period prior to the standstill, coming on top of the substantial technical problems raised in connection with GATT obligations of the GATT member countries, led Chairman Rutten to propose instead a "best efforts standstill" on import and export duties. This too proved difficult to work out, but after extensive negotiations by Mr. Fremantle provisions were agreed. These include notification and consultation procedures for duty changes that are made outside the scope of authorizing GATT provisions, and a commitment to future negotiations on a binding standstill.

Another GATT-related issue was the question -- left unanswered at Marrakesh -- of rules to govern trade between parties to the 1947 GATT who do not join the 1994 GATT, and parties to the 1994 GATT who withdraw from the 1947 GATT. The Conference's decision was to leave this area unregulated by the Charter Treaty.

Russia is to be given, via a legally binding decision by the Conference contained in the Final Act, an exception from the "national treatment" investment obligation for its existing statutory requirement of legislative approval of the leasing of federally-owned property; this will be subject to a condition of non-discrimination among parties to the Charter Treaty.

### Remaining Issues

Russia has been seeking a balance of payments exception from Article 16, "Transfers Related to Investments." However, Russia has entered into some treaties, and is about to

enter into the "Partnership and Co-operation" treaty with the EC, which contain no balance of payments exception. Therefore, Russia could only implement a balance of payments exception in a discriminatory manner, which most delegations to the Conference would find unacceptable. Nonetheless, the Russian Central Bank has insisted upon such an exception in the Charter Treaty. Russia's delegation sought permission to waive the balance of payments exception (I saw an English translation of their message), but so far to no avail. The Charter Conference has decided to request the IMF to accompany the Secretariat to Moscow to try to convince the Central Bank that a discriminatory balance of payments exception would contravene IMF rules.

All of the other pending issues concern principally the US.\*

The US proposes a carve-out from Article 26, "Observance by Sub-National Authorities," for existing state measures that don't conform with the Article 13(7) obligation of "national treatment" of existing investment. Should this exception be granted, Canada and Australia would expect similar treatment. However, the EU has thus far successfully opposed it.

The US has been seeking an exception from "national treatment" for several specific programmes, including its Overseas Private Investment Corporation's political risk insurance and loan programmes for overseas investment that are open only to US-controlled investors; R&D grants; and programmes for socially and economically disadvantaged groups. (Canada seeks a similar exception for its programmes for aboriginal people.) In these areas the EU has candidly said in private that it is willing to exempt the US from the obligations of the Treaty, but only if this can be done in a way that conceals its agreement. The give and take over this has been fractious, and so far no one has found a solution satisfactory to the EU. The immediate cause of disagreement is the language in Article 13(8) that the "modalities of" application of the national treatment standard shall be reserved for the second-phase treaty negotiations (concerning national treatment on the right of establishment). The EU refuses to drop these words, which the US considers unacceptably ambiguous.

The EU has been pursuing exceptions from certain Treaty obligations for a state that is party to an "Economic Integration Agreement". Although the EU originally sought in this context an exemption from the Treaty's "national treatment" provisions, it now pursues only an exemption for its measures from "most favoured nation" (MFN) treatment and this change in position has satisfied most of the negotiating parties. This is not a well understood issue, but it is perceived as unlikely that an OECD country would offer to another country a better investment standard than is available to its own citizens; if that is correct, then a denial of MFN treatment should be of little concern since national treatment will always be at least as good. This might not necessarily be the case for a "transitional" country, which could conceivably offer better investment treatment to another country than to its own investors, but

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\* One issue raised by the US in previous meetings was an exemption from the Treaty for its maritime sector, but I did not hear this mentioned in the latest meetings. Perhaps this is because the Treaty no longer contains binding preinvestment national treatment requirements.