

Brussels, 6 January 1995

NOTE FROM THE SECRETARIAT

Subject: Summary of the Sixteenth Plenary Session of the Energy Charter Conference - Adoption of the Energy Charter Treaty

The Session was held in Lisbon on 16 and 17 December 1994 under the Chairmanship of Ambassador Charles Rutten. Forty eight countries and the EC delegation participated. Two international organisations and one country were represented as observers.

1. Meeting on 16 December

1.1 The Conference Chairman opened the Session and explained that its purpose was to confirm the adoption of the text of the Energy Charter Treaty. A very large majority of the participating countries, well in excess of the two-thirds referred to in Article 9(2) of the Vienna Convention on the Law of Treaties, had already given their written agreement to the adoption of the final text circulated on 14 September 1994 (CONF 104). Certain delegations had, however, raised doubts about this written procedure and it was important to ensure that there were no procedural uncertainties.

1.2 The Chairman informed the meeting that consultations between particular delegations were still in progress on a few issues of interpretation. Requests from the Russian Federation for additional statements to be included in the Final Act of the Conference had been circulated by the Secretariat (CONF 110, 111 and 113) and these might give rise to requests

for statements from other delegations. It was not yet clear whether these questions would be dealt with in the Final Act or in the records of the current meeting.

The Chairman proposed that the meeting should be adjourned to allow more time for resolving these difficulties.

- 1.3 The Chairman reminded delegations of the proposal from Norway circulated in CONF 112 for an alternative Declaration by all representatives in Part V of the Final Act. This would represent a material change in the text of the Final Act on the basis of which delegations had notified their agreement to the adoption of the Treaty text. In any case a number of delegations had indicated that they were opposed to such a change. The vote for adoption of the Treaty text would be a single vote relating to the package as a whole.

The Norwegian delegation said that they were still consulting with other delegations. They regarded the Part V Declaration as superfluous but if delegations still saw a need for such a Declaration they would maintain their proposal for alternative wording when the Plenary resumed.

- 1.4 The Secretary General notified the meeting that, at its own request, Slovakia would be listed in Annex PA of the Treaty.

- 1.5 The Chairman adjourned the meeting to a time to be announced as soon as possible.

2. Meeting on 17 December

- 2.1 The Plenary Session resumed on the morning of 17 December. The Conference Chairman informed the meeting that the consultations on interpretative questions raised by the Russian Federation had resulted in a solution which would avoid adding statements on these points to the Final

Act. Instead the agreements reached on these issues would be recorded in the form of a Chairman's Statement at the current meeting.

- 2.2 The Chairman read out to the meeting the text of his Statement on these issues, which was also circulated in written form. This Statement is recorded in Annex I to this Note.

The Conference agreed without objection to this proposal for resolving the outstanding interpretative issues.

- 2.3 The Chairman drew attention also to a request by the Russian Federation and the European Community, referred to in his Statement, that a Joint Memorandum on nuclear trade should be annexed to the report of the current meeting. This Memorandum is at Annex II to this Note.

- 2.4 Following a brief recess at that delegation's request, Norway informed the Conference that it would withdraw its request for an alternative Part V Declaration if the substance of its proposed Declaration could be added to the Chairman's Statement as a view expressed by Norway and supported by certain other delegations. The Conference welcomed this proposal. The Chairman confirmed that this wording would be added to his Statement and invited delegations which wished to record their support to notify the Secretariat. Paragraph 6 of Annex I sets out the Norwegian text and lists the delegations which notified their support.

- 2.5 The Chairman then invited the Conference to confirm its agreement to the adoption of the text of the Energy Charter Treaty as a whole, including its Annexes and Decisions. The Conference agreed without objection to adoption. The United States asked for its abstention to be recorded.

- 2.6 The Chairman declared that the text of the Treaty had now been adopted and that the Treaty would be opened for signature later that morning. He thanked delegations for their cooperation.

Chairman's Statement at Adoption Session

I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to Making of Investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage.

In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.

Further, the Russian Federation has stated its view that, except where the Treaty expressly indicates a contrary intention, no provision of this Treaty shall derogate from the provisions of GATT 1947 as made applicable by Article 29(2), Annex G and relevant Declarations. This again is clearly the intent of the negotiating parties and a basis for the approach to trade contained in Article 29 of the Treaty.

Having followed the long and difficult discussions on the Freedom of Transfers, I note that certain countries in transition have drawn attention to their interpretation of Decision No.3 which I think to be correct: the rights granted to Investors of other Contracting Parties under paragraph 1(a) of Decision No.3 do not preclude these countries from applying, without derogating from paragraphs 1(b) and (c), (2), (3), and (4) of that Decision, restrictions on movement of capital made by their Investors.

I have also noted the Russian delegation's concerns on nuclear trade with the European Communities. It is clear that as far as the Energy Charter Treaty is concerned, nuclear trade will be governed by Article 29(2)(a), Annex G and the joint declarations, concerning the implementation of the GATT rules by reference. I take note of the fact that the Russian Federation and EC have agreed that a joint memorandum be annexed to the report of our session.

Finally, I note that the representative of Norway supported by the representatives of Armenia, Belarus, Estonia, European Communities and their Member States, Finland, Iceland, Lithuania, Liechtenstein, Kazakhstan, Moldova, the Russian Federation, Sweden, Switzerland and Ukraine have declared that the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

JOINT MEMORANDUM

The delegations of the Russian Federation and of the European Communities have examined the situation of the nuclear trade between both Parties and they acknowledged the following:

- The statement of the European Commission in the Joint Committee held on 1 and 2 December 1994 clearly indicates that "the European Commission and the Euratom Supply Agency have never made it their policy to apply quotas on imports of nuclear materials from Russia and do not intend to do so in the future unless a situation should arise requiring safeguard measures in accordance with Article 15 of the Agreement between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics on Trade and Economic and Commercial Cooperation signed in Brussels on 18 December 1989. This means, a fortiori, that no quotas have been or will be applied on a utility by utility basis".
- The relevant provisions of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States of the one part, and the Russian Federation of the other part, signed in Corfu on 24 June 1994, on national treatment with respect to nuclear materials imported from Russia are fully applicable.
- They acknowledge the intention expressed by the European Commission to look at the way the Euratom Supply Agency is implementing its supply policy, with a view to take full account of both Parties' legitimate interests, including inter alia the interest expressed by Russia in increasing the volume of trade.

Representatives of the Commission and of the Russian Government will meet in the near future in order to examine the difficulties encountered by Russian exporters of nuclear materials.