

**ENERGY CHARTER
SECRETARIAT**

CCDEC 2000

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Brussels, 7 December 2000

Related documents: CC 180, CC 185

DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Review of Pre-Investment Exceptions

The Energy Charter Conference at its 6th Meeting held on 7 December 2000 *noted* the report contained in document CC 180 concerning the annual review of pre-investment exceptions conducted by the Investment Group, and concerning the Group's conclusions regarding its review of land/real estate and reciprocity/MFN exceptions.

In this connection, the Conference *adopted* the Conclusions attached at Annex I (as amended under "NOTED b") taking into account that shortly before the Conference Japan notified the Secretariat of the withdrawal of one of its reciprocity exceptions, thus decreasing the overall number of exceptions to 114) and Annex II.

With respect to the Conclusions contained in Annex II, the Chairman confirmed the following clarification with respect to Decision b) in that Annex:

- that the adoption of this Decision is based on Article 34 (3) (b) of the Treaty (as reflected in Annex VI under the section "ADOPTED");
- that the notification requirement envisaged in the conclusions is ex post facto;
- that this Decision will not have retroactive effect; and
- that it will not require Contracting Parties/Signatories to notify reliance on the reciprocity measures prior to the adoption of this Decision.

Keywords: Pre-Investment Exceptions, Belarus, Bulgaria, Romania, Poland, Former Yugoslav Republic of Macedonia, FYROM

**Conclusions with respect to the Annual Review of Pre-Investment
Exceptions conducted in accordance with Article 10 (9)
of the Energy Charter Treaty**

as adopted by the Energy Charter Conference
at its 6th Meeting held on 7 December 2000

The Charter Conference,

having considered the Investment Group's reviews in 2000 of

- three categories of pre-investment exceptions with respect to privatisation, land/real estate and reciprocity/MFN;
- other exceptions listed by Albania, Azerbaijan, Georgia, Latvia, Lithuania, Kyrgyzstan and the former Yugoslav Republic of Macedonia; and
- exceptions newly notified by the Russian Federation;

recalling that Article 10(5) as regards the Making of Investments requires Contracting Parties/Signatories to limit exceptions to the standard set out in Article 10(3) to the minimum and progressively remove existing non-conforming measures;

NOTED

- a) that the reviews did not identify any case where a new measure decreased the conformity of the measure with the non-discrimination standard;
- b) that the reviews have shown further steps towards liberalisation and enhanced transparency of the Energy Sector, in particular in economies in transition, and that Contracting Parties/Signatories have reduced notified non-conforming measures from 122 registered in the "Blue Book" in December 1999 to 114 exceptions in December 2000, despite the later inclusion of newly notified measures which were in force before the signature of the Treaty or in recently acceding parties;

WELCOMED

the removal by Estonia of its only non-conforming measure concerning privatization thus becoming a Contracting Party maintaining no exceptions to national treatment;

INVITED

the Secretariat, in order to review the implementation of the Conference conclusions adopted in the period 1999 or 2000 with respect to pre-investment non-conforming measures maintained by

Belarus, Bulgaria and Romania (2000 June Conference conclusion (a) - Annex VI of CC 173) concerning their positions with respect to notified privatisation exceptions, in particular taking into account that there had been no extensive use of vouchers in privatisation of energy industries and that the Investment Group had previously agreed that reservation of a minority of shares in a privatised enterprise to particular categories of

investors, employees, customers or small shareholders, or preferential terms given to such categories, are not regarded as contravening the national treatment standard provided there is no legal discrimination against members of such categories that are nationals or legal entities of other Contracting Parties;

Poland (1998 December Conference conclusion – Annex III of CC 137 and 1999 December Conference conclusion - Annex IV of CC 162) concerning the review of the MFN provisions in the new Law on Economic Activity in the context of its overall commitments under the Treaty;

the former Yugoslav Republic of Macedonia (Conference conclusion (a) - Annex V of CC 173) concerning the consideration of recommendation for inclusion of a provision in the bill on Property aiming to offset the intended inclusion of the reciprocity clause regarding the acquisition of land or real estate in relation to the Energy Charter Treaty,

to report the results to the first Conference held in 2001.

Conclusions concerning the review of land / real estate and reciprocity / MFN exceptions conducted by the Investment Group

as adopted by the Energy Charter Conference
at its 6th Meeting held on 7 December 2000

The Charter Conference,

having heard the report from the Investment Group on exceptions with respect to land/real estate and reciprocity/MFN;

recalling that the Contracting Parties/Signatories have already concluded that it was not possible to provide a general exception for all non-conforming measures with respect to land/real estate ownership and that such measures would have to be treated case by case;

considering that Investors of other Contracting Parties/Signatories will be strongly deterred from Making Investments in the Energy Sector of those Contracting Parties/Signatories which do not allow them long-term secure access to land on the same basis in practice as other Investors, both foreign and national;

taking account of the Investment Group conclusion aiming at adoption of measures which would further limit application of land/real estate and reciprocity/MFN non-conforming measures for Making Investment in the Energy Sector;

NOTED

- a) that during 1998 and 1999 Contracting Parties/Signatories, particularly in economies in transition, adopted a number of new laws and regulations which increased a level of energy sector liberalisation, transparency and competition, however, with only a limited impact on reducing the non-conformity concerning land/real estate; no progress has been made in reducing reciprocity/MFN exceptions;
- b) that some non-conforming measures in force before the signature of the Treaty had been newly notified to the Secretariat.

ADOPTED

- a) in accordance with Article 34 (3) (b) of the Energy Charter Treaty, the following Decision with respect to land/real estate non-conforming measures:

“Contracting Parties/Signatories recorded as maintaining exceptions to NT in the area of acquisition or lease of land or immovable property shall, in cases where there is scope to permit foreign ownership of land or participation in other forms of land use, act in a manner which does not limit unreasonably the rights of Investors of other Contracting Parties/Signatories or their Investments to engage in Economic Activities in the Energy Sector.

This commitment has no application where a Contracting Party/Signatory has legal prohibitions on foreign ownership of land or participation in other forms of land use or laws allowing foreign ownership only in specified cases.

This commitment shall not limit the capacity of Contracting Parties/Signatories to determine the appropriate use of land including the right of local authorities to zone or reserve land for a particular purpose.”

- b) in accordance with Article 34 (3) (b) of the Energy Charter Treaty, the following Decision with respect to reciprocity of non-conforming measures:

“Given that historically those Contracting Parties/Signatories with reciprocity exceptions have seldom relied on them, they undertake, where they will have invoked or acted under such exceptions, to notify the Secretariat, which shall inform the Charter Conference.”

CONCLUDED

that Contracting Parties/Signatories maintaining legal prohibitions on foreign ownership of land or participation in other forms of land use or laws allowing foreign ownership only in specified cases should recognize that such measures strongly deterred foreign investment and should make every effort to eliminate or moderate such measures as they affected Investments in the Energy Sector by Investors of other Contracting Parties/Signatories.

URGED

those Contracting Parties/Signatories, which maintain exceptions to national treatment in respect of land/real estate but have no intention of applying them to the Making of Investment in Economic Activity in the Energy Sector, to make voluntary commitments under Article 10(6)(b) of the Treaty to accord to Investors of other Contracting Parties/Signatories in Economic Activity in the Energy Sector national treatment as regards acquisition and leasing of land/real estate and have such voluntary commitments listed in Annex VC.

INVITED

Contracting Parties/Signatories maintaining reciprocity/MFN exceptions in respect of land/real estate to withdraw them, on the basis of the above referred Decisions, and duly notify the Secretariat, or to inform the next Conference about problems hindering such phase-outs and measures taken in respect of achieving this goal.

INVITED IN PARTICULAR

- a) Spain to reconsider its withdrawal of exceptions maintained with respect to third party access and notify the Secretariat of its final position no later than 31 January 2001;
- b) Mongolia, the Russian Federation, Turkmenistan, Ukraine and Uzbekistan to submit to the Secretariat their updated entries concerning their respective land/real estate exceptions no later than 31 January 2001.