

**ENERGY CHARTER  
SECRETARIAT**

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Related documents: CC 607, CC 615
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**DECISION OF THE ENERGY CHARTER CONFERENCE**

**Subject: Report by the Chair of the Implementation Group**

The Energy Charter Conference at its 28th Meeting held on 28-29 November 2017 **took note** of the Report by the Chair of the Implementation Group as contained in document CC 607 (attached hereto).

Keywords: Report, Chair, Implementation Group

### **Report by the Chair of the Implementation Group**

This report provides an overview of the activities of the Implementation Group in 2017. The Group convened five times in 2016: 26 January, 16 March, 11 May, 14 September and 19 October. The discussions in the Implementation Group in 2017 continued to address topical issues relating to investment in the energy sector, energy efficiency, and the trade and transit of energy.

#### **Energy Investment Risk Assessment (EIRA) Flagship Publication**

1. In 2017, as requested by the Energy Charter Conference in Tokyo, the Implementation Group continued its pilot project on the Energy Investment Risk Assessment (EIRA) Report. The EIRA Report is intended to become the flagship publication of the Energy Charter Secretariat. On the basis of the findings of the 2016 pre-pilot, the Implementation Group extensively discussed the Report's purpose, scope, methodology and execution. Moreover, the delegates shared their thoughts on the future steps for the development of the publication.
2. The EIRA Report aims to create a climate favourable to the operation of enterprises and to the flow of investments. It intends to play an important role as an instrument which aids to bridge the gap between the investments needed in the worldwide energy sector and the investment actually taking place. The primary aim of the EIRA Report is to assist governments to develop policies, laws and regulations beneficial to their investment climate. Second, the publication gives insight to industry and investors in order to facilitate investments in the energy sector of the participating countries.
3. The Implementation Group reaffirmed the distinct nature and scope of the Report and stressed that it should not duplicate other publicly available reports by other international organisations nor should the publication solely be a self-assessment by governments. Regarding the scope, it was agreed that the Report should primarily focus on areas close to the core strengths of the Energy Charter Treaty, namely an assessment of risks in the policy, legal and regulatory environment. Therefore, three risk areas have been identified: A. Predictability and robustness of policy goals, B. Discrimination between foreign and domestic investors, and C. Breach of state obligations.
4. On this basis the Energy Charter Secretariat prepared – as a non-public document – the first full EIRA Report, including scope and methodology, and a number of country risk profiles. The Implementation Group supported the project and valued the participation of Afghanistan, Armenia, Belarus, Iran, Kazakhstan, Mauritania, Mongolia, Nigeria, Pakistan, Romania and Ukraine, who volunteered to take part in pilot project. In addition, the Implementation Group welcomed the support of the Energy Charter Industry Advisory Panel for the future development of the publication.

5. The Implementation Group invited the Secretariat, in order to obtain strategic guidance for future editions, to submit the EIRA Report 2017 to the Strategy Group together with a draft Conference decision welcoming the Report and requesting the Secretariat to develop and publish the first public edition of the EIRA Report in 2018.

### **Removing barriers to the pre-establishment phase**

6. In 2016 the Energy Charter Conference welcomed the groundwork activities conducted by the Energy Charter Secretariat aimed at removing barriers to the establishment of energy investment. As continuation of this work, the Secretariat was mandated to formulate specific non-binding instruments which could remove non-discriminatory and de facto barriers to the establishment of energy investments.
7. Based on the discussion that took place at the meetings of the Implementation Group in 2017, the Secretariat prepared specific non-binding policy options for removing non-discriminatory and de facto barriers to the entry of energy investments in the form of the 1<sup>st</sup> edition of the Energy Charter Investment Facilitation Toolbox.
8. The Implementation Group acknowledges that investment facilitation is one of the simplest and most cost effective tools to stimulate the flow of private investments and improve day-to-day business in the host countries. Investment facilitation is about creating favourable conditions for private investment.
9. The 1<sup>st</sup> edition of the Investment Facilitation Toolbox provides governments with examples of specific non-discriminatory and de facto barriers to the establishment of energy investment, which had been selected during expert consultations on removing pre-establishment barriers. Moreover, this year's Toolbox provides guidance on which policy actions could be taken by the countries to simplify and improve their administrative and institutional capability to ensure that investors have favourable investment conditions.
10. The future editions of the Energy Charter Investment Facilitation Toolbox will gradually address further ground-level obstacles to investment in the energy sector in the pre- and post-establishment phases. The Toolbox is intended to progressively identify a variety of *de iure* and *de facto* barriers which impede investment in the energy sector and illustrate a set of actions and best practices, which countries can choose and incorporate into their own regulations and investment promotion efforts in order to improve their overall investment climate and attract energy investors.
11. The Implementation Group asked the Secretariat to submit the Investment Facilitation Toolbox to the Energy Charter Conference requesting it to welcome its publication. The Toolbox is the first publication under the umbrella of the Energy Charter Investment Promotion Centre, which will aim to give an additional boost to the activities of the Energy Charter Secretariat towards mobilising energy investment. The Investment Promotion Centre will give a concrete label to this work and will further improve the publicity and effectiveness of the investment promotion efforts of the Secretariat.

### **In-depth energy efficiency review of the Kyrgyz Republic**

12. An in-depth energy efficiency review of the Kyrgyz Republic was completed in 2017. The review was conducted by a team of experts from Kazakhstan (Chair of the review team), Albania and Estonia, supported by the Energy Charter Secretariat. The final report of the in-depth energy efficiency review of the Kyrgyz Republic will be published before the end of 2017.
13. The review sets out a series of recommendations. Highest priorities include establishing: long-term strategic energy efficiency targets, with a clear baseline to enable evaluation of progress; and transparent, efficient legislative and institutional frameworks to enable implementation of energy efficiency policy. The Government is strongly encouraged to position energy efficiency at the heart of the Government's energy strategy as part of a least cost and integrated approach to energy system development. This will assist to gain consumers' acceptance of higher tariffs needed for full cost recovery and enabling investment.
14. For the power sector, reduction of energy losses and electricity peak demand have the potential to deliver significant energy savings and associated cost savings for consumers along with improved system reliability. This requires improvements to the tariff menu and effective implementation; the energy regulator would be better able to achieve this if more independent of Government and equipped with appropriate resources.
15. Effective energy demand management requires the introduction and effective implementation of international standards (e.g. ISO, IEC) for appliances, vehicles and energy management. National schemes are also needed to enable funding of energy efficiency programmes and initiatives, for energy auditing and for the promotion and support of ESCO business opportunities.

### **Large-scale energy efficiency investment, finance and trade**

16. Following the review of the Energy Charter Treaty, conducted in 2014 under Article 34.7, the PEEREA working group recommended that a clear and transparent system of notification for 'Charter Efficiency Projects' be developed to ensure energy efficiency investments in non-energy sectors would be covered by the ECT (Article 1.6). In May 2017, the Secretariat put forward a proposal to the Implementation Group (in IMPL 8) to develop the mechanism. Following discussions and comments, it was decided that such a Notification Mechanism in itself would likely not be necessary nor practical.
17. The Secretariat also proposed to issue a high-level guide on the role of the International Energy Charter in enabling large-scale energy efficiency investment, finance and trade. The aim of the guide would be to raise stakeholders' awareness of the specific provisions of the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects in relation to promoting and facilitating energy efficiency investment, finance and trade, and also for protecting investment. The guide would also clarify ECT coverage of demand-side energy

efficiency investment, which is relevant to the discussion on whether the Notification Mechanism is necessary or practical.

18. The second draft of the guide was discussed by the Implementation Group in October. The Implementation Group agreed that further research should be conducted in 2018 to identify whether large flows of energy efficiency FDI are likely to occur (as opposed to purely domestic investment). This research will assist the Implementation Group in deciding whether technical updates to the “Annexes EM - Energy Materials and Products” of the ECT will be necessary. In parallel, the Implementation Group will consider whether modernisation of the Protocol on Energy Efficiency and Related Environmental Aspects should be undertaken in parallel with modernisation of the Energy Charter Treaty. The guide can be published once decisions relating to ECT/PEEREA updates or reforms have been taken and implemented.

### **Multilateral Framework Agreement on Energy Transit**

19. The Energy Charter Conference in 2016 invited the delegations to continue further consultation on a Multilateral Framework Agreement on Energy Transit and tasked the Secretariat to identify specific needs and difficulties within the constituency, and to propose solutions that could be part of the Agreement.
20. For this purpose, the Secretariat prepared a discussion note with a non-exhaustive list of issues and challenges, which could be addressed by the proposed Agreement, and invited the delegations to present their views. The list represented a compilation of different needs and difficulties already identified by the Secretariat as an outcome of the meetings of international experts on transit in 2015 and 2016, as well as the meetings of the Trade and Transit Group throughout 2016.
21. At the meeting of the Implementation Group on 16 March, the following delegations delivered presentations on their specific transit needs in their respective regions:
  - ) Turkmenistan presented the priorities of the chairmanship, including the need to diversify supply sources as well as transportation and transit routes. Turkmenistan briefed the delegates on current challenges related to transit of oil and gas (the list of specific transit issues and problems was circulated as a room document).
  - ) Georgia presented an update on recent developments of energy infrastructure projects in the South Caucasus, including oil, gas and electricity. A representative of the Georgia Ministry of Energy stressed the importance of common transit rules for Georgia as it plays an important transit role in the region.
  - ) A representative of the Kyrgyz Republic described the situation with current operation of the unified power system of Central Asia, including Kyrgyzstan, Kazakhstan and Uzbekistan. Countries of the region face major challenges in the power sector related to obtaining access to electricity networks and the absence of a common transit tariff methodology.

- J) Transportation and transit routes remain one of the challenges for Kazakhstan due to its landlocked position in the heart of the Eurasian continent. Kazakhstan presented challenges related to the transit of energy resources, oil and gas in particular, in the broader context of the Eurasian Economic Union (EAEU), which include non-discriminatory conditions for access to infrastructure and transportation tariffs.
22. The Implementation Group decided to continue the consultation process and invited the delegations to submit their positions on transit in writing to make them available on the Energy Charter web-site. The Secretariat was requested to prepare an integrated working document based on the positions provided and to identify potential alternative solutions to address the needs of the constituency.
  23. As part of the consultation process on transit, the Secretariat and the Government of Turkmenistan organised the Ashgabat International Energy Charter Forum on the topic of “Towards a Multilateral Framework Agreement on Transit of Energy Resources”, which brought together over one hundred participants from governments and industry of the ECT members and observers as well as international organisations. The Forum’s participants concluded that issues related to investment procedures, access to infrastructure, refusal criteria and transit tariffs should be addressed by a legally binding transit regime for cross-border transportation of natural gas, electricity and oil.
  24. Discussion on transit continued at the meeting of the Implementation Group on 14 September based on the discussion paper presented by the Secretariat. The paper provided analysis of relevant EU regulation that could serve as a basis for the proposed transit instrument. The Secretariat also presented an alternative option to the reset of negotiations on a Multilateral Framework Agreement on Energy Transit, involving development of a set of soft law instruments.
  25. Based on the questionnaire on alternative options prepared by the Secretariat, the Implementation Group made a decision in favour of developing a set of soft law instruments to address the transit needs of the constituency. It was agreed that these instruments would include declarations or guiding principles on access to transit infrastructure and transit tariffs as well as an update of the Energy Charter Model Agreements. The Implementation Group also decided to create a technical sub-group to take forward this work and address transit issues.

### **Investment protection standards under the Energy Charter Treaty**

26. In accordance with the priorities for 2017 of the Programme of Work, on 27 January 2017 the Secretariat hosted an expert meeting on investment protection standards. It aimed at identifying whether or not the investment protection standards under the ECT were clear and applied in a consistent manner by international arbitral tribunals. The conclusions were discussed at the meeting of the Implementation Group in May, which agreed that the Secretariat should develop in 2018 a comprehensive digest of available case law under the ECT. The Implementation Group also requested the Secretariat to prepare an additional analysis (to be discussed at the Strategy Group)

comparing the existing investment protection provisions under the Energy Charter Treaty with developments contained in recent international investment agreements.

27. In May, the Secretariat presented an update on statistics regarding investment cases under the ECT. Information about the claims was compiled on the basis of public sources, including specialized reporting services. Since there were no comments from delegations, *the Secretary General* suggested to reconsider once more the proposals which the Secretariat has been raising since 2014 to enhance transparency of investment dispute settlement under the ECT. Otherwise, the Secretariat would still lack important and basic information about investment arbitrations on the basis of the Energy Charter Treaty. *The Secretary General* also encouraged the continuation of the discussions on how to make denial of benefits (Article 17 of the ECT) more effective.
28. Following the discussion at the Strategy Group, the Secretariat produced a new paper with additional information on several topics raised by the delegates: transparency; multilateral investment court; right to regulate; indirect expropriation; fair and equitable treatment (FET), in particular legitimate expectations; covered investment; and protected investor, including denial of benefits. The paper was discussed at the Implementation Group meeting in September. *The Chair* concluded that there was a general openness (with the exception of one delegation) to have further consultations on modernisation and asked the Secretariat to prepare a brief document explaining how such consultations could take place and within which timeframe. This would be discussed by the Strategy Group since modernisation could affect any aspect of the ECT.
29. Discussions continued at the Strategy Group, which supported to start discussions on the modernisation of the ECT (as a whole and not limited to the investment protection standards) during 2018-2019.

#### **Handbook on general provisions applicable to investment agreements in the energy sector**

30. With the help of the Legal Advisory Task Force, the Secretariat finalised a handbook on general provisions applicable to investment agreements in the energy sector (including explanatory notes, policy options and model clauses on specific topics).
31. The handbook is designed to help and empower governments in their negotiations of complex investment agreements in the energy sector and follows the successful experience of the cross-border pipeline model agreements. The draft handbook was discussed at the Implementation Group in September and October 2017. Delegations appreciated the work done and supported the publication of the handbook. Any potential capacity building or trainings based on the handbook would be subject to availability of resources.

### **Report on potential standardisation of LNG contracts**

32. Following up on point 3.1 of the Tokyo Declaration ('...we believe that a well-functioning, transparent and competitive global gas market including LNG trading hubs should be further developed and destination clauses should be abolished'), the Secretariat prepared a report identifying current problems and gaps regarding LNG contracts.
33. The report, initially drafted by a team from the law firm Baker Botts, benefited from the comments and input provided by several external experts and industry participants during the specific workshop held at the Secretariat on 29 September 2017 and several LNG events in 2017 (e.g. Tokyo Gastech and 8<sup>th</sup> Turkmenistan Gas Conference).
34. The report was discussed at the October meeting of the Implementation Group, which welcomed the work done and agreed to the publication of the report. However, due to the concerns of some delegations it was decided that the Budget Committee should have the final word on whether further work on standard provisions for LNG contracts, as proposed by the conclusions of the report, should be included in the POW 2018-2019.

### **Compiled summaries of public arbitral awards under the ECT**

35. With the help of the Legal Advisory Task Force, the Secretariat prepared a compilation of summaries of available arbitral awards rendered under the Energy Charter Treaty. It is expected that the summaries would facilitate a better understanding of the investment protection standards by both Contracting Parties and investors (in particular, how they are actually applied), as well as result in greater consistency/uniformity in the application of the ECT by arbitral tribunals. The compilation was welcomed by the Implementation Group at its meeting in September.

### **Best practices to facilitate effective implementation of investment mediation**

36. In November 2016, the Conference requested that in 2017 the Secretariat should conduct a research on the obstacles that may still hinder the effectiveness of investment mediation and draft recommendations to assist governments to overcome them through suggested changes to their domestic frameworks. In order to better understand the main concerns and problems from the perspective of host states, the Secretariat circulated a survey to Members of the Energy Charter Conference in March 2017. At the Implementation Group meeting on 11 May 2017, the Secretariat presented the results of the survey, together with its analysis and some draft recommendations on how to address the concerns identified.
37. At the meeting, the European Union suggested that another way to achieve similar results to those proposed by the Secretariat in its draft recommendations, but in a more flexible way, could be to adopt internal dispute management protocols tailored to the particular needs and circumstances of each member. To facilitate such an approach, Slovakia proposed that the Secretariat develop a model for a dispute

management protocol that could be voluntarily used as a reference by those states who do not have one already in place (or by those who want to update/extend the one they already have). The idea of drafting a model dispute management protocol matched the main conclusion reached in a parallel discussion by several government officials attending the seminar on investment mediation that took place the same day in Brussels.

38. In September, the Implementation Group supported the efforts of the Secretariat and work on the proposed model protocol during 2018-2019.

### **Best Practices in regulatory reform to minimise potential conflicts with investors**

39. At its last meeting, on 20 September 2016, the former Investment Group welcomed a paper on how to avoid investment conflicts and manage them once they arise. As a follow up to the discussion and as part of the continuing efforts of the Secretariat to raise awareness amongst governmental officials on how to maximise the rights of the Contracting Parties under the Energy Charter Treaty, the Secretariat presented in May a draft report and recommendations on best practices in regulatory reform that can help minimise potential conflicts with foreign investors.
40. The report analysed (i) all published arbitral awards under the ECT, discussing the balance between the right to regulate and the protection of the foreign investors, and (ii) several successful practices of some members of the constituency in different geographical areas. In addition, on 12 May, a panel jointly organised with the *Florence School of Regulation*, during the International Energy Charter Legal Forum, addressed 'The Right to Regulate: Best practices in regulatory reform to attract investment and minimise investment disputes.'
41. Based on the discussions that took place at both the Implementation Group and the International Energy Charter Legal Forum, the Secretariat prepared a draft of compiled best practices, which was discussed on 14 September 2017. The objective of the document was not to introduce a new type of soft-law instrument, uniform practices or non-binding recommendations, but to provide concrete, sound and successful regulatory practices that could be used voluntarily as a reference to facilitate internal discussion about how to better introduce regulatory reforms in the energy sector while minimising potential conflicts with foreign investors.
42. With the support of the Implementation Group, the conference adopted the best practices on 11 October 2017 (CCDEC2017 04).