

**ENERGY CHARTER
SECRETARIAT**

CCDEC 1999

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Brussels, 7 December 1999

Related documents: CC 146, CC 162

DECISION OF THE ENERGY CHARTER CONFERENCE

**Subject: Expansion of the Energy Charter Process: Accession Procedures,
Accession Reports Preparation Guidelines**

The Conference noted the policy for expansion of the Energy Charter process, including the existing options for participation, and the procedures, conditions and criteria for accession to the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects included in Annexes 1, 2 and 3 (with Attachment) of document CC 146 with the following amendment:

Point 7 of Annex 1 (Policy: Openness of the Energy Charter process) shall read:

“The process leading to eventual invitations by the Energy Charter Conference to new States/REIOs to accede to the Treaty/Protocol needs to take into account the existing budgetary and organisational potential of the Conference.”

[Attached are the Annexes to doc. CC 146.]

Keywords: Expansion Policy, Accession

POLICY: OPENNESS OF THE ENEREGY CHARTER PROCESS

1. Since its first days the Energy Charter Conference considered the expansion of the Energy Charter Process geographical coverage in the long-term interest of global energy co-operation.
2. The Energy Charter Process has been open to any State or Regional Economic Integration Organisation (REIO) expressing interest in being informed and willing to participate and comply with its rules and obligations.
3. This openness has manifested itself in numerous actions, including the following:
 - The Former Yugoslav Republic of Macedonia and Mongolia were invited to accede to the Treaty and the Protocol.
 - The Energy Charter Conference has proposed to establish a dialogue with certain other emerging markets, particularly in Asia.
 - Mediterranean States, which are not Signatories or observers (Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and The Palestinian Authority) have been invited by the EU to consult modalities of their participation.
 - Twelve States and eight international organisations are observers to the Energy Charter Conference and thus receive full information on the development of the Energy Charter Process.
4. The future policy of the Energy Charter Conference in this area should build upon this foundation and be developed in the interests of global energy co-operation.
5. Through activities of the Energy Charter constituency as well as its Secretariat, the interested other States/REIOs should as a first step be informed on the Energy Charter Process and its relevant aspects.
6. States/REIOs which are willing and capable to comply with the legal rules and obligations established by the Energy Charter Treaty and related instruments, should be offered consultations regarding the participation form most closely corresponding to their needs. Forms of participation to be considered range from observer status to association and ultimately full membership (see Annex 2).
7. The process leading to eventual invitations by the Energy Charter Conference to new States/REIOs to accede to the Treaty/Protocol needs to take into account the existing budgetary and organisational potential of the Energy Charter Conference.
8. Effective interaction of the Energy Charter Conference/Secretariat with other international organisations is an important part of the openness of the Energy Charter Process. Obtaining/granting observer status at/to such organisations is encouraged wherever appropriate and feasible.

PARTICIPATION IN THE ENERGY CHARTER PROCESS

The Treaty and the Conference Rules of Procedure envisage various forms of participation in the Charter process.

I. Full membership

- 1) All ***Signatories to the Treaty*** have agreed to apply the institutional part (Part VII) in full until the Treaty enters into force for them individually. Apart from this arrangement, the Treaty also contains a special provision binding those Signatories which did not make a declaration and subject to the admissibility of their national legislation to apply all other parts of the Treaty on a ***provisional basis*** pending entry into force for them individually. As of 1 November 1999 the following Signatories to the Treaty are not applying the Treaty provisionally: Australia, Iceland, Japan, Malta, Norway, Poland and Turkey.

With the entry into force of the Treaty/Protocol on 16 April 1998, the Conference comprises ***the Contracting Parties*** (i.e. the States and Regional Integration Organisations which have ratified, approved, accepted or acceded to the Treaty/Protocol and for which it has entered into force) which are fully-fledged members of the Conference. ***Signatories*** to the Treaty also participate in the discussions of the Conference. As of 1 November 1999 these Signatories are: Australia, Belarus, Bosnia and Herzegovina, Iceland, Japan, Malta, Norway, Poland, the Russian Federation and Turkey.

- 2) ***Accession*** to the Treaty/Protocol means full participation in the Treaty/Protocol as a Contracting Party. The act of accession is a means of expression of consent by a State/REIO to be bound by the Treaty/Protocol and is the technical means for joining the Treaty/Protocol following the expiration of the time during which the Treaty/Protocol was open for signature. Under international law it has the same status as ratification.

Article 41 of the Treaty and Article 16 of the Protocol state that it is for the Conference to invite a State/REIO and determine the terms and conditions of accession. Article 46 of the Treaty and Article 19 of the Protocol provide that no reservations may be made to the Treaty/Protocol. The basic conditions for accession therefore involve:

- a) the acceptance of
 - the principles embodied in the Energy Charter;
 - the obligations contained in the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and related Environmental Aspects;
 - all decisions of the provisional Charter Conference and the Charter Conference in effect at the time of the deposit of the instrument of accession to the Treaty/Protocol; and

- b) the elaboration of certain, clearly specified documents providing exhaustive information about the legislative climate and other conditions for making business in the energy sector of the acceding State/REIO.

II. Association agreement

The concept of an association agreement described in Article 43 of the Treaty opens a possibility for participation in the Charter process which falls somewhere between the status of full membership and observership. The relationship established with and the rights enjoyed and obligations incurred by an associating State, REIO or international organisation shall be appropriate to the particular circumstances of the association. So far there has been no precedent of such participation.

III. Observership

Observership is the “minimal” form for States and international organisations to participate in the Charter process. There are two forms of observership:

- 1) The ***Signatories of the European Energy Charter*** automatically become observers in the Conference and may attend its meetings without a right to vote and be invited by the Conference to attend meetings of subsidiary bodies in the capacity of observers with a right to speak if invited. Charter Signatories are also able to participate in the negotiations of any new documents (Protocols, Declarations, etc.) provided they agree to contribute to the costs of such negotiations. As of 1 November 1999 the observers with such a status are Canada and the United States of America.
- 2) The Conference may invite representatives of ***States which have not signed the Charter or international organisations*** to be represented as observers without a right to vote at meetings of the Conference or its subsidiary bodies. As of now such observer States include: Algeria, Bahrain, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, Tunisia and the United Arab Emirates. International organisations with observer status include: BSEC, EBRD, EIB, IAEA, IEA, OECD, UN-ECE and the World Bank.

ACCESSION PROCEDURES

Any State/REIO wishing to accede to the Treaty/Protocol shall follow the following administrative procedures and stages of the accession process:

1. A State/REIO intending to become a party to the Treaty/Protocol presents its application to the Conference/Secretariat. The application is distributed to all Contracting Parties/Signatories for their views and subsequent decision by the Conference.
2. If Contracting Parties/Signatories agree, the Conference invites such State/REIO sign the European Energy Charter, the Concluding Document of The Hague Conference on the European Energy Charter (a political instrument signed in The Hague on 17 December 1991) and to initiate accession process. The signature of the Charter is a basic condition for accession to the Treaty/Protocol.
3. The Conference then invites the Government of the Netherlands, as Depositary of the Charter, to make appropriate arrangements for assisting such State/REIO in the signature process.
4. After signature of the Charter, the Government of the Netherlands notifies the Secretariat accordingly. From that date on, the State/REIO becomes an observer to the Conference, may attend its meetings and be invited by the Conference to attend meetings of subsidiary bodies in the capacity of an observer.
5. Following the signature of the Charter, the Secretary-General submits a letter to the Government of the State/representative of the REIO concerned specifying the requirements and general conditions relating to the accession procedures [the basic condition for accession is the acceptance of the obligations contained in the Treaty/Protocol and of all decisions of the provisional Charter Conference and the Charter Conference in effect at the time of the deposit of the instrument of accession to the Treaty/Protocol; the elaboration of other supportive documents will also be required based on clearly specified guidelines].

The State/REIO is also requested to provide information with regard to its readiness and ability to comply with the obligations of the Treaty/Protocol.

6. Upon receipt of confirmation from the Government of that State/representative of the REIO of its readiness and ability to comply with the obligations of the Treaty/Protocol, the Secretariat submits to the Government of that State/representative of the REIO a set of basic documents which are essential for initiation of accession process and requests the State/REIO to submit to the Secretariat a proposal for schedule of consultations.
7. As a part of a consultation process, the State/REIO is requested to elaborate three reports:

- a) Report on harmonisation of laws and regulations with the provisions of the Treaty providing the description and analysis of the legislative situation concerning Articles 3-15, 18-23, 26, 27 and 29 of the Treaty.
- b) Report on investment climate and exceptions to national treatment addressing general policy issues, energy supply and demand, market structure by sub-sectors, future development and investment needs in each of energy sub-sectors, issues of privatisation and monopolies, general legislation relevant to investment, exceptions to national treatment and plans for further liberalisation, etc.
- c) Report on energy efficiency describing energy efficiency and environmental policies and addressing all relevant issues contained in Articles 3-9 of the Protocol.

Guidelines describing in more detail the content of all three accession reports are included in an Attachment to this Annex.

8. Based on the analysis of the reports, and the input provided during the consultative process, the Secretariat prepares a comprehensive report for the Conference. Provided that basic accession requirements are met, the Conference invites the State/REIO to accede subject to specific accession terms and conditions.
 - a) The basic condition for accession to the Treaty involves the acceptance of the obligations contained in the following documents:
 - i) the Energy Charter Treaty, including the Annexes to the Treaty set out in Annex 1 and the Decisions set out in Annex 2 to the Final Act of the European Energy Charter Conference signed at Lisbon on 17 December 1994, which, according to Article 48 of the Treaty, form an integral part of the Treaty;
 - ii) the Final Act of the European Energy Charter Conference of 17 December 1994, except Section VII, taking due note of the Chairman's Statement at that time, which appears in Annex I to Document CONF 115 of 6 January 1995;
 - iii) the Amendment to Trade-Related Provisions of the Energy Charter Treaty, including the Decisions in connection with the adoption of this Amendment set out in Annex 2 to the Final Act of the International Conference adopted at Brussels on 24 April 1998;
 - iv) the Final Act of the International Conference and Decision by the Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty of 24 April 1998;
 - v) all Decisions and Conclusions of the provisional Energy Charter Conference and the Energy Charter Conference which shall be in force at the time of the deposit of the instrument of accession.

- b) The basic condition for accession to the Protocol involves the acceptance of the obligations contained in the following documents:
- i) the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects;
 - ii) Section VII of the Final Act of the European Energy Charter Conference of 17 December 1994;
 - iii) all Decisions and Conclusions of the provisional Energy Charter Conference and Energy Charter Conference relating to the Protocol which shall be in force at the time of the deposit of the instrument of accession.
- c) Other conditions required to be fulfilled at the time of deposit of accession instruments may include submission of:
- i) a report summarising all laws, regulations or other measures relevant to exceptions from the better of most favoured or national treatment as regards the Making of Investments in its Area and programmes under which a State/REIO provides grants or other financial assistance, or enters into contracts, for energy technology research and development;
 - ii) a list of all tariff rates and other charges levied on Energy Materials and Products and Energy-Related Equipment at the time of their importation or exportation as applicable on the date of accession;
 - iii) the designation of one or more enquiry points to which requests for information about laws, regulations, judicial decisions and administrative rulings may be addressed; etc.
- d) There might be some other terms, such as:
- that a State/REIO shall not make any declaration that might diminish its determination to achieve the objectives of the Treaty and carry it out;
 - that a State/REIO shall apply the Trade Amendment on a provisional basis with all rights and obligations contained therein, pending the entry into force of the Trade Amendment;
 - that a State/REIO shall follow certain procedures with respect to the deposit of its ratification instruments, etc.
9. The invitation by the Conference which informs that a State/REIO may accede to the Treaty/Protocol is officially announced through a letter of the Secretary-General to the Government of the State/representative of the REIO concerned. The decision by the Conference, stating all terms and conditions which will have to be fulfilled by the State/REIO and which are integral parts of the internal ratification process, is attached to this letter.

10. In response to the letter of the Secretary-General, the Government of the State/representative of the REIO concerned submits a letter to the Secretary-General:
 - a) confirming its intention to accede to the Treaty/Protocol;
 - b) accepting the terms and conditions stated in the decision of the Conference.
11. The final stage of the accession process involves national ratification of the Treaty/Protocol/Trade Amendment, following country's jurisdiction.
12. Once the national legislative and other procedures are completed, the instrument of accession to the Treaty/Protocol and the instrument of ratification of the Trade Amendment will be deposited with the Government of the Portuguese Republic (Depositary). Upon deposit of its instruments of accession and ratification with the Depositary, a State/REIO submits simultaneously all necessary information, or documents included in a Conference decision, to the Secretariat.
13. In order to satisfy the legal requirements for the deposit of instruments of accession, ratification, acceptance or approval, a State/REIO is advised by the Secretariat to accept the following practical steps after the adoption of the Treaty, Protocol and Trade Amendment by its Parliament:

The Government of the State/representative of the REIO issues three separate instruments:

- a) the instrument of accession to the Treaty;
- b) the instrument of accession to the Protocol;
- c) the instrument of ratification, acceptance or approval of the Trade Amendment.

At any time after the conclusion of the national ratification procedure, a State/REIO may deposit with the Government of the Portuguese Republic the instrument of accession to the Treaty and the instrument of ratification, acceptance or approval of the Trade Amendment (the "First Deposit").

The Treaty shall enter into force for a State/REIO on the ninetieth day after the date of deposit of its instrument of accession to the Treaty.

The Trade Amendment shall enter into force for a State/REIO on the ninetieth day after the date of deposit of at least three-fourths of the Contracting Parties to the Treaty of their instruments of ratification, acceptance or approval if the Amendment is not in force or on the ninetieth day after the date of deposit of its instrument of ratification, acceptance or approval if the Amendment has entered into force.

A State/REIO may deposit the instrument of accession to the Protocol with the Government of the Portuguese Republic only after it becomes a Contracting Party to the Treaty (the "Second Deposit"), i.e. no earlier than 91 days after the date of the First Deposit.

The Protocol shall enter into force for a State/REIO on the thirtieth day after the date of deposit of its instrument of accession to the Protocol.

GUIDELINES FOR THE PREPARATION OF ACCESSION REPORTS TO THE ENERGY CHARTER TREATY

I. REPORT ON HARMONISATION OF LAWS AND REGULATIONS WITH THE PROVISIONS OF THE TREATY

1. General

- Constitutional provisions and legal system in relation to international treaties;
- Current situation of market reforms;
- Membership in international economic or environmental organisations or integration economic agreements, custom unions or free trade areas and relations with other major international organisations or groupings;
- International aid.

2. Articles 3, 4 and 29 - International markets and trade

- Legal basis;
- Foreign trade regimes (practices, policies) with a particular focus on the energy sector:
 - tariffs (general, MFN, preferential) imposed on imported or exported energy materials and products;
 - tariff schedules, bindings;
 - other import duties and charges;
 - non-tariff measures (prohibitions, quotas, import-export licensing, technical regulations, standards certification, labelling requirements, etc.);
 - export incentives;
 - list of tariff duties and other charges levied on imported and exported energy materials and products applied for the current year;
- Customs regulations;
- Free trade zones;
- Trade agreements (list of countries, special arrangements).

3. Article 5 - Trade-related investment measures

- Applicable trade-related investment measures; relevant legislation;
- Plans and measures suggested for their termination.

Note

The following should be taken in consideration when identifying TRIMs. There is no universally accepted specific definition of TRIMs. Under the Treaty as well as the TRIMs Agreement of the WTO, they are government measures which are mandatory or enforceable under domestic law or under administrative rulings and which might be applied as a condition to the making of foreign direct investment in a host country affecting the trade or which might be a pre-condition for obtaining an advantage for an investment. It is a legislation-imposed condition on foreign investment.

[International petroleum agreements very often contain obligations to favour domestic suppliers, promote employment and training of local staff, develop local business etc. These conditions are usually accepted by companies as a condition for access to resources and as a recognition of the state sovereignty. Such a freely negotiated agreement containing TRIM-like obligations should not be therefore considered as TRIMs].

4. Article 6 - Competition

- Legislative framework - general and specific for energy industries;
- Enforcement of the competition rules; existence of competition or anti-monopoly bodies; regulators;
- Monopolies; mergers; dominant positions - policies and practices applied in the energy sector;
- State aid; subsidies other than on exportation;
- Pricing of energy materials and products; subsidies.

5. Article 7 - Transit

- Legislative framework for transit - general and applicable for the energy materials and products (freedom of transit; non-discrimination as to the pricing and the origin etc.);
- Access terms and conditions to transit networks (oil, gas, electricity);
- Environmental and other regulations affecting the construction of transit networks.

6. Article 8 - Transfer of technology

- Foreign trade regime regarding the energy technology; access and transfer; discriminative non-tariff measures (prohibitions, quotas, technical regulations, standards certifications, labelling requirements, etc.);
- Legislation regulating the intellectual property rights; membership in relevant international conventions.

7. Article 9 - Access to capital

- General legislation regulating access to capital; discriminatory elements;
- Conditions for granting credits to foreign traders or investors;
- Conditions for making foreign currency loans by domestic traders or investors.

8. Article 10 - Investments

- **See Report on investment climate and exceptions to national treatment.**

9. Article 11 - Key personnel

- Conditions for entry, stay and work of foreign natural persons generally and in relation to investments;
- Definitions, forms and differences in the residence status.

10. Articles 12 and 13 - Compensation for losses, expropriation

- Legislative basis;
- Procedures and forms for granting a compensation;
- Transparency and the evaluation methods for expropriation payments;
- Recourse or appeal procedures.

11. Article 14 - Transfers

- Foreign exchange regulations;
- Securities regulations;
- Restrictions on foreign exchange transfers applicable to nationals and foreigners;
- Regulations on transfers of returns in kind.

12. Article 15 - Subrogation

- Rules or policies governing the recognition of subrogation in relation to foreign investors and their investments;
- Rules and policies for the provision of state guarantees to investments of national investors abroad;
- Rules on insurance of investments and companies.

13. Article 18 - Sovereignty over natural resources

- General legal framework;
- Ownership of energy resources;
- Systems and published criteria for allocating of authorisations, licences, concessions or contracts for the exploration and exploitation of energy resources;
- Fiscal instruments connected with the exploration and exploitation of energy resources (taxes, royalties, etc.);
- State policies for the depletion and recovery of natural resources.

14. Article 19 - Environmental aspects

- Legislative and institutional framework;
- International agreements to which the country is a party;
- General environmental policies and the impact of the energy sector (energy efficiency programmes, measures adopted for wider use of energy efficient and environmentally sound technologies, standardisation, information, etc.);
- Policies and measures adopted or proposed in relation to “polluter pays” and “fuller reflection of the environmental cost in energy prices” principles;

15. Article 20 - Transparency

- Legislation regulating the publishing of laws and other legal acts;
- Subjects of the publishing (laws, regulations, administrative rulings, judicial decisions, international agreements, public procurement, etc.);
- Information centres;
- Designation of the enquiry point for the Treaty purposes (Article 20(3) of the Treaty).

16. Article 21 - Taxation

- Taxation of corporations;
- Taxation of foreign corporations;
- Taxation of shareholders;
- Other indirect taxes for energy;
- Tax treaties (list of agreements on avoidance of double taxation);
- Accounting system.

17. Article 22 - State and privileged enterprises

- State (public) enterprises according to the energy sub-sectors;
- Legally protected monopolies on national, regional or municipality levels;
- Legal basis and the prerequisites for the establishment of state or privileged enterprises; nationality or control requirements.

18. Article 23 - Observance by sub-national authorities

- Competence of sub-national authorities (governments);
- Enactment of international treaties at sub-national levels;
- General measures for ensuring the observance at sub-national levels.

19. Article 26 - State to Investor disputes

- Requirements for listing in Annex ID;
- Policies, practices and conditions not allowing an investor to resubmit the same dispute to international arbitration at a later stage.

20. Article 27 - State to State disputes

- Requirements for listing in Annex P regarding the special sub-national dispute procedure.

II. REPORT ON INVESTMENT CLIMATE AND EXCEPTIONS TO NATIONAL TREATMENT

I General policy issues

- Area; population; climate;
- Macro-economic development (e.g. GDP; GDP per capita; industrial production; inflation; foreign debts and assets; exchange rate, etc.);
- Energy policy;
- Institutional structure and responsibilities for energy policy;
- Energy industry regulation;
- Energy prices and taxation by sub-sectors.

II Energy supply and demand

- Recent development and the structure; outlook and its structure;
- Energy end-use (final consumption) and energy intensity overall and in the industry, residential, commercial and public sectors, transport;
- Institutional structure for energy demand and efficiency policy;
- Energy efficiency policies and goals.

III Market structure by sub-sectors

(non-exhaustive examples on the possible content)

- Oil (organisational structure; oil exploration and production; crude oil supply and pipeline infrastructure; refining; oil products trade, distribution and retailing; oil storage and emergency planning; regulation);
- Gas (organisational structure; production; imports/exports; transportation/transit; storage; regulation);
- Coal (organisational structure; reserves and production; trade/exports/imports; subsidies);
- Electricity (organisational structure; industrial structure(production); supply and demand; transmission and distribution; trade/export/import; dispatching);
- Nuclear power (organisational structure; safety and quality control; fuel cycle; regulation);
- Renewable energy (biomass and waste; geothermal; solar; wind; small hydro; research and development).

IV Future development and investment needs in each of energy sub-sectors

V Monopolies and privatisation according to each energy sub-sector

- Monopolies (legal, de facto, natural); plans for dismantling monopolies;
- Restructuring and privatisation plans;
- Investment opportunities in the privatisation process.

VI General legislation relevant to investment

- Foreign investment legislation, including definitions and forms of investment;
- Establishment of enterprises (differences between establishment of national and foreign companies);
- Entrepreneurship and corporate law;
- Legislation on land/immovable property/real estate acquisition by foreigners (natural persons and legal persons);
- Legislative framework for privatisation;
- Sectoral laws;
- Concession/licensing regimes, including definitions of terms;
- Pipeline/transit regulations;
- Bilateral investment treaties (list of agreements on the protection and promotion of foreign investments).

VI Exceptions to national treatment

- Description of measures discriminating foreign investors or their investments (NT, MFN, reciprocity requirements);
- Formal requirements for the purposes of the Supplementary Treaty;
- Plans for the roll-back.

VII List of laws concerning foreign investment

III. REPORT ON ENERGY EFFICIENCY

1. General

- General energy policy including demand side aspects;
- Environmental policy and its relation to the energy sector;
- Main directions of the economic, fiscal and monetary policies.

2. Article 3 - Basic principles

- Existing energy efficiency policies;
- Laws and regulations regarding: energy prices, private sector initiatives, energy efficiency financing mechanisms, information, transparency and environmental standards;
- Elements of energy efficiency included in policies and strategies of other economic sectors;
- Further plans (time schedule to be included).

3. Article 4 - Division of responsibility and coordination

- Overview of Governmental and local authorities responsible for energy efficiency and their functions.

4. Article 5 - Strategies and policy aims

- Strategies and policy aims to improve Energy Efficiency and reduce Environmental Impacts;
- Co-ordination with other environmental and sectoral strategies related to the particular restructuring conditions of the economy.

5. Articles 6 and 7 - Financial incentives, promotion of technologies

- Energy efficiency related financial approaches and methods: conditions for Third Party Financing and fiscal or financial incentives for energy efficiency investments and promotion of energy efficient technologies.

6. Article 8 - Domestic programmes

- Any national or sectoral programme developed or planned to be developed in relation to the activities listed under Art. 8 (2); special attention should be paid in describing those activities or plans for developing: energy balances and data bases, specialised energy efficiency bodies, specific standards, environmental and economic impact assessment studies and innovative approaches for investments in energy efficiency;
- Institutions and legal arrangements related to the above mentioned programmes.

7. Article 9 - Areas of co-operation

- Existing co-operation activities in the field of energy efficiency with other countries or international organisations; priority areas of interest for a State.

NOTE

Subject matters included in points 1 and 2 of this Report may, to a certain extent, overlap with the contents of the point 14 of the Report on Harmonisation of Laws and Regulations with the Provisions of the Treaty and points 2 and 3 of the Report on Investment Climate and Exceptions to National Treatment. This is inevitable for the maintaining of independence of each Report. However, it is possible to borrow the subject matters from the Treaty Reports and emphasise or supplement aspects related to energy efficiency in the context of this Report.