

ENERGY CHARTER SECRETARIAT

CCDEC 2002

15 TTG

Brussels, 17-18 December 2002

Related documents: CC 232, CC 233, CC 233 Addendum, RD 4 Rev. (ECC of 17-18 12 2002), RD 5 Rev. (ECC of 17-18 12 2002), RD 6 (ECC of 17-18 12 2002), RD 8 (ECC of 17-18 12 2002)
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DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Finalisation of negotiations on an Energy Charter Protocol on Transit based on the Transit Working Group Chairman's Final Compromise text

[The Energy Charter Conference at its 11th Meeting held on 17-18 December 2002, agreed the statement of the Chairman on the present position in the negotiation process on the Draft Energy Charter Protocol on Transit:]

“The Heads of Delegations to the Energy Charter Conference recorded at the end of their December meeting that in view of the very wide measure of agreement reached on the Energy Charter Protocol on Transit, the text of the Transit Protocol, in order to facilitate a rapid conclusion of the negotiations, should not be open for further negotiations with the exception of the following three inter-related issues:

- Right of First Refusal;
- Application of REIO (Article 20 and its associated Declaration 2); and
- Transit Tariffs – on which issue a new drafting proposal was provisionally agreed, subject to all delegations maintaining a reserve.”

[The Conference took note of the statement by the delegation of the Russian Federation, circulated as Room Document 8 (Annex I).

The Conference took note of new proposals on the issue of transit tariffs, circulated as Room Document 4 (Annex II), and on the “right of first refusal”, circulated as Room Document 5 (Annex III).

The Conference took note of comments made by the delegation of Japan, contained in document CC 233 Addendum 1 (Annex IV).

Keywords: Transit Protocol, Right of First Refusal, REIO Clause, Transit Tariffs

The Conference also authorised the Chairman to call for consultations as may be necessary to prepare the Transit Protocol for adoption.]

Statement by the delegation of the Russian Federation to the Energy Charter Conference, 17-18 December 2002

The Russian Federation views the Energy Charter as an important instrument of international energy cooperation, and reiterates its intention to continue its participation in the discussions of a wide range of issues related to energy transit, trade, investments, and energy efficiency within the framework of the Charter Process.

The Russian Federation has yet to ratify the Energy Charter Treaty, but, as a Signatory Country, it implements the Treaty from the day it entered into force.

We proceed on the premise that the ratification of the Energy Charter Treaty by the Russian Parliament would largely depend on a successful finalization of the Transit Protocol, where, despite obvious progress achieved by negotiators in recent years, there still remain some outstanding issues. These are of principle importance, and failing their resolution it would seem premature to speak of the success of the negotiations. Given good will, we believe, generally acceptable compromise could be found. The Russian Federation is prepared to continue the work on the Transit Protocol in any format acceptable to the Energy Charter members.

The Russian Federation is not only one of the world's largest producers of fuel and energy, and also a transit country with a high dependence on conditions of transportation of the energy carriers and delivery thereof to consumers. It is obvious, therefore, how important for us is negotiation of such transit arrangements, which would be acceptable both for energy consumer states, and Russia, as well as all other negotiating parties to the Protocol. We do not seek unilateral advantage; rather, we are seeking a common benefit, such as ensuring stability and security of supply for the foreseeable future.

A constructive dialogue, a spirit of cooperation, focus on a positive result: this is the road we intend to follow in our work within the Energy Charter.

**Proposal with regard to the wording of Article 10 (Transit Tariffs)
of the draft Energy Charter Protocol on Transit**

as circulated to the Energy Charter Conference on 17-18 December 2002

ARTICLE 10

TARIFFS

1. ...
2. ...
3. (a) Transit Tariffs shall be based on operational and investment costs, including a reasonable rate of return.

(b) Subject to sub-paragraph (a), Transit Tariffs may be determined by appropriate means, including regulation, commercial negotiations or congestion management mechanisms.

Understanding with respect to Article 10

For the avoidance of doubt, it is understood that the current congestion management mechanism of the Nordic electricity system may provide an illustrative example of a congestion management mechanism which is in compliance with Article 10.

**Proposal with regard to the Decision with respect to Article 8
of the draft Energy Charter Protocol on Transit**

as circulated to the Energy Charter Conference on 17-18 December 2002

DECISION¹ WITH RESPECT TO THE TRANSIT PROTOCOL

(to become Annex 2 to the Final Act)

The Energy Charter Conference has adopted the following decision:

With respect to Article 8

1. Where the duration of a Transit Agreement relating to Transit of hydrocarbons does not match the duration of a supply contract, the Contracting Party through whose Area the hydrocarbons transit shall ensure that the owners or operators of Energy Transport Facilities under its jurisdiction who are in negotiations on access to Available Capacity consider in good faith and under competitive conditions the renewal of such Transit Agreements. This means that the existing user upon the expiry of the Transit Agreement shall be treated neither better nor worse than other potential users at that time, except that the existing user shall be given the first opportunity to accept the conditions offered for any new Transit Agreement for that Available Capacity.
2. Paragraph 1 is subject to Article 6² and 7 of the Energy Charter Treaty and Article 8 of this Protocol.³
3. The application of this Decision becomes effective when the Russian Federation deposits its instruments of ratification of the Energy Charter Protocol on Transit.
4. The Charter Conference should periodically consider the effects of this Decision on competition and security of supply.⁴

¹ Decisions are legally binding (see Article 32 of the Transit Protocol).

² Paragraphs (1) and (2) of Article 6 of the Treaty are reproduced for convenience:

(1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.

(2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector.

³ LAC to analyse whether the legal content of this paragraph can be secured without the explicit reference to these Articles per se.

⁴ The EU may make a declaration clarifying relevant measures and policies falling within the scope of Article 6 ECT.

Comments made the delegation of Japan concerning the Report by the Chairman of the Transit Working Group, and Finalisation of negotiations on an Energy Charter Protocol on Transit, based on the Transit Working Group Chairman’s Final Compromise Text (CC 232)

I REIO Clause

“The delegation of Japan stated that it would accept the Declaration with respect to Article 20 (CC 232) regarding the REIO clause, on the understanding that the European Community and its member states will ensure the principles of fair and non-discriminatory treatment between like products of Community origin and those originating from outside the Community because they are legally bound by the Treaty establishing the European Community pursuant to the transparent, non-discriminatory and fair principles within the European Community, and any future relevant legislation within the European Community and its member states will be consistent with the provisions of the Energy Charter Treaty.”

II Geographical Scope

“The delegation of Japan reaffirmed its understanding that the provisions of the Transit Protocol are not intended to affect the interpretation of existing international laws, including the UNCLOS, and stated that further coordination with the Secretariat on technical issues would be necessary in case a situation not stipulated in existing international laws might occur. The Chairman remarked that technical coordination needed to be continued between Japan and the Legal Adviser of the Secretariat.”