

Brussels, 9 December 2009

Related documents: CC 371, CC 374, CC 376, CC 378, CC 379, CC 382, CC 385, CC 390 Rev. 2

DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Reports submitted to the 20th Meeting of the Energy Charter Conference held on 9 December 2009

- [*The Conference welcomed* the report of the Chairman of the Trade and Transit Group as contained in document CC 371.]

The Group Chairman reported that the multilateral consultations on the draft Transit Protocol stayed at the centre of the Group's work in 2009. [...] The Trade and Transit Group in cooperation with the Investment Group had a thorough discussion with a focus on the role of gas storage for balancing supply and demand, for securing gas supplies and transit and for flexibility and optimisation in gas trading. The Group also looked at the impact of global financial turmoil on the energy trade and investment, and the resulting volatility of oil and gas prices.

Under the ongoing Transparency Initiative, several projects were presented to the Group, including Nord Stream, White Stream, the Trans-Adriatic Pipeline and the refurbishment and enlargement of the Ukrainian gas transit system. This was complemented by presentations on various cases of existing transit and transportation arrangements within the Energy Charter constituency and on ongoing initiatives for frameworks on transit arrangements.

During the years, the Group continued to address the operational and transparency aspects of cross-border transportation and the transit of natural gas. Two successful examples of operational cooperation at industry level were discussed at the Group: namely the EASEE-gas initiative (European Association for the Streamlining of Energy Exchange) and the GTE Transparency Platform for gas transportation.

Keywords: Energy Charter Review, Trade Amendment, Strategy Issues, IAP, Industry Advisory Panel

Another aspect of the Group's ongoing work in 2009 was cross-border electricity cooperation between Central Asian countries and with neighbouring countries in South Asia. The Task Force held two meetings in 2009 – on 21 April in Almaty, Kazakhstan, and on 18 November in Ashgabat, Turkmenistan. [...]

On 23 October 2009, the necessary number of ratifications was reached for the Trade Amendment to enter into force. Georgia was the 35th member state to deposit its instrument of ratification with the Depository in Lisbon. With this, the Trade Amendment is to enter into force on 21 January 2010 bringing the ECT trade regime in line with the WTO provisions and expanding the Treaty to cover energy equipment. This year the Group also started addressing the application of WTO rules to the energy trade under the ECT trade regime.

- [*The Conference welcomed* the Report by the Chairman of the Investment Group as contained in document CC 374.]

The Group Chairman reported that throughout 2009 the Group's agenda was built around four essential topics: 1) improving the investment climate through reducing barriers to investments in the energy sector, 2) reducing risks through the exchange of information and undertaking a risk-reduction dialogue among member states and observes, 3) engaging in a dialogue with the business community through the Industry Advisory Panel, and 4) partnership with international organisations that deal with the energy sector and investments, to ensure synergies at all possible levels.

Within the framework of the risk-reduction dialogue, the Group worked together with the European Bank for Reconstruction and Development and focused on the analysis of stabilisation clauses in long-term energy contracts. The Investment Group also benefited from materials provided by UNCTAD which analysed recent developments in international rule-making. The Group also discussed and welcomed the guidelines for the development of the Market and System Interoperability Model Agreement for the electricity sector which were developed by the Secretariat and the Legal Advisory Task Force. For 2010, the Group intends to look into the experience of ECT member states which have joined the Extractive Industries Transparency Initiative in order to see how this could benefit promoting transparency in the energy sector.

The Group welcomed two reports prepared by the Secretariat in 2009. The first one, on underground gas storage, looked at the measures aimed at creating better transparency in this segment of the energy supply chain and their implications for security of supply and within the ECT constituency. The second study focused on long-term deployment of carbon capture and storage and considered the necessary incentives to give further impetus to this sector.

The Group Chairman also highlighted the importance of the two high-level conferences organised by the Secretariat in 2009:

- 'Ensuring Investment in Secure and Sustainable Energy: Benefits of Multilateral Action,' which was organised in cooperation with the European Investment Bank and took place in May 2009;
- 'Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty,' which took place in October 2009 and was organised in conjunction with the Arbitration Institute of the Stockholm Chamber of Commerce, the British Institute of International and Comparative Law, the

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International Centre for Settlement of Investment Disputes, the International Chamber of Commerce and the Permanent Court of Arbitration.

- The Conference *took note* of the Financial Statements and the Auditor's Report of 2008, as circulated in document CC 376, and *approved* the recommendation of the Budget Committee to discharge the Secretary General from his management and administrative responsibility in respect to the 2008 Budget, in accordance with Article 32(4) of the Financial Rules.
- [*The Conference welcomed* the report of the Ad Hoc Strategy Group Chairman as contained in document CC 378.]

The Group Chairman reported that following the gas crisis of January 2009, the Ad Hoc Energy Charter Strategy Group (AHSO) proved to be a suitable forum for discussing the situation and considering the question of whether the Energy Charter Process had a role to play and the right instruments to offer in such a situation. Doubts were expressed about whether arbitration under Article 27 ECT was sufficiently fast to overcome a crisis situation and restore gas flows, and whether the conciliation procedure under Article 7(7) was sufficiently clear and precise.

The AHSO recommended that the Conference continue its work on further defining the role of the ECT with regard to crisis situations, with a focus on fast-track arbitration and on mediation by legal experts acting under the authority of the Energy Charter Conference.

Another topical issue covered by the Group was the "Conceptual Approach to the New Legal Framework for Energy Cooperation" presented by the Russian President Dmitry Medvedev in April 2009. The delegates to the Group considered this initiative relevant to the work of the Group and agreed to start an informal discussion, also in the context of the idea of modernising the Energy Charter Process. Delegations expressed their readiness to engage in a constructive dialogue with Russia on the "Conceptual Approach". Several delegations expressed the view that there was no need to negotiate an entirely new legal framework and that it was preferable to bring the discussion into the already existing Energy Charter Process, whose effectiveness could however be further improved, e.g., by the inclusion of more global players on energy markets, such as major producers and emerging economies, and by effective implementation mechanisms. The Charter Process could benefit from a continued discussion on these issues.

Finally, at its four meetings throughout 2009, the Group has actively and openly discussed the inexactness and unclearness of certain ECT provisions and a constructive dialogue has been launched to identify the most appropriate solutions. The Group also analysed such horizontal issues as the repercussions of the global economic and financial crises for the energy sector, and the role of the Energy Charter's activities with regard to investment and energy efficiency policies in the light of the implementation of global climate change mitigation policies.

In conclusion, the Chairman stated that the Group had been actively used as a tool to address strategic and horizontal issues as well as energy security. This strongly suggested that it might be useful to have such a Group available on a permanent basis.

- [*The Conference took note* of the Industry Advisory Panel's Communication as presented in document CC 379.]

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In 2009, the activities of the IAP covered such issues as energy resource availability, LNG supply and trading, refining economics and strategy, regional infrastructure development, unconventional energy sources, gas transit, underground gas storage, carbon capture and storage and the role of the Energy Charter in these areas. It was noted that the ECT could play an important role in facilitating cross-border CO2 transfers for accessing suitable storage capacity, and that natural gas storage may contribute to supply security while underlining the need for an appropriate tariff regime to stimulate new gas storage investment.

The IAP also looked at a number of examples of the commercial and regulatory issues related to major energy infrastructure development including:

- the Adriatic LNG re-gasification plant;
- the Southern Energy Corridor (including the Turkey-Greece-Italy, Trans-Adriatic and Nabucco natural gas pipeline projects);
- Turkey as a natural gas hub;
- natural gas transportation in the Mashreq countries.

Discussions in the IAP on the above issues underlined the importance of commercial viability, as well as political support, as the key to successful infrastructure delivery.

The IAP also had the opportunity to comment on the Energy Charter Review conducted during the year in accordance with ECT Article 34(7). The Charter process and the principles which it embodies were fully supported. Support was also given to the Secretariat for its role in providing expertise and visibility for the ECT.

Proposed issues for consideration by the IAP during 2010 are electricity systems, including smart grids; major infrastructure developments and securing appropriate finance; nonconventional resource technology and policy options; the energy market in Africa; energy technology and energy efficiency; the importance of natural gas in a carbon-constrained world; and finally, development and use of coal as a global fuel.

The Conference *welcomed* the IAP's contribution to the work of the Energy Charter, and *asked* the Secretariat to incorporate the relevant IAP findings in Energy Charter activities.

- [*The Conference welcomed* the Secretary General's report on the work of the Secretariat in regard to non-signatories throughout 2009, as presented in CC 382.]

The Secretary General noted that the strategy of the Secretariat is to foster relations with non-signatory countries which have a direct impact on the energy security of existing member states, i.e., the main energy exporters and importers, key energy transit countries, and countries contiguous to the existing constituency. The Secretary General also welcomed warmly Indonesia's becoming an Observer to the Energy Charter Conference in the summer of 2009.

- [The Conference *welcomed* the Final Report by the Special Representative for the Energy Charter Review under Article 34(7) of the Energy Charter Treaty as contained in Message 858. *The Conference took note* of the Conclusions of the Energy Charter Review as presented in document CC 385. The text of the above conclusions is attached at Annex.]

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**DRAFT CONCLUSIONS OF THE REVIEW CONDUCTED
UNDER ARTICLE 34(7) OF ENERGY CHARTER TREATY**

A. General Conclusion: The Need for Modernisation

1. The Contracting Parties and other Signatories to the Energy Charter Treaty (herein after referred to as “the ECT”) confirm their continuing commitment to the Energy Charter Process initiated by the Energy Charter Declaration of 1991, which they consider to be an important and useful tool for enhancing their relations in the energy field, based on complementarities and mutual benefits.
2. The authority of the Process stems from the unique legal framework provided by the provisions of the Energy Charter Treaty. The success of the Treaty is manifest in its ratification by 46 states and the growing number of countries engaged in the Energy Charter Process. Member states remain firm in their commitment to the Treaty and acknowledge its achievements.
3. At the same time, there is broad recognition that in the face of the rapid evolution of the international energy context, there is a need to modernise the Energy Charter Process. The changes within the ECT constituency are one reason for modernisation, other important ones being changes in the global market balance reflected by recent price developments and energy security policies as well as the impact of the global policies to mitigate climate change on the energy sector.

Modernisation of the Energy Charter Process and strengthening the ECT are the keys to ensure that the potential of this legal framework to promote long-term co-operation in the energy field is fully used. They are the right way to strengthen the Energy Charter’s authority and to make it attractive for those major actors on the global energy market which are currently not part of its constituency, but with whom the current members share common interests in the areas covered by the ECT.

4. Possible instruments to strengthen and modernise the Energy Charter Process may include any measure based on the functions of the Charter Conference provided in Art. 34(3) ECT.

It is important to redefine and improve relations with existing multilateral and intergovernmental organisations in the energy field. The Energy Charter is the ideal forum for elaborating legally binding instruments, which might include the analysis of more general conceptual proposals related to international energy governance.

B. Core Priorities

5. The ECT’s core tasks - investment promotion and protection, trade, transit, and dispute settlement as well as energy efficiency, in connection with PEEREA - continue to be highly important in current circumstances.
6. Building a broad constituency, encompassing the producer, consumer and transit states in key energy markets is a central and urgent task.

7. The implementation of the ECT and of PEEREA should be the main objective of the Member states' co-operation. Innovative and reliable ways need to be identified to ensure that this implementation is effective, meets the purpose of the ECT, promotes the principles of the Charter and corresponds to changing circumstances.
8. In particular, the ECT's provisions on transit need to be complemented by the more detailed provisions of the Transit Protocol, whose finalisation should be a priority.
9. The Member states continue to value the Energy Charter Process as a policy forum within a broad constituency, uniting major producing, consuming and transit countries on the basis of common principles. Knowledge sharing, benchmarking, peer review processes and open policy debates help to promote the joint agenda.

In this context, the forum provided by the Ad Hoc Strategy Group has been particularly useful. This dialogue should be continued in a Strategy Group to be established as a standing group under the Conference.

C. Trade and Transit

10. The gas crisis in January 2009 has again emphasised the need for a sound and comprehensive multilateral legal and operational framework for energy transit.

The transit provisions of the ECT (Article 7) continue to play a fundamental role as the only existing legal provisions for transit by fixed infrastructure.

Finalization of negotiations on and the adoption of the Transit Protocol remain of highest priority for Member States. Accordingly, Member States strongly recommend the resumption of multilateral formal negotiations on the Transit Protocol in 2010 on the remaining open issues with a view to the finalization and adoption of the Protocol by the Conference in a timely manner. Once the Transit Protocol has been adopted it should be applied on a provisional basis, while major efforts should be undertaken to foster ratification and entry into force.

11. The trade regime is one of the pillars of the ECT. Despite the enlargement of WTO membership to countries in Eastern Europe and the wider Eurasian continent, several ECT members are still outside the WTO trade regime. The ECT provides a value added to the WTO in terms of expansion of the WTO rules to energy trade to countries outside the WTO system and serves as a stepping stone for these countries on the way to the WTO. Moreover, the ECT provides useful addition to the WTO on energy-related trade matters such as access to energy networks, technical barriers to trade.

An important positive development since the last review has been the forthcoming entry into force of the Trade Amendment which updates the ECT from GATT to WTO and expands the trade regime of the ECT to energy related equipment. Together with the progress with regard to the draft Transit Protocol, this may stimulate a deepened co-operation with the WTO. The focus of the trade discussions in the future should be on changes that ensue in the ECT trade regime from the Trade Amendment, especially the move to the tariff bound regime. In parallel, it remains crucial to foster further ratifications of the Trade Amendment, especially by the ECT countries that are not yet WTO members.

12. Promoting the diffusion and transfer of energy technology while protecting intellectual property rights, remains an important provision of the ECT, especially in the context of climate change discussions, and the need to transfer efficient and clean energy technologies. The work undertaken in the past years identifying the barriers to technology transfer in the energy sector should be continued with more focus on barriers in specific countries.

D. Energy Investment

13. The promotion and protection of investments in the energy sectors of Energy Charter states, based on a predictable, transparent and non-discriminatory legislative environment, remains a priority area of co-operation. Member states will continue their efforts to promote a favourable environment for investors in the respective energy sectors. They recognise the value of the Charter as a forum for an exchange of experience from across the entire constituency on policy issues related to energy investments. Country reviews as an instrument to implement investment provisions of the ECT should be further enhanced.
14. In the context of global policies to mitigate climate change, the ECT provisions regarding investment promotion and protection have an important role to play. Many, if not all, of the ways in which states can reduce their net greenhouse gas emissions require investment.

The role the Energy Charter Process can play in this context should be explored further, while avoiding overlaps with other international organisations. Whereas for new infrastructure projects based on renewable or nuclear energy the applicability of the ECT's investment regime is obvious, its role with regard to investments in energy efficiency or in carbon sequestration should be a matter of discussion within the Energy Charter Process.

15. In view of the leading role of the private sector with regard to investments and the benefits it gets from the ECT, co-operation between the Investment Group and the Industry Advisory Panel should be further intensified.

The work of the Industry Advisory Panel is highly appreciated by the Member states and its prolongation and intensification is explicitly encouraged.

E. Environment and Energy Efficiency

16. In order for PEEREA to do its job effectively, its participants should preferably be experts in energy efficiency. This would ensure that issues can be discussed in detail, that implications for each country can be fully understood and that possibilities for joint implementation of activities can be fully considered.

The PEEREA is a technical working group rather than a negotiating group and so it is important that delegates have the necessary expert skills in the group's core business.

17. Many delegates have expressed an interest in strengthening cooperation between the work of the PEEREA and that of other international organisations. The Secretariat has actively sought to coordinate activities with organizations such as the IEA and IPEEC and should continue and intensify these efforts in order to overcome inertia.

18. Delegates continue to support the Energy Efficiency Review process. Ways should be explored how its effectiveness could be further strengthened.
19. The efficiency of the PEEREA group could be increased if it would become a Standing Group and receive a mandate broader than monitoring the implementation of the PEEREA, for instance regarding environmental issues.
Possibilities for co-operative implementation of on-the-ground activities (e.g. labeling schemes, development of energy efficiency funds, harmonised data collection) can be explored.

F. Legal Issues

20. The ECT's dispute settlement mechanisms are an important instrument to ensure compliance with its substantive provisions. The increasing significance of the ECT as an international legal instrument has been recognized by Member states in the context of the 2009 Review.
21. In the area of research and information dissemination, delegations have noted the significance of initiatives to increase the level of knowledge about the functioning of the ECT as a legal instrument. Specific topics which – subject to available resources – merit further research include consistency among international arbitral awards, denial of advantages under the ECT, the applicability of investment related provisions to trade and transit issues, and the relationship between investment treaties and EU law.
22. Delegations have also supported the development of legal instruments with a view to advancing the aims of the Energy Charter Process, including model agreements in various areas. This includes developing the Electricity Model Agreements and Pipeline Model Agreements projects which have been favourably received by Member states. The Secretariat should consider developing other model agreements, and advising on the use of the existing model agreements for specific projects, as desired by member states.
23. Given the importance of rapidly resolving urgent energy disputes, and in response to the interest expressed by a number of Member state delegations, the Secretariat should research the feasibility of setting up a fast-track arbitration mechanism for such disputes.
24. In view of the increasing significance and complexity of legal issues in relation to the Treaty, discussion of such issues should in the first instance take place within the existing Legal Advisory Committee (constituted by the Conference at its third meeting in October 1995), or at specialist conferences such as the conference organised by the Secretariat in Brussels in October 2009, or, in the specific case of model agreements, the existing Expert Group on Model Agreements.

G. Ad Hoc Strategy Group

25. Based on the experience with the Ad Hoc Strategy Group as an effective and efficient high level forum to address strategic issues between the annual meetings of the Conference, a Strategy Group should be established as a standing group under the Conference with its tasks and mandate to be stated in specific terms of reference.

26. The Strategy Group should serve as a forum for discussion of significant strategic issues relevant to the Charter Process. It should provide guidance on the work of the other Groups and of the Secretariat by drawing key lessons and by addressing horizontal issues beyond the remit of a single group such as responses to new challenges in the world of energy; enlargement activities; by providing strategic input to the Secretariat's Programme of Work and preparing the Energy Charter Conference. It should follow the implementation of ECT Review recommendations; and function as a forum for members, observers and other states to address possible concerns with certain ECT provisions and to promote the modernization of the Energy Charter Process.

H. Conceptual Approach to the New Framework for Energy Co-operation

27. The Strategy Group could also be a suitable venue to discuss the "Conceptual Approach to the New Framework for Energy Co-operation" presented by the Russian President, Mr. Medvedev, in April 2009. Member states consider this initiative to be of high importance in view of the common interest in strong and effective legal frameworks addressing energy trade, transit and investment, and in view of shared principles such as non-discrimination, transparency and mutual responsibility.

The Russian proposal would be compatible with an effective and strong ECT and Energy Charter Process.

The ECT Member states are ready to engage in an in-depth discussion on how relevant aspects of the "Conceptual Approach to the New Framework for Energy Co-operation" could be translated into legal provisions within the framework of the existing ECT. They may wish to encourage the Russian Federation to take a leading role in this discussion.

I. Enlargement and Outreach Action

28. The ECT members continue to support the openness of the Energy Charter Process 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.

The active engagement of the member states with regard to the relations with non-signatories is crucial. The Secretariat is requested to strive to integrate relevant actions into a consistent enlargement policy under the overall authority of the Conference to be monitored by the Strategy Group.

29. The Energy Charter's enlargement policy should focus on the added value for the existing constituency, in particular in view of existing and evolving energy co-operation, markets and transportation networks as well as global trends. With this in mind, the Charter should continue to focus on global major suppliers and consumer, on regions neighbouring the current constituency, such as the Middle East, Asia and North Africa.

The ultimate goal of the policy should be to expand the ECT's legally binding regime to relevant countries and to strengthen the ECT's global authority.

30. At the same time, the enlargement policy should include the possibility of innovative arrangements for example, by means of Association Agreements with States or Groupings of States such as Mercosur, SADC or ECOWAS, in which relevant parts of the ECT's legally binding regime could be mutually recognized to an extent acceptable and mutually beneficial both for the existing constituency and those Groupings or States (such as with the Energy protocol of the ECOWAS, which is almost identical with the ECT).

J. Organisational Issues

31. The resources of the Secretariat have decreased by some 15% in real terms since the last Review; reaching a level at which any further reduction may undermine the ability of the Secretariat to fulfil its minimum functions. Priority must be given to the most efficient allocation of resources. The Secretariat should focus its efforts on core tasks.
32. Ways in which the budget could be used more effectively should be explored. Currently State party contributions do not cover the existing expenditures of the Secretariat. Grants and other forms of contribution can be solicited to perform specific tasks. Back-to-back meetings of subsidiary bodies can be considered to save time and resources. These issues will need to be addressed in the near future.