

**ENERGY CHARTER
SECRETARIAT**

CCDEC 2012

6 NOT

Brussels, 26/27 November 2012

Related documents: CC 438, CC 458

DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Report by the Chairman of the Investment Group

At the request of the Chairman, [the Energy Charter Conference at its 23rd Meeting held on 26th/27th November 2012] *took note* of the Report by the Chairman of the Investment Group (CC 438 - Annex).

Keywords: Report, Chairman, Investment Group

Report by the Chairman of the Investment Group

This report provides an overview of the activities of the Investment Group (IG) in 2012.

The IG convened two times in 2012: on 4 April and on 25 September in Brussels. Both meetings were chaired by Dr. Michael Thomadakis and with good level of participation by the delegations.

During the reported period the Charter Conference approved, by a written procedure, nominations of Deputies to the Chairman of the IG namely Ms. Klara Rakhmetova delegate of Kazakhstan and Mr. Ramiz Rzaev delegate of Azerbaijan.

The activities of the IG have shown that the signatories are active in promoting investment and facilitating cross-border investment flows which require further national and international measures to further improve and sustain the most conducive climate for investment in the energy sector during time of economic uncertainty in the global financial markets.

In 2012, the delegations of the IG engaged in the consultation process on the assessment of the ECT provisions with regard to low-carbon investment, reviewed two country reports on Investment Climate and Market Structure, continued monitoring of investment policy developments, discussed specific aspects related to conditions for mutual investments along the energy value chain, and finally discussed issues of transparency and competition in the framework of ECT Implementation in selected areas. A short summary with conclusions and recommendations of all addressed topic along with outlook for future activities is presented below.

1. Assessment of the ECT provisions with regard to low-carbon investment

Many ECT Contracting Parties are already taking actions to promote low carbon investment. There is also a high level of awareness of the international dimension of this issue and some of the multilateral institutions are already engaged in developing initiatives in this area. In accordance with the Road Map for the Modernisation of the Energy Charter Process the Secretariat implemented “Assessment of the ECT provisions with regard to low-carbon investment.” The Secretariat conducted public consultations process which was open to the ECT signatories, observer countries, Industry Advisory Panel and interested stakeholders to seek accurate and precise guidance about the scope for actions and measures that might be taken to promote low-carbon investment, including trade and energy efficiency aspects.

The delegations of different subsidiary bodies including the IG discussed some intermediate and advanced results of the Assessment. The final report included specific recommendations to conduct further analysis on legal instruments and to initiate activities on low-carbon within the Annual Programme of Work of the Energy Charter Secretariat from 2013 and onwards.

The Secretariat submitted the final report on “Assessment of the ECT provisions with regard to low-carbon investment” (Document CC 439) for adoption by the Energy Charter Conference.

In my capacity of the Chairman I invite the delegations to support further activities on promoting low-carbon investment which have potential to make strong contribution of the Energy Charter towards mobilising low-carbon investment for economic growth and sustainable development.

2. Country Reports on Investment Climate and Market Structure (ICMS)

In 2012, Lithuania and Kazakhstan presented in-depth reviews on Investment Climate and Market Structure (ICMS) in the energy sector. The reviews were prepared by the national authorities of above mentioned countries in close cooperation with the Energy Charter Secretariat. *Sweden* and *Ukraine* acted as peer review countries for the report of Lithuania. *France* and *Portugal* acted as peer review countries for the report of Kazakhstan. The review processes was fully supported by the Secretariat that presented its Main findings in relation to each report with the Policy Conclusions and Recommendations. Having discussed the reports, the IG appreciated, in particular:

- With regard to Lithuania its efforts to improve business climate and continued progress in developing energy sector legislation and market reforms. In Lithuania, development of renewable energy sources is very important to address climate change issues and increase country’s energy independence. The IG recommends: continue the reforms aimed at creating favourable business conditions, make priorities to in terms of investment from the budgetary funds and further development of energy sector infrastructure and renewable energy sources.
- With regard to Kazakhstan its extensive business reforms over the last years which resulted in significant inflow of FDI. In Kazakhstan - energy production capacities, development of existing and new infrastructure for export of oil and natural gas are important factors in increasing the security of local, regional and global energy markets The IG recommends: preparation of a national energy strategy for a long term energy complex development; ratification of the ECT Trade Amendment; establishment of independent regulatory agency for the energy sector and continue strengthening market-oriented energy policies and a predictable and transparent framework.

The IG has submitted detailed Policy Conclusions and Recommendations (Document CC 441) to the Governments of Lithuania and Kazakhstan for adoption by the Energy Charter Conference.

The final ICMS reports along with the adopted Policy Conclusions and Recommendations will be published by the Energy Charter Secretariat.

3. Improving Entry Conditions for Foreign Investors

Protection against discrimination is one of the most important components in creating a favourable investment climate in the ECT constituency. Both the Secretariat and the IG continue review of recent investment policy developments through review of new exceptions (non-conforming measures) to national treatment principle recorded in the

Blue Book of the Energy Charter. In accordance with Article 10(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

- limit to the minimum the exceptions to the national treatment principle;
- progressively remove existing restrictions affecting Investors of other Contracting Parties.

In 2012, despite the best endeavour commitment the number of exceptions has increased by two new exceptions of Kazakhstan and possibly one new exception of Lithuania.

ICMS report on Kazakhstan identified one exception to national treatment principle that related to measures regarding access to land and second exception related to participation of foreign investors in auctions for strategic properties which include some energy sector infrastructure.

ICMS report on Lithuania resulted in update of already registered exception related to access to land and identified new potential exception related to some screening requirements to establishing enterprises in the energy sector. The delegation of Lithuania required more time to analyse this possible exception.

As a result of above mentioned notifications the number of exceptions recorded in the Energy Charter Blue Book has increased from 87 to 89 in 2012. The current edition of the Energy Charter “Blue Book” will be updated and made available to the delegates as a reference document at the web site of the Charter Secretariat.

4. Conditions for Mutual Investments along the Energy Value Chain – “Analysis of mutual exchanges of the business assets within investment activities in the energy sector”

The IG continues policy dialog on improving conditions for mutual investments along the energy value chain. In 2012, the delegations concluded preparatory work related to “Analysis of mutual exchanges of the business assets within investment activities in the energy sector” which is envisaged by the “Road Map for the Modernisation of the Energy Charter Process”. The Chairman of the Industry Advisory Panel contributed to the discussions in the IG by sharing views from a business sector prospective. The rationale behind the proposed analysis is to give the best possible assessment of the proposal to promote “asset swaps” within investment activities in the energy sector.

The delegations of the IG discussed a background paper and agreed on the Terms of Reference which outline scope of the proposed analysis related to exchange of business assets. The delegations welcomed work of the Secretariat on improving conditions for mutual investments in the energy sector.

5. Review of ECT Implementation in Selected Areas and Risk Mitigation

In the context of investment arbitration, the Secretariat updated the delegations about the work of the United Nations Commission on International Trade Law (UNCITRAL) in developing a legal standard on transparency in treaty-based investor-State arbitration. It was underlined if the Transparency Rules developed by the Working Group II within UNICITRAL became applicable to ECT-based arbitrations, a considerable amount of information would be made available to the public, and thus, it would be much easier for the Secretariat and the ECT constituency to collect information on those cases and assess

the effectiveness of the ECT's dispute settlement mechanism. The delegations were informed about substance of the transparency rules and scope of application. It was concluded that it is useful to keep the IG updated on a regular basis on the issues of investment arbitration and work related to transparency.

In addressing the political and regulatory risks for foreign investors, in terms of the Risk Reduction Dialogue commenced in 2004, the IG looked into specific aspects of bilateral and multilateral cooperation options under the competition and free-market economy principles embodied within the ECT. The Secretariat prepared an analytical paper to facilitate discussions which reflected on how to create an energy competition forum in order to exchange views, experiences and best practices, and to facilitate case-specific cooperation in enforcement of competition rules under the auspices of the ECT. It was concluded that a competition forum created under the ECT could have a strategic edge compared to other regional and multinational information exchange arrangements.

The delegations welcomed the work of the Secretariat which helped to widen the exchange of experiences and stimulate cooperation in relation to issues of competition, particularly where barriers to network access in electricity and gas markets are concerned. The delegates agreed to publish the paper and continue activities related to promotion of competition in the energy sector.

6. Outlook into Future Activities

In accordance with its mandate the Investment Group will continue its work in the core activity areas. Within the framework of investment reviews the IG welcomes commitment of Mongolia to prepare in depth ICMS reports in the course of 2013. The Secretariat prepares the ICMS reports in close cooperation with the Member and the Observer States on a voluntary basis. It is observed that member states are actively taking part in the peer review process on the reports which is a positive development to strengthen cooperation among the constituency.

In April 2012 the Secretariat received a voluntary contribution from the Government of the Netherlands for the Assessment of the ECT provisions with regard to low-carbon investment which could be directed towards follow up activities on the results of the Assessment provided approval by the Charter Conference. The IG continues to be an appropriate platform to continue multilateral consultations and exchange of experiences to promote low carbon investments.

The Modernisation Road Map calls for a comprehensive review of the exceptions to non-discriminatory treatment in the Blue Book of the Charter. The IG plans to undertake some preparatory work for a comprehensive review of the Blue Book which is planned in 2013-2014. In the course of next year the Secretariat will prepare a status report on the Blue Book which will illustrate the current system of exceptions and outline some policy options in order to launch the comprehensive review of the Blue Book. The objective of this activity is to monitor and limit to the minimum the exceptions, thus improving entry conditions for foreign direct investments in the energy sector.

The IG intends to initiate new activities to promote low carbon investment, to continue activities in the frameworks of "Conditions for Mutual Investments along the Energy Value Chain" and "ECT Implementations in selected areas and Risk Mitigation Dialog".

Finally, a new preliminary regional study on the "Gobitec and Asian Super Grid" for renewable energies will be launched within the framework "Promoting investments in regional energy markets" in the course of next year.