

DRAFT FINAL ACT OF THE INTERNATIONAL CONFERENCE, DRAFT SUPPLEMENTARY TREATY TO THE ENERGY CHARTER TREATY, DRAFT DECISION OF THE ENERGY CHARTER CONFERENCE, DRAFT DECLARATION ON ENVIRONMENTAL AND SOCIAL STANDARDS, AND GUIDELINES TO INVESTORS *

Article 10(4) of the Energy Charter Treaty (reproduced in vol. II of this *Compendium*) required signatories to commence negotiations on a supplementary treaty not later than 1 January 1995, with a view to concluding it by 1 January 1998. The aim of the Supplementary Treaty is to provide a non-discriminatory basis for making investments in the energy sector while grandfathering existing discriminatory measures and catering for specific reservations in respect of privatizations. As of the time of the printing of this volume, broad agreement had been reached on the draft texts, with a few outstanding issues remaining to be solved. Discussions continue in the Energy Charter Investment Group on those issues. The draft texts consist of the following parts: the draft Final Act, the draft text of the Supplementary Treaty, the draft Decisions and the draft Declaration on Environmental and Social Standards, and Guidelines to Investors.

DRAFT **

**FINAL ACT OF THE INTERNATIONAL CONFERENCE AND
DRAFT DECISION OF THE ENERGY CHARTER CONFERENCE**

I. Acting in accordance with Article 10(4) of the Energy Charter Treaty, negotiations for a supplementary treaty began in December 1994 by the setting up of a Working Group to prepare the text. The Provisional Energy Charter Conference met a number of times and concluded the negotiations on the Supplementary Treaty to the Energy Charter Treaty (hereinafter referred to as the "Supplementary Treaty") in December 1997. A Conference to adopt the Supplementary Treaty was held at Brussels in three sessions on 23-24 April, on 24-25 June 1998 and on [...].

Representatives of the Republic of Albania, the Republic of Armenia, Australia, the Republic of Austria, the Azerbaijani Republic, the Kingdom of Belgium, the Republic of Belarus, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Communities, the Republic of Finland, the French Republic, the Republic of Georgia, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, the Republic of Iceland, Ireland, the Italian Republic, Japan, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Moldova, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, the Portuguese Republic, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of

* *Source*: Energy Charter Conference (1998). "Draft Final Act of the International Conference, Draft Supplementary Treaty to the Energy Charter Treaty and Decision of the Energy Charter Conference, Draft Declaration on Environmental and Social Standards and Guidelines to Investors"; (Brussels: Energy Charter Secretariat); available on the Internet (<http://www.encharter.org>). [Note added by the editor.]

** This text reflects a work in progress, and has been produced for documentary purposes without involving the responsibility on the Energy Charter Conference or its Secretariat. Permission to reproduce the text should be obtained from the Energy Charter Secretariat.

Sweden, the Swiss Confederation, the Republic of Tajikistan, the former Yugoslav Republic of Macedonia, the Republic of Turkey, Turkmenistan, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the Republic of Uzbekistan (hereinafter referred to as "the representatives") participated in the Conference, as did invited observers from certain countries and international organisations.

II. The Energy Charter Conference, which was definitively established on the entry into force on 16 April 1998 of the Energy Charter Treaty, also met in Brussels in April and June 1998 and on [...] to consider adoption of the Supplementary Treaty.

DRAFT

SUPPLEMENTARY TREATY TO THE ENERGY CHARTER TREATY

III. The text of the Supplementary Treaty which is set out in Annex 1 and Decisions with respect thereto which are set out in Annex 2 were adopted and it was agreed that the Supplementary Treaty would be open for signature at [...] from [...] to [...].

UNDERSTANDINGS

IV. The following Understandings were adopted with respect to the Supplementary Treaty:

1. With respect to Article 10(2)

- a. With respect to the foundation and establishment of banks and their licensing it is understood that Article 10(2) places on Contracting Parties no obligations relating to economic activities other than Economic Activities in the Energy Sector.
- b. The obligation in Article 10(2) on a Contracting Party to accord treatment no less favourable than that which it accords to its own Investors or their Investments does not apply to the disposal by a Contracting Party of an asset described in Article 1(6)(a) of the Energy Charter Treaty which has a value of less than 75.000 Special Drawing Rights. However, a Contracting Party can not artificially partition an asset in order to evade the obligations of Article 10(2).
- c. Public ownership and/or participation in the energy sector, including in monopolized and demonopolized sectors, is not as such regarded as contravening Article 10(2).

For the avoidance of doubt, and consistent with the Supplementary Treaty, a Contracting Party, when demonopolizing an activity, may establish transparent, objective, non-discriminatory conditions and requirements on the basis of which new entrants may take up the previously monopolized activity.

2. With respect to Article 10(3)

Restrictions in the constituent instruments of companies on the shareholdings or powers of Investors of other Contracting Parties and their Investments are regarded as contravening Article 10(2) if imposed or requested by a Contracting Party.

However, existing restrictions in such constituent instruments on the subsequent acquisition of privatised shares by Investors of other Contracting Parties are not affected by Article 10(2).

3. With respect to Article 10(3)(a)

It is understood that the individual exceptions in Annex EX do not affect the scope or interpretation of the Energy Charter Treaty.

4. With respect to Article 10(3)(b)

- a. Restrictions on the percentage or type of shares which can be owned by a single holder or association of such holders are not a contravention of Article 10(2) unless such restrictions discriminate against Investors of other Contracting Parties and their Investments.
- b. Reservation of a minority of shares in a privatised enterprise to particular categories of Investors, employees, customers or small shareholders, or preferential terms given to such categories, are not regarded as contravening Article 10(2) provided there is no legal discrimination against members of such categories that are nationals or legal entities of other Contracting Parties.
- c. The enquiry points designated under Article 20(3) of the Energy Charter Treaty shall be ready, if the designating Contracting Party so wishes, to make information available either free or for a reasonable charge about plans and intentions regarding privatisation and reduction of exclusive and special privileges. They should be ready to supply to Investors all the non-confidential information needed to tackle specific problems concerning Investments.
- d. Contracting Parties acknowledge that special share arrangements are compatible with Article 10(2), unless they explicitly or intentionally favour Investors or Investments of a Contracting Party or discriminate against Investors or Investments of another Contracting Party on the grounds of their nationality or permanent residency.

5. With respect to Article 10(2) to (5)

For the avoidance of doubt, the Decisions and Understandings which form part of the Final Act of the European Energy Charter Conference done in Lisbon on 17 December 1994 apply to the Supplementary Treaty.

DECLARATIONS

V. The following Declarations were made with respect to the Supplementary Treaty:

1. The Charter Conference will proceed to a review of the Investor-State dispute settlement provisions. In so doing it shall take account of relevant international legal developments in the field of investor protection.

The review shall commence once such developments are manifest, but no later than 2005.

2. The representatives have taken note of the position of a significant number of delegations that they attach importance to high standards of environmental protection and conservation and in the field of labour, and that they reaffirm their commitment to sustainable development, taking into

account the principles on environmental standards already set out in Article 19 of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, together with measures incorporating social and labour considerations.

The representatives also took note that there was broad support for including a strong commitment in future on those issues. [See separate Declaration]

3. Contracting Parties undertake that in the light of the results of the efforts underway in other international fora to establish and further develop multilateral rules governing investment, they will commence consideration, not later than 2005 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference.

VI. The representatives also noted the following Declarations that were made with respect to the Supplementary Treaty:

DOCUMENTATION

VII. The records of negotiations of the Supplementary Treaty will be deposited with the Secretariat.

Done at [...] on [...].

DRAFT

SUPPLEMENTARY TREATY TO THE ENERGY CHARTER TREATY

PREAMBLE

The Contracting Parties to this Treaty,

Having regard to the Energy Charter Treaty done at Lisbon on 17 December 1994;

Acting in accordance with Article 10(4) of the Energy Charter Treaty which calls for negotiation of a supplementary treaty that will, subject to the conditions laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in Article 10(3) of the Energy Charter Treaty;

Recalling Understanding No. 10 adopted at the signature of the Final Act of the European Energy Charter Conference in Lisbon on 17 December 1994, which specifies that those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatisation) and to the dismantling of monopolies (demonopolization);

Considering the important contribution that foreign investment can make to the development of energy sectors of the Contracting Parties;

Desiring to liberalise further the existing regimes relating to the Making of Investments in the energy sector;

Wishing to establish stable, equitable, favourable and transparent market conditions to achieve this purpose;

Confirming the importance of effective dispute settlement procedures,

HAVE AGREED as follows:

PART I:

INVESTMENT PROMOTION AND PROTECTION

ARTICLE 1 DEFINITION

In this Treaty “Contracting Party” means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which this Treaty is in force.

ARTICLE 2 TREATMENT OF THE MAKING OF INVESTMENTS

1. As among the Contracting Parties, Article 10(2) to (5) of the Energy Charter Treaty shall read as follows:

2. Each Contracting Party shall accord to Investors of other Contracting Parties and their Investments in its Area, as regards the Making of Investments in its Area, treatment no less favourable than that which it accords to its own Investors or their Investments, or to Investors of any other Contracting Party or any third state or their Investments, whichever is the most favourable.

3. a. Paragraph (2) shall not apply to :

- i. any non-conforming measure that is maintained by a Contracting Party as set out in Annex EX;
- ii. the continuation or prompt renewal of such non-conforming measure; or
- iii. an amendment to such non-conforming measure to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraph (2).

b. The obligation in paragraph (2) to accord treatment no less favourable than that which a Contracting Party accords to its own Investors or their Investments shall not apply to measures concerning privatisation as provided for in Annex PR.

4. In the event of any inconsistency between paragraphs (2) and (3) of Article 10 and paragraph (7) of Article 10 the provision or provisions more favourable to the Investor or Investment shall prevail.

5. Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:
- a. limit to the minimum the application of measures referred to in paragraph (3);
 - b. progressively remove existing restrictions affecting Investors of other Contracting Parties or their Investments;
 - c.
 - i. progressively reduce the scope of application inscribed against its name in Annex PR; and
 - ii. remove its name from the list of Annex PR.

The Charter Conference shall review Annex PR annually with a view to encouraging Contracting Parties listed therein to remove their names from that Annex.

In this light the Charter Conference shall, not later than 1 January 2004, conduct a comprehensive assessment of Annex PR taking into account the results of the annual reviews and any notifications by Contracting Parties of reliance on exceptions provided for in Annex PR.

2. As a consequence of paragraph 1. of this Article, the reference in paragraph (10) of Article 10 to paragraph (3) shall read paragraph (2).

PART II:

FINAL PROVISIONS

ANNEX EX

NON-CONFORMING MEASURES MAINTAINED BY A CONTRACTING PARTY AND ANY COMMITMENTS WITH REGARD TO THEM

(in accordance with Article 10(3)(a)(i))

[See the “Blue Book” for measures notified in accordance Article 10(9) of the Energy Charter Treaty]

**ANNEX PR
EXCEPTIONS RELATING TO PRIVATISATION MEASURES**

(In accordance with Article 10(3)(b))

1. Contracting Party listed below may, subject to the scope of application inscribed against its name, reserve a right for its own Investors to acquire all or some of the shares of a state enterprise or assets owned by the state or a state enterprise which it is privatising, or may sell or dispose of such shares or assets to its own Investors on preferential terms.

| Country | Scope of Application |
|----------------|-----------------------------|
|----------------|-----------------------------|

2. Any Contracting Party may reduce the scope of application inscribed against its name or remove its name from the list by notifying the Secretariat. The Secretariat shall forthwith inform other Contracting Parties and update Annex PR accordingly.

DRAFT

**DECISIONS WITH RESPECT TO THE ENERGY CHARTER TREATY AND THE
SUPPLEMENTARY TREATY**

The following Decisions were adopted with respect to the Energy Charter Treaty and the Supplementary Treaty:

1. With respect to Article 10(8)

Given that there do not appear to be any programmes maintained by signatories to the Energy Charter Treaty that come within the terms of Article 10(8) of that Treaty, the modalities of application of Article 10(7) of the Energy Charter Treaty to any such programmes shall be reserved for further consideration by the Charter Conference at an appropriate time.

2. With respect to the application of the institutional arrangements of the Energy Charter Treaty to the Supplementary Treaty

The Energy Charter Conference and the Secretariat established under the Energy Charter Treaty (referred to in the Supplementary Treaty and Decisions and Understandings respectively as the Charter Conference and the Secretariat) shall perform relevant duties and functions with respect to the Supplementary Treaty.

3. With respect to Article 10(3)(a)

Given that historically those few Contracting Parties with reciprocity exceptions have seldom relied on them and that the Supplementary Treaty represents substantial progress in meeting the conditions of such exceptions, the Contracting Parties concerned shall, where they have invoked or acted under such exceptions, notify the Secretariat, which shall inform the Charter Conference.

4. With respect to Article 10(9)

Having regard to the value gained from the first review of the reports submitted to the Secretariat under Article 10(9) of the Energy Charter Treaty:

- a. The Contracting Parties shall continue to include material illustrating the overall opportunities for investors of other Contracting Parties to Make Investments in their Areas. Such material shall cover in particular the existence and nature of relevant state entities, monopoly situations and exclusive and special privileges.
- b. The Charter Conference should further define, as and when appropriate, the details of information to be included in such explanatory material.

Each Contracting Party listed in Annex PR to the Supplementary Treaty shall on an annual basis notify the Secretariat of any reliance on an exception provided for in Annex PR that relates to the obligation in Article 10(2) on a Contracting Party to accord treatment no less favourable than that it accords to its own Investors or their Investments. The Charter Conference may review the information provided.

5. With respect to Article 10(3)(b)

A Contracting Party which is not listed in Annex PR may, regarding an exception inscribed in Annex PR by a Contracting Party which is listed in Annex PR but not Annex T, invoke an equivalent exception to its obligation in Article 10(2) in relation to the Investors of that other Contracting Party or their Investments in its own privatisation operations.

DRAFT

DECLARATION ON ENVIRONMENTAL AND SOCIAL STANDARDS, AND GUIDELINES TO INVESTORS

SOCIAL AND ENVIRONMENTAL STANDARDS

A. The Contracting Parties declare that, as regards measures taken in the context of investment promotion, they shall endeavour to ensure:

- i. that such measures are consistent with internationally recognised fundamental health, safety and labour standards, and relevant international environmental obligations; and
- ii. that no measure taken by a Contracting Party shall derogate from its domestic health, safety, labour or environmental laws and regulations, so as to induce an Investor to make an Investments within its Area.

B. The Charter Conference may, at the request of one or more Contracting Parties, review compliance with the terms set out in paragraph A(ii) above.

GUIDELINES TO INVESTORS

C. The Contracting parties further declare that they jointly recommend to multinational enterprises engaged in Economic Activity in the Energy Sector the observance of the Guidelines for Multinational Enterprises annexed to this Declaration. The Charter Conference shall consider any subsequent revisions of the Guidelines with a view of recommending them.

* * *

