

**ENERGY CHARTER
SECRETARIAT**

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Related documents: CC 598, Mess 1367/17
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DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Adoption by correspondence – Best practices in regulatory reform

By document CC 598, dated 22 September 2017, the Conference was invited to welcome and endorse the best practices in regulatory reform. As specified by Rule 19 (b) of the Rules of Procedure concerning the adoption of decisions by correspondence, members of the Energy Charter Conference were informed that any delegation that wished to object to this decision should notify the Secretariat of its position in writing by 11 October 2017.

Having received no objections within the specified time limit, on 11 October 2017 the Conference **welcomed** and **endorsed** the best practices in regulatory reform with the understanding that they are not to be considered as a soft-law instrument, uniform practices or non-binding recommendations.

Keywords: Best Practices, Regulatory Reform, conflicts, foreign investors



BEST PRACTICES IN REGULATORY REFORM: MINIMISING POTENTIAL CONFLICTS WITH FOREIGN INVESTORS

Recalling that the G20 Guiding Principles for Global Investment Policymaking (2016) state that Governments reaffirm the right to regulate investment for legitimate public policy purposes but that regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law;

Recalling that the Joint ACP¹-UNCTAD² Guiding Principles for Investment Policymaking (2017) confirm the right to regulate investment for legitimate public policy purposes but that investment policies should be balanced and developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors;

Considering that arbitral tribunals constituted under the Energy Charter Treaty have confirmed that it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest though subsequent changes should be made fairly, non-retroactively, consistently and predictably, taking into account the circumstances of the investment;

Recognising that some recent investment policy practices (in particular those supported by Canada and the EU) expressly state the right of states to introduce regulatory changes in the public interest (to achieve legitimate policy objectives) including in a way that may negatively affect the investments without constituting a breach of the investment protection standards;

The following sound, best practices have been identified as good references for introducing non-discriminatory regulatory reform while minimising potential conflicts with foreign investors:

- *Clear and unambiguous identification of a single lead agency in charge of the regulatory reform at hand;*
- *Application of some previously published and discussed strategic long-term plan / policy goals. This should allow foreign investors enough anticipation of the future outcome;*

¹ African, Caribbean and Pacific Group of States.

² UN Conference on Trade and Development.

- *Development of a consolidated program document, implementation roadmap, and decision-making schedule, with public meetings to report progress;*
- *Consultation with all significantly affected foreign investors (not only relevant domestic parties), where appropriate, at the earliest possible stage while developing or reviewing regulations.*
- *Provide explanatory/background materials and timely information on the proposed regulatory reform to help understand better its purpose and applicability.*
- *Ensuring that the consultation itself is timely, transparent and provides stakeholders with sufficient time to submit their position. It's scope should be clearly understood and it's useful to report back on the result of such consultation explaining how stakeholder input has been assessed and taken into account.*
- *Early survey of all existing international obligations of the state as well as mapping the categories of foreign investors currently present in the territory of the host state analysing the potential impact and risks stemming from the envisaged regulatory reform;*
- *Comprehensive study into problems, conflicts, and disputes the host state experienced in the past in that particular sector, as well as comparative analysis of problems faced by other states who had introduced similar reforms. This should be part of the impact assessment of the proposed regulatory reform.*
- *Avoiding retroactive application of changes to existing regulations and double check potential existing stabilization clauses (eg. in International Investment Agreements, domestic investment laws, previous contracts...).*