

**ENERGY CHARTER
SECRETARIAT**

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| Related documents: CC 722 Rev |
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DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Progress Report of the Modernisation Group 2021

The Energy Charter Conference at its 32nd Statutory Meeting held on 14 December 2021 **took note** of the Progress Report of the Modernisation Group 2021.

Keywords: Report, Progress, Modernisation Group, 2021

PROGRESS REPORT OF THE MODERNISATION GROUP 2021

A. Background

1. In line with its decision on the schedule of meetings in 2021 (MOD 32), the Group held five negotiation rounds: 2-5 March 2021, 1-4 June 2021, 6-9 July 2021, 28 September-1 October 2021, and 9-12 November 2021. In addition, the Modernisation Group held a meeting on 25 November 2021 to decide on the schedule of meetings of the Group in 2022. Considering the continuation of the Coronavirus disease (COVID-19) pandemic and the resulting travel restrictions, the meetings had to take place by Zoom videoconference (“on-premises”).
2. The Modernisation Group also agreed to hold an additional online negotiation round on 13 December 2021, before the 32nd meeting of the Conference that was previously planned to take place in Yerevan, Armenia.
3. Following the Informal Roadmap (MOD 35), the Group also held two informal drafting meetings, on 21 June and 8 September 2021 to facilitate the drafting of compromise proposals by the Secretariat before formal consideration by the Modernisation Group in the following negotiation rounds.
4. Pursuant to its decision on the possibility of holding informal workshops (MOD 32), the Group held two informal workshops on specific topics: 23 March 2021 (Definition of “Economic Activity in the Energy Sector”) and 10 September 2021 (“Transit Issues”).
5. In line with the mandate (CCDEC 2019 10), a steering group was established to support the work of the Chair and the Vice- chair to chair and conduct the negotiation rounds. This group is composed of all interested delegations, the Chair and Vice-Chair of the Modernisation Group and the Secretariat. It meets informally at regular intervals to prepare the upcoming negotiation rounds and, for the sake of transparency, debriefs the Modernisation Group. For greater certainty, no decisions can be taken in this steering group. In 2021, the steering group held seven meetings: 4 February 2021 (chaired by Turkey), 24 February 2021 (chaired by the United Kingdom), 27 April 2021 (chaired by Azerbaijan), 26 May 2021 (chaired by Switzerland), 23 June 2021 (chaired by the European Union), 14 September 2021 (chaired by Japan), and 12 October 2021 (chaired by Kazakhstan). The Modernisation Group agreed (MOD 38) that the summary records of future meetings of the steering would be circulated to Contracting Parties in advance of the relevant negotiation round. Along with the Chair and the Vice-Chairs of the Group and the Secretariat, the steering group was composed of the following delegations: Azerbaijan, the European Union, Georgia, Japan, Kazakhstan, Switzerland, Turkey, and the United Kingdom.
6. In addition, the Chair and Vice-Chairs of the Group held an informal briefing on the modernisation process on 22 April 2021 as part of the outreach efforts to involve all Contracting Parties in the negotiations.
7. The Modernisation Group also adopted (MOD 36) a policy for acceding to the audio recordings of its meetings, allowing delegates to listen to audio recordings at the Secretariat’s office but without providing a copy.

B. Negotiations in 2021

8. The aim of discussions in 2021 was to discuss and clarify or modify the underlying positions of the Contracting Parties and to merge different text proposals to the largest extent possible to produce draft compromise proposals. The Group agreed that the progress attained in the negotiation rounds of 2021 achieved this aim.
9. The discussions were based on a single negotiation draft (with text proposals, positions and draft compromise proposals), which was updated before, during and after each negotiation round. The Contracting Parties that submitted similar text proposals on a topic were encouraged to agree on a compromise wording with assistance of the Secretariat and the Chairs. For most of the topics, the Secretariat was mandated to prepare draft compromise proposals, which were used as a basis for further discussions.
10. The negotiation rounds were chaired by Mr Lukas Stifter (Austria), Chair of the Group. The Vice-Chairs of the Group were Messrs Felix Imhof (Switzerland), Guy Lentz (Luxembourg), Samir Abdurahimov (Azerbaijan), and Sunao Orii later replaced on 1 July 2021 by Akiyoshi Kawabata (Japan).
11. The following delegations participated in the negotiation rounds: Armenia, Austria, Azerbaijan, Belgium, Croatia, Cyprus, Czech Republic, Estonia, the European Union, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Japan, Jordan, Kazakhstan, Lithuania, Luxembourg, Republic of Moldova, Mongolia, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Turkmenistan, Ukraine, the United Kingdom, Uzbekistan, and Yemen.
12. The discussions adhered to the following schedule:
 - 2-5 March 2021: definition of “Charter”, definition of “Economic Activity in the Energy Sector”, definition of “Investment”, definition of “Investor”, clarification of “most constant protection and security”, compensation for losses, definition of “fair and equitable treatment”, definition of “indirect expropriation”, denial of benefits, MFN clause, right to regulate, transfers related to investments, and umbrella clause.
 - 1-4 June 2021: remaining topics from the previous round (transfers related to investments), definition of “Transit”, access to infrastructure (including denial of access and available capacities), definition and principles of tariff setting, sustainable development and corporate social responsibility, frivolous claims, security for costs, third-party funding, transparency, valuation of damages, and definition of “Economic Activity in the Energy Sector”.
 - 6-9 July 2021: pre-investment, REIO, obsolete provisions, and revision of the topics from the fourth negotiation round, including on the basis of available draft compromise proposals (in particular, the Group discussed the following topics: definition of “Economic Activity in the Energy Sector”, definition of

“Investment”, definition of “Investor”, clarification of “most constant protection and security”, definition of “fair and equitable treatment”, compensation for losses, definition of “indirect expropriation”, denial of benefits, MFN clause, right to regulate, transfers related to investments).

- 28 September-1 October 2021: remaining topics from the previous round (umbrella clause), definition of “Transit”, access to infrastructure (including denial of access and available capacities), definition and principles of tariff setting, sustainable development and corporate social responsibility, frivolous claims, security for costs, third-party funding, transparency, valuation of damages, definition of “Economic Activity in the Energy Sector”.
- 9-12 November 2021: definition of “Investment”, definition of “Investor”, clarification of “most constant protection and security”, compensation for losses, definition of “fair and equitable treatment”, definition of “indirect expropriation”, denial of benefits, MFN clause, right to regulate, transfers related to investments, umbrella clause, sustainable development and corporate social responsibility, frivolous claims, security for costs, third-party funding, transparency, valuation of damages.
- 13 December 2021: definition of “Economic Activity in the Energy Sector”, definition of “Transit”, access to infrastructure (including denial of access and available capacities), definition and principles of tariff setting, definition of “fair and equitable treatment”.

13. During the negotiation rounds held in 2021, the following progress was made:

- *Definition of “Charter”*: The Group tentatively agreed to conclude the discussion on this topic.
- *Definition of “Economic Activity in the Energy Sector”*: The Group discussed this topic in five negotiations rounds. In addition, an Informal Workshop on the Definition of “Economic Activity in the Energy Sector” was organised on 23 March 2021. The Modernisation Group continued discussions on the definition of “Economic Activity in the Energy Sector”. In this context, the Contracting Parties also considered possible options prepared by the Secretariat to discuss the flexibility considered necessary by individual Contracting Parties, taking into account their individual energy security and climate goals.
- *Investment protection topics*: The Group discussed these topics in four negotiations rounds. The Group tentatively agreed on draft provisions on the definition of “Investor”, the clarification of “most constant protection and security”, compensation for losses and transfers related to investments. *Good progress* was made with respect to the compromise proposals on the definition of “Investment”, the definition of “indirect expropriation” as well as the topic of denial of benefits. The Group continued discussing the introduction of provisions on the right to regulate as well as agreed to further consider the umbrella clause together with other provisions. The Modernisation Group continued its discussion regarding the “Definition of Fair and Equitable Treatment (FET)” on the basis of a new text proposal.

- *Transit topics:* The Group discussed these topics in three negotiations rounds. In addition, an Informal Workshop on Transit Issues was organised on 10 September 2021. Deliberations on transit topics were held on the basis of a draft compromise proposal drafted by the Secretariat for the December round.
- *Sustainable development and corporate social responsibility:* The Group discussed this topic in three negotiations rounds. The Group advanced the discussions on the topic based on the draft compromise proposal prepared by the Secretariat, parts of which have reached a high degree of convergence. In particular, the Contracting Parties considered compromise drafts on possible references to international instruments and agreements in the field of sustainable development and corporate social responsibility. Discussions also covered a provision addressing environmental impact assessment for investments with significant environmental impact, a proposed amendment of the ECT provisions on transparency as well as a proposal on climate change and clean energy transition, including a reference to the Paris agreement.
- *Dispute settlement topics:* The Group discussed the topics related to investor-State dispute settlement in three negotiation rounds. Good progress was made with respect to Frivolous claims, Security for costs, Third-Party Funding, Transparency and Valuation of damages on the basis of compromise proposals.
- *Pre-investment:* The Group tentatively concluded the discussion and agreed that it would only be resumed if a Contracting Party submitted a specific text proposal.
- *REIO:* The Contracting Parties further clarified their positions.
- *Obsolete provisions:* The discussions took place based on the list of obsolete provisions prepared by the Secretariat. The Group tentatively agreed to conclude the discussion on this topic.

C. Outlook

16. The negotiations for the modernisation of the ECT will continue in 2022. On 25 November, the Group agreed on the following schedule based on the proposal of the Chair (Message 1886):

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| <i>3 January</i> | <i>Deadline for delegates to send their submissions</i> |
| <i>7 January</i> | <i>Secretariat distributes negotiation draft</i> |
| <i>18-21 January</i> | <i>Tenth Round of Negotiations (Zoom)</i> |
| <i>28 January</i> | <i>Secretariat distributes revised negotiation draft</i> |
| <i>14 February</i> | <i>Deadline for delegates to send their submissions</i> |

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| 18 February | Secretariat distributes negotiation draft |
| 1-4 March | Eleventh Round of Negotiations (Brussels) |
| 11 March | Secretariat distributes revised negotiation draft |
| 4 April | Deadline for delegates to send their submissions |
| 8 April | Secretariat distributes negotiation draft |
| 19-22 April | Twelfth Round of Negotiations (Zoom) |
| 29 April | Secretariat distributes revised negotiation draft |
| 2 May | Deadline for delegates to send their submissions |
| 6 May | Secretariat distributes negotiation draft |
| 17-20 May | Thirteenth Round of Negotiations (Brussels) |
| 27 May | Secretariat distributes revised negotiation draft |
| June (tbc) | Ad Hoc Energy Charter Conference in person aiming at reaching the agreement in principle (venue tbc) |
| September (tbc) | Meeting of the Modernisation Group on procedural issues regarding the adoption of the amendments (Brussels) |
| 22-23 November | Energy Charter Conference in person (Ulaanbaatar) |