



PUBLIC COMMUNICATION ON THE SECOND NEGOTIATION ROUND ON THE MODERNISATION OF THE ENERGY CHARTER TREATY

On 8-11 September 2020, the Second Negotiation Round on the modernisation of the Energy Charter Treaty (ECT) was held by videoconference.¹

Taking into account the list of agreed topics for modernisation of the Energy Charter Treaty (see Conference Decision [CCDEC 2018 18](#)) and the suggested policy options for modernisation of the ECT (see Conference Decision [CCDEC 2019 08](#)), the Modernisation Group has discussed this Round the following topics:

- Transit
 - 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
- Dispute settlement
 - Frivolous claims
 - Security for costs
 - Third party funding
 - Transparency
 - Valuation of damages
- Remaining topics from the previous negotiation round

The Modernisation Group discussed the aforementioned issues on the basis of text proposals submitted by the delegations. The goal of this Round was to explain and clarify the proposals and find common ground for the discussion without prejudice to any delegation’s final position.

The discussion on ‘Transit’ was based upon comments submitted by delegations pertaining to possible amendments of Article 7 ECT. These initial considerations focused in particular on the possible modification of the definition of “transit” with a view to reflecting recent developments. It was also suggested to introduce new language to clarify the main principles of tariff setting for the transit of energy resources, and on access to existing infrastructure, as well as grounds for denying this access.

¹ On 6 November 2019 (see Conference Decision [CCDEC 2019 10](#)), the Energy Charter Conference established and mandated the Modernisation Group to start negotiations on the modernisation of the Energy Charter Treaty, with a view to conclude negotiations expeditiously. The [First Negotiation Round](#) on the Modernisation of the Energy Charter Treaty took place on 6-9 July 2020.

In connection with ‘Sustainable development and corporate social responsibility’, delegations considered objectives related to sustainable development, environment, climate change and corporate social responsibility. The discussions included comments and proposals on the right to regulate, relevant multilateral environmental agreements, climate change and the clean energy transition such as the Paris Agreement, international standards of labour protection, responsible business practices, the conduct of environmental impact assessment and good governance (transparency).

During the deliberations on ‘Dispute Settlement’, several delegations took the view that a modernised ECT should reflect modern trends in treaty practice pertaining to the topics encompassed in the list of topics for modernisation of the Energy Charter Treaty ([CCDEC2018 18](#)), including discussions taking place in UNCITRAL and ICSID. Some delegations presented proposals to ensure the expedited disposal of unmeritorious and/or abusive claims and to avoid costs linked to the litigation of such claims. An initial discussion took place on proposals to regulate the issues of Security for costs and Third Party Funding in the context of the Energy Charter Treaty. It was generally felt that the Modernisation Group should further explore the possibility of increasing transparency in investor-State dispute settlement. The Group discussed if and to what extent the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration could be integrated. Some delegations stressed the need for maintaining a balance between transparency on the one hand, and other legitimate interests on the other. Discussions also took place on a proposal to regulate interventions by non-disputing parties and third parties to cases under the ECT. The Modernisation Group also had a preliminary discussion on questions relating to the valuation of damages.

Under the item ‘Remaining topics from previous negotiation round’, delegations availed themselves of the possibility to seek clarifications on comments and proposals discussed during the first round of negotiations (6-9 July 2020; see [Public Communication](#)). In this context, inter alia, a provision on Public Debt was discussed.

The Third Negotiation Round will take place by videoconference on 3-6 November 2020. The Modernisation Group envisages to address the following topics:

- Pre-investment
- REIO
- Obsolete provisions
- Remaining topics from previous negotiation rounds.

After the third round, the Modernisation Group will present a first progress report to the Energy Charter Conference.

No consensus was reached on a request by one delegation to discuss a broader reform of ISDS beyond the list of topics for modernisation ([CCDEC2018 18](#)).