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DECISION OF THE ENERGY CHARTER CONFERENCE

Subject: Report of the Modernisation Group on Progress Made in Fulfilling the Negotiations Mandate

The Energy Charter Conference at its 31st Statutory Meeting held on 16 December 2020 **took note** of the Report of the Modernisation Group on Progress Made in Fulfilling the Negotiations Mandate.

Keywords: Report, Progress, Modernisation Group

REPORT OF THE MODERNISATION GROUP ON PROGRESS MADE IN FULFILLING THE NEGOTIATIONS MANDATE

A. Background

1. In December 2017, the Energy Charter Conference (the Conference) agreed to launch a process with the aim of exploring the potential update and modernisation of the Energy Charter Treaty. After a scoping exercise conducted by a subgroup on Modernisation established by the Strategy Group, the Energy Charter Conference agreed on a list of topics for modernisation in December 2018.
2. On 6 November 2019, the Conference established and mandated the Modernisation Group (the Group) to start negotiations on the modernisation of the Energy Charter Treaty (ECT), with a view to conclude the negotiations expeditiously and to report on the progress made in fulfilling the negotiations mandate (CCDEC 2019 10). Against this background, the Group has prepared the present report.
3. Since the approval of its mandate, the Group has held five meetings: 11 December 2019, 2 June 2020, 6-9 July 2020, 8-11 September 2020, and 3-6 November 2020.
4. At its first meeting of 11 December 2019, in line with the approved mandate, the Group formed a steering group to support the work of the Chair and Vice-Chairs. It was confirmed that the steering group is of informal nature, cannot take any decisions and is open for all interested delegations. Also, the Group discussed procedural issues and a preliminary grouping of topics for negotiation rounds to be held in 2020.
5. In view of the outbreak of the Coronavirus disease (COVID-19), upon consultation with the Chairmanship and the Chair of the Modernisation Group, the first meeting of the Group in 2020 expected for the second half of April, had to be postponed to 2 June 2020. In addition, considering the general worldwide sanitary situation and the resulting travel restrictions, the negotiation rounds had to take place by Zoom videoconference (“on-premises”).
6. At its 2 June 2020 meeting, the Group approved the dates of the three negotiation rounds to be held in 2020 as well as the grouping of topics for each round based on the compromise proposal of the Vice-Chairs on the tentative schedule for 2020 (Message 1677 Rev). It was clarified that additional topics may be added if there is consensus on their inclusion among the Contracting Parties.
7. The steering group held five meetings: 20 May 2020 (chaired by the European Union), 30 June 2020 (chaired by Switzerland), 1 September 2020 (chaired by Georgia), 5 October 2020 (chaired by Japan), and 30 October 2020 (chaired by the Chair of the Modernisation Group).
8. Along with the Chair and the Vice-Chairs of the Modernisation Group and the Secretariat, the steering group was composed of the following delegations: Afghanistan, the European Union, Georgia, Japan, Kazakhstan, Switzerland, Turkey, the United Kingdom, and Yemen.
9. In addition, the Chair and Vice-Chairs of the Modernisation Group held an informal

briefing on the modernisation process on 3 September 2020 as part of the outreach efforts to involve all Contracting Parties in the negotiations.

B. Negotiations in 2020: Progress Report

10. The group agreed the aim of the three negotiation rounds in 2020 was to have an open discussion on the topics proposed for modernisation to gain a greater understanding of the topics and to ascertain initial impressions of the positions of the delegations. The group agreed that the progress attained in the three negotiation rounds of 2020 achieved this aim.
11. During the three negotiation rounds held in 2020, the Group considered (text) proposals, discussion papers and comments pertaining to the approved list of topics, without prejudice to delegations' final positions. The discussions adhered to the following schedule:
 - 6-9 July 2020: definition of "Charter", 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" (FET), umbrella clause, compensation for losses, definition of "indirect expropriation", denial of benefits, MFN clause, right to regulate, and transfers related to investments.
 - 8-11 September 2020: 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 outstanding issues related to the definition of "Investment" and the right to regulate, such as public debt.
 - 3-6 November 2020: pre-investment, REIO, obsolete provisions, and remaining topics from previous negotiation rounds (in particular, the Group discussed the following topics: definition of investment, definition of investor, right to regulate, most constant protection and security, frivolous claims, third party funding, security for costs).
12. The negotiation rounds were chaired by Mr Lukas Stifter (Austria), Chair of the Modernisation Group, together with Messrs Felix Imhof (Switzerland), Guy Lentz (Luxembourg), Samir Abdurahimov (Azerbaijan), and Sunao Orii (Japan) as Vice-Chairs.
13. 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, Japan, Jordan, Kazakhstan, Lithuania, Luxembourg, Republic of Moldova, Mongolia, The Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, the United Kingdom, Uzbekistan, and Yemen.
14. During the three negotiation rounds held in 2020, the following progress was made:

- *Definition of “Charter”*

15. The Group considered one text proposal and one discussion paper.
16. Several delegations supported the inclusion of the reference to the International Energy Charter in addition to the European Energy Charter in the definition of “Charter” in Article 1(1).

- *Definition of “Economic Activity in the Energy Sector”*

17. The Group considered one discussion paper. One delegation informed the Group that it was working on its text proposal and would submit it in due time.
18. Several delegations indicated their readiness to consider modifying Article 1(5) to cover new investment trends and technologies in the energy sector.

- *Definition of “Investment”*

19. The Group considered three text proposals and one basic position.
20. Delegations discussed in a preliminary manner whether investment should fulfil certain criteria.
21. Throughout the discussion on the topics relating to investment protection, one delegation proposed to consider whether the current provisions on investment protection serve well the objectives of the ECT, and, therefore, whether their current text should be maintained.

- *Definition of “Investor”*

22. The Group considered three text proposals and one basic position.
23. The discussion focused on the question whether an investor should meet the requirement of “substantial business activities” in the State of their incorporation or whether the current definition of an “Investor” serves well the objectives of the ECT and should, thus, be maintained. Furthermore, it was considered whether the current wording providing for both “nationality” and “citizenship” should be kept.

- *Clarification of “most constant protection and security”*

24. The Group considered two text proposals and one basic position. After discussions, one of the two delegations decided to withdraw its proposal in favour of the other one.
25. Delegations considered whether a possible clarification of “most constant protection and security” should limit this provision’s scope to “physical security” so that all other cases, such as legal security, are excluded.

- *Definition of “fair and equitable treatment” (FET)*

26. The Group considered two text proposals and one basic position. After a discussion, one of the two delegations decided to withdraw its proposal in favour of the other one with certain amendments to the wording. Another delegation suggested an amendment to the wording of the remaining text proposal.
27. In the discussion, delegations expressed different positions regarding the nature and scope of the elements contained in the proposed texts.

- *Umbrella clause*

28. The Group considered two text proposals and one basic position.
29. Delegations expressed their initial positions on the scope of the umbrella clause and whether it should be kept.

- *Compensation for losses*

30. The Group considered one text proposal and one discussion paper.
31. After a discussion, several delegations supported the submitted text proposal.

- *Definition of “indirect expropriation”*

32. The Group considered three text proposals and one basic position. One delegation joined one of the text proposals.
33. Delegations discussed whether a definition on “indirect expropriation” should be introduced. It was suggested that such definition should take into account the principle of proportionality such that that only “manifestly excessive” measures may qualify as indirect expropriation. Furthermore, some delegations noted that due consideration to the right to regulate should be given.
34. In general, the group expressed its general readiness to continue the discussion on the definition of “indirect expropriation”.

- *Denial of benefits*

35. The Group considered two text proposals and one basic position. Some delegations partially supported the text proposals.
36. During the debate, delegates discussed whether a more detailed procedure for the invocation of the denial-of-benefits clause could be introduced. In particular, it was noted that cases of corporate re-structuring for the sole purpose of benefiting from the Treaty could be addressed.

- *MFN clause*

37. The Group considered three text proposals and one basic position. Three delegations partly joined one of the text proposals.
38. In the discussion, delegations expressed different positions regarding the scope of the MFN clause.

- *Right to regulate*

39. The Group considered two text proposals for a new article (one of them included text for the Preamble) and one basic position. After discussion, one of the two delegations kept its proposal for the Preamble but withdrew its article proposal in favour of the other one (with one change). One delegation partly joined the remaining text proposal.
40. Delegates considered whether a stand-alone provision on the right to regulate should be included and to what extent existing provisions may sufficiently safeguard this right.

- *Transfers related to investments*

41. The Group considered one text proposal and one basic position. One delegation partly joined the text proposal.
42. Delegates discussed whether a modification of restrictions on/exceptions to the freedom of transfers related to investments should be contemplated.

- *Definition of "Transit"*

43. The Group considered two text proposals. The sponsors of these two text proposals agreed to prepare a joint text proposal.
44. Delegates discussed whether a possible clarification of the current definition of "Transit" was required or not. The delegates discussed the proposed definition of transit to reflect the latest trends and considered the definition of "maritime transport" for transportation of energy resources.

- *Access to infrastructure (including denial of access and available capacities)*

45. The Group considered four text proposals. The delegates addressed the rules for transparent and non-discriminatory access to existing infrastructure and existing facilities. Delegates discussed the definitions of "Access to Infrastructure", "Available Capacity" and "Allocation of Capacity", and also discussed specific criteria for when access to infrastructure can be denied.

46. Delegates discussed the definition of “International Energy Swap Operations”, also discussed the relation between the supply of energy materials and products based on virtual flows and swap operations.

- *Definition and principles of tariff setting*

47. The Group considered two text proposals. One delegation joined one of the text proposals.

48. The delegates discussed the basic principles of transit tariff setting, and considered the conditions for the possible use of a “congestion management mechanism”.

- *Sustainable development and corporate social responsibility*

49. The Group considered two text proposals. One delegation suggested amendments to the wording of one of the text proposals.

50. Several delegations proposed to introduce new articles/provisions on sustainable development and corporate social responsibility, whereas one delegation expressed its readiness to consider the need of including a separate provision.

51. The discussions included comments and proposals on international standards of labour protection and on relevant multilateral environmental agreements, climate change and clean energy transition, such as the Paris Agreement.

- *Frivolous claims*

52. The Group considered two text proposals. One delegation suggested to the delegations-sponsors of the text proposals to combine their proposals.

53. Several delegations were in support of introducing a provision on frivolous claims, building on existing mechanisms for the early dismissal of patently unmeritorious claims.

- *Security for costs*

54. The Group considered four text proposals. One delegation expressed partial support for some of the text proposals.

55. Several delegations supported the inclusion of a provision on security for costs, whereas one delegation expressed its readiness to discuss such inclusion. Some delegations proposed to take into account discussions held in other fora.

- *Third-party funding*

56. The Group considered four text proposals.

57. Several delegations supported the inclusion of a provision on the third-party funding in the modernised ECT.

- *Transparency*

58. The Group considered three text proposals. After a discussion, one of the three delegations decided to withdraw its proposal, whereas another delegation joined one of the two remaining text proposals.

59. It was discussed if and to what extent the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration could be integrated. In this regard, the need for maintaining a balance between transparency on the one hand, and other legitimate interests on the other was mentioned.

- *Valuation of damages*

60. The Group considered one text proposal. The delegation sponsoring the text proposal reserved its right to provide a more detailed text at a later stage. One more delegation reserved its right to table a text proposal at a later stage.

- *Outstanding issues related to the definition of investment and the right to regulate, such as public debt*

61. The Group considered one text proposal on the issue of public debt.

62. In this connection, a discussion took place whether public debt instruments should be excluded from the scope of the Treaty or whether the right to bring a claim in case of disputes related to public debt should, in particular sets of circumstances, be limited.

- *Pre-investment*

63. The Group considered one discussion paper.

64. Delegates expressed positions on the topic, while taking into account that the current text of the ECT stipulates that Contracting Parties shall endeavour to provide non-discriminatory treatment to investors from other Contracting Parties in the making of investments.

- *REIO*

65. The Group considered one text proposal.

66. Delegates considered a definition of the “Regional Economic Integration Organisation” in the context of the need to clarify the legal relationship between members of a REIO under the ECT.

- *Obsolete provisions*

67. The Group considered the list of obsolete provisions included in the policy options approved by the Energy Charter Conference (CCDEC 2019 08).
68. The Group requested the Secretariat to suggest specific text proposals for the list of obsolete provisions (deletion or rewording of each provision) without prejudice to the discussion by delegations on those provisions and keeping in mind the negotiations on other topics of the modernisation.

- *Other*

69. A suggestion made by one delegation to discuss a structural reform of ISDS, which is not part of the agreed list of the 25 topics for modernisation (CCDEC2018 18), did not reach consensus among Contracting Parties.

C. Outlook

70. Pending confirmation of the exact dates and of a more detailed work plan at the Group's meeting on 18 December 2020, the negotiations for the modernisation of the ECT will continue in 2021. The Chair invited the Group to consider holding four negotiation rounds in 2021 and to reflect upon the possibility of holding informal meetings ('workshops') between or in the margins of negotiation rounds, taking into account whether or not there should be positive significance of those informal meetings, and the burden which could be laid upon the delegations.
71. Further to this progress report, the Conference received a compilation of the three revised negotiation drafts, which are subject to point m ("Restriction of documents") of Conference decision CCDEC 2019 10. It is expected that one single document will be used during the negotiations in 2021.