ENERGY CHARTER SECRETARIAT **MOD 36 Restricted**

11 June 2021

SUMMARY RECORD OF THE MODERNISATION GROUP MEETING OF 1-4 JUNE 2021: FIFTH NEGOTIATION ROUND

Subject to no objections being received by 30 June 2021, this summary record will be considered as approved by the Modernisation Group.

1. The meeting (open only to Contracting Parties to the Energy Charter Treaty) took place via Zoom videoconference chaired by *Mr Lukas Stifter,* Chair of the Modernisation Group, with *Mr Sunao Orii*, *Mr Guy Lentz*, and *Mr Felix Imhof* as Vice-Chairs. It was attended by Armenia, Austria, Azerbaijan, Belgium, Cyprus, Czech Republic, Estonia, the European Union, Finland, France, Germany, Greece, Hungary, Japan, Jordan, Kazakhstan, Lithuania, Luxembourg, Republic of Moldova, Mongolia, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Turkey, Turkmenistan, Ukraine, the United Kingdom and Uzbekistan.

Approval of the Agenda (Message 1804/21 Rev)

2. *The agenda as set out in Message 1804/21 Rev was approved.*

Approval of the summary record of the meeting of the Modernisation Group of 2-5 March 2021 (MOD 34, Message 1805/21)

3. *The Modernisation Group approved the Summary Record of the Modernisation Group meeting held on 2-5 March 2021, taking into account the comments received from Japan (Message 1805/21).*

Debriefing of the steering group

4. *Azerbaijan* and *Switzerland*, who chaired the meetings of the steering group on 27 April and 26 May 2021, respectively debriefed the delegates.
5. *The Modernisation Group took note of the debriefing of the steering group.*

Policy regarding access to audio recordings of the negotiation round

6. *The Chair* explained that neither the Mandate (CCDEC2019 10) nor the Procedural Rules of the Conference contain any specific policy regarding access to audio recordings of the meetings of the subsidiary bodies. According to point 1 of the Mandate, at the end of the negotiations, recordings of the meetings of the Modernisation Group will be part of the travaux. *The Chair* suggested having a policy for acceding to the audio recordings similar to the one used for the audio travaux on the ECT (CCDEC2016 24), which is to allow to listen to audio recordings at the Secretariat's office but without providing a copy.

7. *Japan* noted that the Secretariat would need to establish a strict system for identification allowing only representatives of Contracting Parties to accede to the audio recordings and keeping a registry of those who accede to them. At the same time, there should be a good system to ensure the protection of the audio recordings allowing to stream them without copying them.

8. *The Modernisation Group approved the policy regarding access to audio recordings of the negotiation round as suggested by the Chair, taking into account Japan's comments.*

Negotiation

- *Transfers related to investments*

9. *The Secretariat* explained that the Decision with respect to Article 14 could be considered as an obsolete provision because only the Russian Federation notified the Secretariat within the deadline indicated in para 3 of the Decision of its intention to apply restrictions in accordance with the Decision. As a result, the Decision does not apply anymore.

10. *Japan* explained that the intention of the suggested chapeau of Article 14(4) was to achieve better clarity and to have the limitation at the beginning (in line with its recent treaty practise) to make sure that prevention or delays only happen in the cases listed. *Japan* further explained that the wording "equitable, non-discriminatory and good faith" refers to the modality, how the laws would be applied. *Turkey* mentioned that the language suggested by Japan seemed inspired by NAFTA and CPTPP, and that the term "equitable" (fair) was not the same as "non-discriminatory". *Kazakhstan* noted that such wording ("equitable, non-discriminatory and good faith") already appears in the current wording of Article 14(4) ECT.

11. *The European Union* could join Japan's proposed chapeau to Article 14(4) provided that the text is clear. *Switzerland* suggested adding to Japan's chapeau the wording "as far as this does not constitute a disguised restriction on transfers" coming from the EU's proposal. *Turkey* and *Azerbaijan* supported Japan's chapeau with the suggested addition of Switzerland. *The United Kingdom* still supported the EU's chapeau and put a scrutiny reservation over the chapeau proposed by Japan. Finally, *Switzerland* suggested a compromise wording for the chapeau of paragraph 4.

12. *Kazakhstan* asked to add "and *other* regulations" in every text proposal since otherwise, it did not make sense in Russian.

13. *The European Union* and *Kazakhstan* suggested deleting the wording "futures, options" from paragraph 4(b) since it was already covered by the term "securities", while *Azerbaijan* suggested replacing it with "equities". *Japan* explained that the wording "securities, futures, options" comes from Article 9.9.4.b of the CPTPP. Similar wording is also in Article 9.3.1.b of the EU-Japan Economic Partnership Agreement ("in securities, or futures, options").

14. *The EU* clarified to Japan that the wording "deceptive or fraudulent practices" in para 4(d) comes from Article XIV(c)(i) of GATS. *Japan* noted that while a similar wording was also in Article 9.3.1.d of the EU-Japan Economic Partnership Agreement, such provision was included in a section dealing with "trade in services, investment liberalisation and electronic commerce", and no other agreement entered into by Japan contained similar wording for transfers related to investments.

15. *Turkey, UK, Switzerland* expressed their support to paragraph 7 proposed by the EU. *Japan* (following its treaty practice) suggested including a sub-paragraph (f) requiring to notify other Contracting Parties in such circumstances. The *EU* had a reservation to such an addition. *Japan* asked whether paragraph 7 refers only to FDI, and Azerbaijan replied that Article 14.1 also refers to payments under Articles 12 and 13, and paragraph 7 refers to the IMF agreement.

16. *The European Union* clarified again that the proposed footnote to paragraph 7 was usually required by the EU trade partners to clarify who can take those measures. It applies to EU Member States who are not members of the Eurozone, while proposed paragraph 8 applies to EU

Member States who are members of the Eurozone. New wording was proposed for paragraph 8 to cover also other Contracting Parties.

17. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Definition of 'transit'*

18. *Kazakhstan* and *Turkmenistan* clarified that freedom of transport should not be restricted, so the idea is to cover "any means of transport" without conflicting with other international agreements. *Kazakhstan* noted that they do not intend to cover whatever goes under the sea.

19. *Turkey* was sceptical and had a reservation about deleting the word "land" in Article 1(5). It considered necessary to check whether there would be no conflict with applicable maritime conventions.

20. *Japan* had concerns about consistency with existing international agreements on international transportation as well as the impact on conventions on the law of the sea (e.g. issues related to access). It also raised concerns on how to distinguish which ships are energy-related and what would be the impact in the context of maritime transport. Finally, it enquired whether an exception clause would be needed for cases where sanctions are applicable.

21. *The European Union* questioned the deletion of the word "land" in Article 1(5) since this article is linked to investment, not to transit. This would expand the scope of protected investments without particularly expanding the scope of transit. *The EU* considers that the actual wording of Article 7(10) already covers maritime transit and did not understand why the reference to the "port facilities in its Area for loading or unloading" was deleted from Article 7(10)(a)(i). *Kazakhstan* and *Turkmenistan* explained that deletion of the reference to port facilities was done at the request of some delegations and was open to considering other proposals.

22. *The Secretariat* noted that Article 7(8) expressly refer to the non-derogation of a Contracting Party's rights and obligations under international law, including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines. If needed, it could be considered a rewording of such a paragraph to address concerns regarding transportation conventions. In response to Japan, the *Secretariat* clarified that sanctions are already covered by Article 24(3)(a)(i) and that UN Security Council sanctions would, in any case, prevail over any obligation of the ECT according to the UN Charter (as was expressly confirmed during the negotiations of the ECT). *The Secretariat* also confirmed that changes to Article 1(5) would affect the coverage of protected investments (e.g. to cover investments related to maritime transport), not the transit.

23. *The United Kingdom* supported the EU proposal for Article 7(7bis). There was no opposition from the group on such a new paragraph. In addition, *the European Union* suggested using the term "virtual flows" (included in its proposal of Article 7(7bis)) while *Kazakhstan* and *Turkmenistan* prefer to keep the wording "virtual exchange" in their proposed Article 10(a)(iii-iv). According to *Kazakhstan*, the very nature of transit swap operations is "exchange", not flows.

24. Turkey, the *EU* and *Switzerland* had concerns about coverage of "non-fixed" facilities in the proposed change to Article 7(10)(a) and asked whether there were any compelling reasons for such change as well as whether such term would cover something else than ships (since LNG terminals and ports were already covered by "other" fixed facilities). *Kazakhstan* stated that it did not experience any particular problems but wished to extend the scope to "non-fixed facilities". *Azerbaijan* referred to the Transcaspian transportation system. Floating LNG facilities

and terminals were mentioned as examples.

25. *The Chair* suggested holding an informal workshop on transit issues and invited delegations to provide their concerns and comments in writing to facilitate the preparation of an explanatory note by the Secretariat to facilitate the discussion. *Kazakhstan* welcomed the proposal to have an informal workshop and warned that for it to be useful many Contracting Parties should participate and express their position. *The EU*, *Japan* and *Azerbaijan* also welcomed the organisation of the informal workshop.

26. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

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

27. *The EU* and *Switzerland* considered that the proposed exception of Azerbaijan in Article 7(1) regarding international and national security was already covered by Article 24 (exceptions), and there was no need to highlight such exception. It could also create a conflict between both provisions (particularly, considering that Article 24 requires that measures should not constitute a disguised restriction on transit). It was suggested to have just a reference to Article 24. However, *Azerbaijan* preferred to include the reference in Article 24(3) to clarify that the exception in Article 7(1) should not constitute a disguised restriction on transit. *Kazakhstan* and *Turkey* supported the proposal of Azerbaijan for Article 7(1), which could be useful to transit.

28. *Turkmenistan* asked Azerbaijan to provide examples of concrete situations and reserved its position on the suggested wording. *Azerbaijan* stated that it could not provide an actual example but noted that such security concerns could arise in an emergency situation in the region.

29. According to *Switzerland*, the wording "generate concerns" was vague and wider than the current provision of Article 24(3) "for the protection of its essential security interests". *Azerbaijan* replied that the wording "generate concerns" was borrowed from the 2017 Ashgabat Energy Charter Declaration (CCDEC 2017 17) and came from the EU. To clarify this, *Azerbaijan* proposed to include a footnote with reference to the Ashgabat Energy Charter Declaration.

30. With respect to proposed Article 7(2bis), *the European Union* referred to its Energy System Integration strategy and hesitated to have very detailed provisions on transit; *the EU* preferred to keep the general rules already included in Article 7, which was already comprehensive enough, with just minor additions on transparency and virtual flows.

31. *Kazakhstan* stressed that while it supported sustainable development and is a party to the Paris Agreement, the energy transition will take some time. In the meantime, pipelines would still be important, so *Kazakhstan* wants to enlarge the transit provisions since they are an important part of the ECT, which is the only multilateral agreement explicitly covering energy transit. Those transit proposals are not only relevant for hydrocarbons and will benefit energy-producing, transiting and importing countries. *Turkmenistan* supported including details to the transit provisions since the discussions on the "Multilateral Framework Agreement on Transit of Energy Resources" that took place during its Chairmanship in 2017 did not materialise at the end.

32. *Azerbaijan* supported having more detailed provisions on transit but considered that some of the proposals in Article 7(2bis) refer to technical issues of the transmission/transportation

rather than to transit itself.

33. *The United Kingdom* could consider the proposals in Article 7(2bis), but additional discussions were needed since, as an example, auctions were not mentioned in the proposed Article 7(2bis)(f) while they are an effective mechanism for allocation of capacities. *The European Union* also had a similar concern, since auctions are used in the EU for capacity allocation with time limitation (that is why the EU suggested wording in Article 7(5) regarding renewal of expired contracts). *Kazakhstan* clarified that the reference to auctions in its initial proposal was removed since a delegation objected to it.

34. *Azerbaijan* clarified its proposal of an exception of "national security and serious safety implications" in Article 7(6): the term "security" is political, whereas "safety" is more technical. *Switzerland* noted that "safety", in principle, seems to be linked to the exceptions included in Article 24(2)(b)(i) ("necessary to protect human, animal or plant life or health").

35. *Japan* and *Switzerland* mentioned it would be difficult to include all potential activities related to sovereignty over energy resources in Article 18(1). *Azerbaijan* clarified that the wording of Article 18(1) was very general and sought to provide clarity, explicitly mentioning the main phases of exploration, transportation and transit. *Switzerland* noted a potential contradiction since a transit country could not exercise sovereignty over energy materials and resources transiting through its territory (which by definition should have originated in a different country).

36. *France* raised concerns on whether Azerbaijan's proposal was beyond the topic of transit and therefore outside the scope of the Mandate of the Modernisation Group.

37. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Definition and principles of tariff setting*

38. Given the similarities, *Uzbekistan* decided to withdraw its proposal and join the proposal tabled by *Kazakhstan* and *Turkmenistan*. *The United Kingdom* noted its proposal also had similarities, but although "transparency" (as foreseen in the proposal of *Kazakhstan* and *Turkmenistan*) is related to publication, the UK still considered it necessary to keep an express requirement for the publication of the terms, conditions and tariffs. *Kazakhstan* supported the UK's request for a publication, which was introduced into a merged proposal for Article 7(2ter).

39. *Kazakhstan* explained that in its proposal, "reasonable" meant that a tariff would need to generate reasonable profit to cover all expenses incurred. Such a term is used in other treaties as well as in national legislations.

40. *The European Union* noted that in many Contracting Parties, pipelines are run by one or a conglomerate of companies that very often have a dominant position; therefore, to avoid imposing high tariffs, the EU asked what could a Contracting Party do to avoid such market distortion, how to implement the proposed Article 7(2ter)(b) in case of market distortion. *Kazakhstan* referred to sub-paragraph (d).

41. Regarding the proposal of *Kazakhstan* for Article 7(7)(c), *the Secretariat* explained that in the past, some concerns were raised about the wide discretion of the conciliator to impose compulsory interim tariffs (for 12 months) under the conciliation mechanism for transit disputes. *The European Union* consider there was no particular reason for such limitation.

42. *Turkey* raised concerns about the compatibility of those transit proposals with the existing Host Government Agreements (HGAs) and Intergovernmental Agreements (IGAs) for pipelines. The Secretariat referred to Article 7(8) of the ECT, which clarifies the priority of those multilateral/bilateral agreements on pipelines. Another example was in the final wording of Article 7(6), which contains an exception for the obligation not to interrupt or reduce transit if it is expressly provided for in the contract or agreement governing such transit.
43. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Sustainable development and corporate social responsibility*

44. *The Secretariat* explained how it structured the text proposals in the Working Document for the Fifth Round of Negotiations (Room Document 2) and asked about the preferred structure to be followed (either modifying Article 19, which also refers to sustainable development or in a new article devoted to sustainable development) to facilitate further discussions.
45. *Japan* explained its text proposal and preferred Article 19 to be the basis of discussions (instead of creating additional articles) as it is the main reference to the environment and sustainable development in the Treaty. While some additional issues as included (e.g. CSR and the right to regulate), changes should not be too ambitious and should be coherent with existing practice.
46. For *the United Kingdom*, *the European Union* and *Switzerland,* the structure was not a concern and substance was more important. They, however, agreed on the need not to overload Article 19 and to implement existing commitments without introducing new obligations. Nevertheless, *the European Union* proposed to cover not only environmental aspects but also labour protection (supported by Switzerland), climate change, the right to regulate, and key international standards. *Switzerland* proposed to introduce a specific Part entitled sustainable development instead of locating the provision of sustainable development in the Part entitled "Miscellaneous Provisions".
47. *The Secretariat* suggested using Article 19 as the basis and modifying its title to "Environmental Aspects and Sustainable Development".

Regarding the Context and Objectives

48. *The European Union* insisted on the existing link between social, labour and environmental protections in the context of sustainable development.
49. *Switzerland* suggested moving the first paragraph of the EU proposal to the preamble. *The European Union* could consider it. *Japan* and *Azerbaijan* could also consider it but with a more general wording (without reference to labour) and reserved their position.

Regarding Corporate Social Responsibility/ Responsible Business Practices

50. In reply to the UK, *the European Union* clarified that while its proposal did not contain an obligation to impose CSR obligations on companies, the inclusion of a specific wording stating the voluntary character of CSR may have a negative/discouraging effect. It also clarified that the ILO Tripartite Declaration was considered an authoritative document

regarding the labour standards that companies should consider and that labour rights should be covered. There was no harm in expressly mentioning some of the relevant international instruments that should be promoted, providing a good indication/reference (without imposing them) to companies about what was considered by CSR. *The United Kingdom* and *Japan* preferred to reaffirm the importance of CSR without imposing legal obligations on companies (therefore, the express reference to "voluntary" incorporation).

51. While *Japan* recognised the importance of environmental aspects, it had concerns about how much the scope of the ECT could be extended. The ECT deals with energy and should be kept limited to such industry without encompassing other issues related to economic activities in general. In particular, labour issues are complex and different Contracting Parties have different views on that matter. Therefore, addressing labour rights would unnecessarily delay negotiations. *Turkey* agreed with Japan (since otherwise, it would be difficult to apply the ECT) and supported a concise text without detailing international instruments.

52. *Azerbaijan* made a reservation to any reference to labour protection in the ECT. *Japan* and *the United Kingdom* also reserved their positions.

53. In reply to France, *the United Kingdom* clarified that their proposal targeted not only foreign investors operating in the Area of a Contracting Party but also investors "subject to its jurisdiction" (therefore, national companies investing abroad). *The European Union* noted that its proposal refers to all investors without limitation (therefore, including also nationals investing abroad).

54. *Switzerland* preferred the wording "responsible business conduct/practices" (as mentioned in the EU proposal) over "corporate social responsibility", as the latter might include some component of philanthropy. *Switzerland* suggested to expressly refer to international standards which each Contracting Party has endorsed (since, for example, not all Contracting Parties have endorsed the OECD Guidelines for Multinational Enterprises). *The European Union* found such a proposal constructive.

55. *The European Union* preferred to use the term "shall" (or other strong wording) over "should" to make it clear that while no obligations are imposed, CSR is a serious and important matter.

56. *Turkey* supported Japan's proposal, and *Switzerland* supported the EU's proposal with the change suggested. *The UK* supported the first paragraph of the EU's proposal.

Regarding the right to regulate

57. *The European Union* considered that the broader the scope of this provision, the better, while *Azerbaijan* could support the EU proposal with a reservation on the reference to labour. *Switzerland* preferred not to duplicate provisions on the right to regulate. *The European Union* clarified that both provisions had different functions and play a different role: the proposed provision on the right to regulate in Part III concerned the investor-state relations (and would be subject to Article 26), while the provision related to sustainable development was more relevant for the relationship between Contracting Parties (and not subject to Article 26).

58. *The European Union* could support the UK's wording "climate change mitigation and adaptation" but put a scrutiny reserve. *Japan* could also consider including a reference to climate change, but the wording will depend on the context. The proposals of the EU and UK were merged with the request of the EU to keep the wording "in a manner consistent with this Part."

Regarding the weakening or reducing the levels of protection

59. The two proposals were similar, so they were merged (including a reference to investment in energy) keeping two main options: (i) "shall not" (for consistency purposes with other provisions) / "it is inappropriate to"; and (ii) the reference to trade and labour.
60. In addition, Japan explained that wording similar to its proposed paragraph 3 could be found in the CPTPP, Article XX GATT and Article 16.2(3) of the EU-Japan Economic Partnership Agreement
61. *Kazakhstan* asked to delete the word "standards" since it was not relevant in this context, at least in the Russian version. It preferred to use the term "laws" and qualify "*other* regulations" (since otherwise, it did not make sense in Russian). *The European Union* clarified that the wording "laws and regulations" is the one used by the ECT, so preferred to have consistency; and that, in English, "laws" are different from "standards".

Regarding the impact assessment

62. In reply to Turkey, *the European Union* agreed to replace the wording "production of energy goods" with the language from Article 19(i): "*energy investment projects with significant environmental impact*". *Kazakhstan* supported this suggestion.
63. *Switzerland* asked whether it should always be an "environmental" impact assessment. *The European Union* agreed to delete the reference to "environment".
64. *Japan* proposed to delete "in its legislation" from the provision at issue. *The European Union* agreed.

Regarding the reference to multilateral environmental agreements

65. *Turkey* showed discomfort in language reinforcing the implementation of other international agreements instead of just referring to them. *Japan* was of a similar opinion, in particular regarding references to labour instruments. *The United Kingdom* also shared the preference for simple reference without requiring implementation; therefore, its proposal used the term "reaffirm" as a reminder without expressly requiring compliance.
66. *Azerbaijan* was not against a general reference to sustainable development, excluding labour instruments, and noted that the EU's proposal was too broad, whereas the ECT was confined to the energy sector.
67. *The European Union* again recalled that it considered social, labour and environmental protections as aspects of sustainable development.

Regarding Climate Change and Clean Energy Transition

68. *The European Union* stated that the provision at issue was a core part of the modernisation process for the EU and its Member States, as well as a specific requirement from its stakeholders. It was not EU-specific, and they have little margin for manoeuvre; in particular, the proposed sub-paragraph (a) was a must-have. Nevertheless, *the European Union* appreciated the different circumstances of the Contracting Parties.
69. *Turkey* also considered this issue a critical one, kept its reservations and suggested addressing the issue bilaterally with the EU.

70. *Switzerland* expressed support for the proposed article. *Azerbaijan* also supported the proposal with certain amendments: qualifying "*adverse* impacts" and using the expression "climate resilient *pathways*" instead of "development".

71. *Japan* supports addressing climate change but has reservations on whether this should be part of the ECT (which is a treaty focused on the energy sector) and whether specific commitments regarding other international agreements should be covered in the ECT. *Kazakhstan* agreed with *Japan* and noted that, while it also supports sustainable development, each country has its own way of development in line with its energy policy.

72. *The United Kingdom* would further need to consult internally but was concerned about proposed sub-paragraph (c) and the connection with low carbon technologies (i.e. in case of removal of subsidies for some low carbon technologies that are already market viable). *The United Kingdom* also was concerned about potential implications with other ECT provisions creating potential expectations of investors. *The European Union* expressed its readiness to discuss the matter bilaterally.

Regarding transparency

73. There were no comments.

Regarding the dispute settlement of environmental disputes

74. *Switzerland* expressed support for *the European Union's* proposal.

75. *Japan* was not in favour of extending the scope of the ECT, while the current Article 19(2) provided a dispute settlement mechanism that may suffice. *Kazakhstan* and *Japan* put a reservation.

76. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Frivolous claims*

77. *Switzerland* noted the potential risk of overlap between the two types of objections and preferred to consider an approach similar to ICSID Article 41 (Working Paper 4). Also, for coherence and predictability. While preparing a compromise proposal, *the Secretariat* could be inspired by this provision.

78. *Japan* agreed, in principle, to address the issue of frivolous claims. However, the scope of all proposed articles on dispute settlement, except valuation of damages, should be limited to arbitration and conciliation pursuant to Article 26(4). Those new articles should not apply to other dispute resolution methods available under Article 26(2). *Japan* did not consider it necessary to have two different proceedings to deal with frivolous claims. Since there was no consensus on the time frame in ICSID, it was better to use language similar to the UK's proposal.

79. *The European Union* and *the United Kingdom* explained the reason behind the two different procedures, with different thresholds and objectives. Both agreed that a strict deadline of 30 days might be too ambitious, and the 45 days deadline contained in the ICSID proposal was considered. *The European Union* was flexible about the structure (one or two articles) as far as

paragraphs 3 and 4 of its proposal remain. *Japan* could support the main idea behind paras 3-4 of the EU proposal but had a reservation on the language.

80. *The European Union* elaborated that its proposal would promote the economy of resources and wanted to extend it to other dispute resolution methods other than arbitration (though maybe not domestic courts) not to allow investors to deliberately avoid ICSID (since its rules contain a similar provision). *The European Union* noted that similar procedures are already included in some treaties (such as CPTPP).

81. *Kazakhstan* supported the inclusion of one article entitled "frivolous claims" and preferred the UK's wording with the hope that the EU and the UK would find a compromise since their proposals had many similarities. *Kazakhstan* was against imposing a specific deadline for the filing of the objection and preferred to use the UK approach of referring to the possibility of submitting the objection before the first session of the tribunal (and to have the decision at such first session).

82. *Turkey* supported the EU proposal and preferred "frivolous claims" as a title.

83. *The European Union* mentioned that usually ICSID tribunals do not have their first session within 30/45 days of its constitution and had concerns about the limitation to file an objection in paragraph 2 of the first UK's proposal ("disputes manifestly without legal merit").

84. *The European Union*, *Turkey* and *Switzerland* supported including an explanation of what is covered by the objection in paragraph 1 of the EU proposal, using some wording from the ICSID text (WP4). *The Secretariat* suggested replacing the "Centre" (which refers to ICSID) for the "arbitration centre" since other arbitral institutions may be involved in disputes under the ECT (such as the Permanent Court of Arbitration or the Arbitration Institute of the Stockholm Chamber of Commerce).

85. *Georgia* raised some practical issues (it always takes time to investigate the facts before being able to file an objection) and reminded that, in its view, frivolous claims also cover parallel proceedings and jurisdictional objections. Therefore, *Georgia* suggested addressing frivolous claims in a more comprehensive manner by considering not only the procedural perspective but also substantive issues. It proposed introducing a separate provision on abuse of procedure that could include two elements: (i) abuse of corporate identity (forum shopping); and (ii) multiple/parallel proceedings. *Switzerland* and *Georgia* suggested that the Secretariat prepares the initial drafts. *The European Union* mentioned that earlier it had also suggested a provision addressing parallel proceedings and multiple claims.

86. Finally, the Secretariat shared an informal draft timeline to facilitate the comparison of the different proposals. It would be included in the revised negotiation draft.

87. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Valuation of damages*

88. *The European Union* reminded that it had to withdraw its original proposal on allocation of costs following the request of *Japan*, while paragraph 2 of Japan's recent proposal addresses the same issue. It further considered paragraph 1 of Japan's proposal not about "valuation" but about available remedies. *Japan* took note and was ready to withdraw its proposal on allocation of costs if nobody was willing to discuss it. *Switzerland* stated that it was prepared to consider the allocation of costs based on the "loser pays" principle. *The European Union* was also interested

in discussing the allocation of costs based on their initial proposal.

89. *Japan* could consider streamlining its proposal in paragraph 1 if some elements are already covered in Article 26(8) and will reflect on it. Its idea was to clarify in the ECT the Mandate given to the arbitral tribunal: which remedies can be awarded, not allowing punitive damages and consider the allocation of costs.

90. To facilitate the discussion, *the Secretariat* merged the proposals and clarified that Article 26(8) allows to pay monetary damages instead of a non-pecuniary remedy only in cases involving measures from sub-national governments or authorities, so the proposal of Japan would expand it to all cases when restitution of property is involved (but not other non-pecuniary remedies). *Japan* would need time to reflect on it.

91. *The European Union* clarified that its proposal was aimed at various dispute resolution mechanisms but could consider excluding domestic courts from the scope of application. *Japan* stated that while it prefers to restrict the provision on the allocation of costs only to arbitration proceedings, part of its proposal could also apply to domestic courts. However, *Japan* would prefer to negotiate on substance before discussing the potential extension to domestic courts.

92. In reply to Japan, *the European Union* noted that the term "loss suffered" in its proposal does not include future profits *per se* (though they could be factored into the valuation of a company). *Japan* had a reservation since the EU's approach might be far more restricted than existing arbitral case law. *Japan* also kept its reservation on the last paragraph of the EU's proposal regarding valuation criteria based on internationally recognised principles and norms.

93. *The European Union* asked whether Japan's paragraph 1(b) suggested that monetary damages were equal to the value of the property at the time of the expropriation. *Japan* would come back on it. *The United Kingdom* enquired under which circumstances the tribunal would award restitution of property, and *the Secretariat* replied that it was not aware of any such cases under the ECT but would look into it.

94. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Transparency*

95. *The United Kingdom* and *Switzerland* could agree on the proposal of Japan to refer to Article 26(4). On the contrary, *the European Union* still preferred a general reference to Article 26 order to apply the transparency provisions also to Article 26(2)(b).

96. While there was general support for the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (taking into account Japan's reservation), there was less support on the additional provisions suggested by the EU.

97. *Japan* did not support enlarging the types of documents to be made disclosed (sub-paragraphs (a)-(c) in paragraph 1 of the EU's proposal) because it would overburden parties to the dispute and had concerns about who would receive the information disclosed (sub-paragraph (d) in paragraph 1 of the EU's proposal). *Japan* was also not in favour of paragraph 2 of the EU's proposal extending the transparency requirements to state-state disputes since it would complicate those proceedings.

Regarding the Non-Disputing Party to the Treaty and other Contracting Parties

98. *Japan* once again explained its reservations to the new article suggested by *the European Union*. In particular, *Japan* clarified that parties could already provide their submissions in writing, so there was no need to allow for oral comments by non-disputing parties. *The European Union* mentioned that oral submissions were becoming common treaty practice (e.g. Article 9.23 CPTPP). *Turkey* needed more time to consider the proposals on transparency.

99. *The Chair* suggested considering an informal workshop on the topic of transparency if needed.

Regarding intervention by third parties

100. *Japan* had concerns about the proposal of the EU on intervention by third parties, in particular regarding the obligation to accept those requests for intervention ("the tribunal shall permit") without knowing the criteria for considering who has a direct and present interest in the result of the dispute. Also, the topic was already covered by ICSID and other arbitration rules, so there is no need to include it in the ECT. *The European Union* clarified that this proposal is not the same as *amicus curiae* by NGOs or other third parties (as covered by the UNCITRAL transparency rules), but the intervention of directly affected third parties such as the community impacted by an energy project.

- *Security for costs*

101. *Switzerland* asked to consider the ICSID proposal (Rule 53 in Working Paper 4) as a fourth column. *Switzerland* wished to guarantee equality of arms by allowing the application of security for costs to both parties. It could support paragraphs 1 and 2 of the UK proposal for the purpose of drafting compromise proposals. *The European Union* replied that it would be surprising to see an investor asking for security for costs, so its proposal only refers to a request from the respondent.

102. *Japan* supported the introduction of an article on this topic but limited it to Article 26(4) of the ECT. Arbitral tribunals should consider a request for security costs on a case by case basis and take into account all the relevant circumstances, some of which were outlined in its proposal. *Japan* also expressed support for paragraphs 2-3 of the UK's proposal and paragraph 2 of the EU's proposal.

103. *Turkey* stressed the importance of this article and expressed support to paragraph 2 of the EU's proposal instead of its paragraph 3.

104. *Kazakhstan* supported the UK's proposal as a basis for the discussion.

105. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Third party funding (TPF)*

106. *Japan* had a reservation on the definition of TPF and was concerned by the obligation to disclose the beneficial owner of a third-party funder in the EU's proposal since there could be multiple beneficial owners making it very difficult to comply with such obligation. The *European Union* clarified that the information on beneficial owners was required to avoid

situations when the latter are just "shells".

107. *The European Union* could agree with part of paragraph 1 of the UK's proposal referring to the inclusion of "any other Contracting Party or third State". It could also agree in principle with paragraph 3 of the proposal of Turkmenistan and Turkey regarding "doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence" with a modified wording (though it may not be needed to expressly write it down since this was precisely the essence of the disclosure). In relation to paragraph 4 proposed by Turkmenistan and Turkey, *the EU* considered that those commitments were not always relevant. *The EU* could also support Japan's proposed wording.

108. *Turkmenistan* clarified that the powers of tribunals were currently limited, and the parties could provide redacted documents; its proposals also sought to eliminate any conflict of interest in relation to funders, and there was no threat of possible leakages of disclosed information as arbitral proceedings are highly confidential.

109. *The Modernisation Group took note of the comments and positions of the delegations as well as of the progress made at the meeting, which will be reflected in MOD 33 Rev 4.*

- *Definition of "Economic Activity in the Energy Sector"*

110. *Azerbaijan* observed that there was a need to take into account the circumstances of different groups of Contracting Parties. Energy transition should be reflected as a gradual process without a fixed, specific timeline. Therefore, it has a reservation on the EU's text proposal. Also, some technical terms used in the EU's proposal needed to be defined and further clarified (e.g. "low-carbon gas" or "infrastructure"). Phasing out the protection of certain energy investments would require a double approach: (i) checking compliance with commitments in bilateral investment treaties; and (ii) avoiding divergences with other parts of the ECT. Finally, *Azerbaijan* suggested including a specific reference to the principle of Common but Differentiated Responsibilities (CBDR).

111. *Japan* stated that this is one of the most important and contentious topics. *Japan* cannot support the EU proposal since no singular model for addressing energy transition should be imposed. It is important to consider the individual commitments and circumstances of each Contracting Party. Furthermore, there should be a balanced energy transition to avoid undermining energy security, which is still an important issue.

112. *Kazakhstan* supported Japan and noted that it could not agree with the EU proposal with a specific timeline since hydrocarbons would still be used during the energy transition.

113. While still developing its official position, *Switzerland* made several preliminary observations and supported the reference to the CBDR principle since commitments are different from one country to another (so the EU's proposal may not be pertinent to non-EU countries). *Switzerland* also had concerns about specific deadlines (e.g. aviation fuels are delivered to airports by pipelines, and it is highly unlikely that aviation fuels will disappear by the timing proposed by the EU, so infrastructure needs to be maintained). There is a need to consider not only energy security but also safety (investors may start neglecting the safety of infrastructure at the end of the deadlines, e.g. cybersecurity). In addition, the concept of "net-zero" does not mean that hydrocarbons would be totally eliminated (e.g. some EU Member States have ongoing projects on the exploration phase for which production may start after the proposed deadlines for the phase-out). *Switzerland* suggested the EU to explore a proposal on Article 26(3) to prevent possible fossil-fuels related arbitrations against the EU, allowing the

other Contracting Parties to decide by themselves their own energy transition.

114. While *Turkey* is still considering its official position, it shared the reservations of the previous delegations. *The United Kingdom* also considered it a difficult topic and was not ready to give its official position. *Turkey*, *Kazakhstan* and *the UK* were interested in knowing whether there had been any stakeholder engagement for the EU proposal, consultation with the industry (including the Industry Advisory Panel) and/or impact assessment as to the effects of the proposal on investments under the ECT.

115. *Switzerland* referred to the paper under discussion at the Strategy Group on energy investments under the ECT. According to *Switzerland*, there were three types of investments: (i) in renewables (no problem); (ii) upstream oil and gas (no problem since they have their particular dispute resolution clauses); and (iii) in between companies, such as pipeline operators, who would be the most impacted by the EU proposal.

116. *The European Union* clarified that it was not proposing the phasing out of fossil fuels but the protection of investment in fossil fuels. It could not be considered a Eurocentric proposal since its main principle could hardly be challenged and is a matter that affects all Contracting Parties. In support, the EU referred to the recent IEA report (Net Zero by 2050: A Roadmap for the Global Energy Sector). Nevertheless, the EU took note of all the concerns expressed and would reflect internally looking into alternatives. *The EU* was firm on principle but flexible on the implementation.

117. *Japan* noted that the IEA report is just one of the several paths towards the goal. There is no single, uniform path.

Adoption of the Public Communication (Room Document 1, Room Document 1 rev)

118. *The Modernisation Group* discussed and finalised the public communication (point m of CCDEC2019 10) based on the working draft, which had been circulated as a Room Document 1. A revised version based on comments received was circulated before its publication on the public website of the Secretariat on 4 June 2021.

Any other business

119. At the suggestion of *the European Union*, the Modernisation Group addressed the Informal Roadmap (MOD 35). *The European Union* proposed to increase the number of informal drafting sessions and to keep them short and focused. *The Secretariat* mentioned that the proposed date for the first informal drafting meeting is now 21 June. *France* proposed to have four days for the negotiation round in November in case it is held physically (instead of 3 days previously agreed in case of physical meetings). *Kazakhstan* suggested having the informal workshop on transit issues in September.

120. *Mr Sunao Orii, Vice-Chair* of the Modernisation Group, informed about his resignation due to relocation to Tokyo. *Japan* would nominate a new person to serve as Vice-Chair of the Modernisation Group. The Modernisation Group thanked Mr Orii for his service and contribution to the process.

121. Since there were no other comments, *the Chair* concluded the fifth negotiation round.