

25 November 2020

**31<sup>ST</sup> MEETING OF THE ENERGY CHARTER CONFERENCE**

**16 December 2020**

**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.



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**COMPILATION OF THE THREE REVISED NEGOTIATION DRAFTS**  
**(MOD 24 Rev 2, MOD 27 Rev 2 and MOD 29 Rev)**

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## 1. DEFINITION OF CHARTER

(1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter [EU + its Member States: , and the International Energy Charter adopted in the Concluding Document of the Hague II Conference on the International Energy Charter signed at The Hague on 20 May 2015; signature of the Concluding Document is considered to be signature of the Charter].

**Albania, Georgia, Kazakhstan, Switzerland and Turkey** support the introduction of a reference to the International Energy Charter in Article 1(1).

**Japan** referred to the discussion paper submitted in preparation to this first round of negotiations and raised some questions about potential implications in relation to objectives (Article 2 ECT), Energy Charter Protocols and Declarations (Article 33(2) ECT), Voting (Article 36(1)(b) ECT) and accession to the ECT (Article 41 ECT).

## 2. DEFINITION OF 'ECONOMIC ACTIVITY IN THE ENERGY SECTOR'

**Albania** and **Azerbaijan**, are open to discuss the possibility to modify Article 1(5) in order to cover new investment trends and technologies in the definition of "Economic Activity in the Energy Sector".

### **The European Union and its Member States**

(4) and (4bis) [*Placeholder: the paragraphs are related to the definition of "Economic Activity in the Energy Sector", for which a EU proposal text is being developed. Therefore, those paragraphs might be addressed together with paragraph 5*].

(5) [*Placeholder: The EU will table a proposal at the appropriate time in the course of the negotiations.*]

The Modernised ECT should include a definition of the 'economic activity in the energy sector' which allows addressing the challenges and opportunities of the transition to a safe and sustainable low-carbon, more digital and consumer-centric energy system.

**Japan** referred to the discussion paper submitted in preparation to this first round of negotiations and raised some questions about potential implications in relation to definitions (Article 1(5), 1(6)(f)) as well as Annexes EM and NI.

**Luxembourg** proposes to modify Article 1(5) and related Annexes to adapt the Treaty to the Energy Transition / Decarbonisation Processes and Contracting Parties Climate Change Commitments and therefore cover new investment trends and new technologies in the definition of 'economic activity in the energy sector'. Modification would require a substantial horizontal amendment of the Treaty.

**Switzerland** is open to discuss a modification to Article 1(5) in order to cover types of investment not covered so far in ECT (e.g. sea transport/offshore cable or pipeline, vessels) in the definition of 'economic activity in the energy sector'. Amending Annexes EM to cover energy carriers/technologies not covered so far (e.g. biogas, other biogenic feedstock, hydrogen) could be considered.

**Turkey** proposes to modify Article 1(5) and related Annexes to adapt the Treaty to the Energy Transition / Decarbonisation Processes, and Contracting Parties' Climate Change Commitments in order to and therefore cover new investment trends and new technologies in the definition of 'economic activity in the energy sector'.

### 3. DEFINITION OF INVESTMENT

(6) "Investment" means every kind of asset,

[EU + its Member States + AZE: owned or controlled directly or indirectly by an Investor that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, [EU + its Member States: which includes a certain duration and other characteristics] such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk and. Forms that an investment may take, includes]:

[TUR: ~~owned or controlled directly or indirectly by an Investor invested or acquired in the territory of the State of the Contracting Party in conformity with its laws and regulations and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, contribution to the economy of the host Contracting Party, or a certain duration, and shall include in particular, but not exclusively:]~~

(d) Intellectual Property[EU + its Member States: <sup>1</sup>]

[EU + its Member States: For greater certainty:

(a) "claims to money" does not include claims to money that arise solely from commercial transactions for the sale of goods or services by a natural person, a company or other organisation in the territory of a Party to a natural person, a company or other organisation in the territory of the other Party, or the extension of credit in relation to such transactions; and

(b) an order or judgment entered in a judicial or administrative action or an arbitral award shall not in itself constitute an investment

(c) a short-term loan or short-term financial contribution does not constitute an investment.]

[AZE: Investment does not include:

- a. claims to payment that are immediately due and result from the sale of goods or services;
- b. public debt operations.]

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments [EU + its Member States: made in accordance with the applicable law and the domestic law of the host Contracting Party], whether existing at or made after the later of the date of entry into force of this

Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

*[EU + its Member States: Footnote*

*"intellectual property rights" means:*

*(a) all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the Agreement on Trade-Related Aspects of Intellectual Property Rights contained in Annex IC of the WTO Agreement (hereinafter referred to as the "TRIPS Agreement") namely:*

- (i) copyright and related rights;*
  - (ii) patents (which, in the case of the Union, include rights derived from supplementary protection certificates);*
  - (iii) trademarks;*
  - (iv) designs;*
  - (v) layout-designs (topographies) of integrated circuits;*
  - (vi) geographical indications; (vii) protection of undisclosed information; and*
- (b) plant variety rights.*

~~*Article 1(12) "Intellectual Property" includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.*~~

~~*[UNDERSTANDING With respect to Article 1(12)*~~

~~*The representatives recognise the necessity for adequate and effective protection of Intellectual Property rights according to the highest internationally accepted standards.*~~

**Albania** proposes to introduce additional characteristics such as the commitment of capital, the expectation of profit and the assumption of risk, or other relevant characteristics; to specify that certain types of assets are excluded and also to specify that the investment must be made in accordance with the law of the host State.

**The European Union and its Member States** referred also to its proposal on "public debt", which has a horizontal character as it is partly related to the definition of investment but also to article 26 and the right to regulate, and proposes to address it during the September negotiation round.

**Georgia** proposes to introduce additional characteristics of investment in order to differentiate investments from other types of transactions in energy field that do not have an objective nature of investment activity (including one-off commercial transactions). Such characteristics shall include commitment of capital or other resources, expectation of gain or profit and the assumption of risk. Georgia proposes to maintain closed list of assets in the definition of investment and if necessary introduce exceptions from the list: such as exclusion of one-off commercial transactions, award or judgment rendered with regard to investments, etc. Georgia proposes to introduce a legality requirement in the definition; in particular, the definition of investment shall contain a requirement that the investments are made “in accordance with the legislation” of the host Contracting Party. Alternatively, we could introduce legality requirement in the dispute settlement chapter of the ECT that would limit the jurisdiction of the fora proposed in the Treaty to the investments that satisfy legality requirements.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the Definition of investment should be maintained.

**Switzerland** suggests to require investment to fulfil specific characteristics, such as the commitment of capital, the expectation of profit and the assumption of risk. Moreover, the investment must comply with the laws and regulations of the host State at the time the investment is made.

#### 4. DEFINITION OF INVESTOR

(7) "Investor" means:

(a) with respect to a Contracting Party: ~~[AZE: (a) with respect to a Contracting Party:-~~ [TUR: (a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law [EU + its Member States: Footnote 1;

~~(i)a. any natural person having the nationality of a Contracting Party in accordance with its national legislation. In cases of double nationality, a person shall be considered to be a national exclusively of the State in which it has a dominant and effective nationality. Dominant and effective nationality refers to the place in which the physical person pays its taxes, receives its social security, exercises its voting rights and/or can hold public office;~~

~~(ia) a natural persons having the citizenship or nationality of or who is permanently residing in that a Contracting Party in accordance with according to its applicable laws;~~

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party and engaged in substantive business activities [Footnote 2] in the territory of that Contracting Party;]

~~(ii)b. a legal entity incorporated or duly constituted for profit in accordance with applicable national legislation of one Contracting Party and having its seat and conducting substantial business activities within the territory of the state of that Contracting Party.]~~

~~(iib) a companies, corporations, firms, business partnerships incorporated or constituted under the law in force of or other organisation organised in accordance with the law applicable in that a Contracting Party and having their registered offices together with substantial business activities in the territory of that Contracting Party;]~~

[AZE + TUR: (b) with respect to a "third state", a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for

a Contracting Party.]

[EU + its Member States: Footnote 1: The definition of “investors” includes persons permanently residing in the Republic of Latvia who are not citizens of the Republic of Latvia or any other state but who are entitled, under the law of the Republic of Latvia, to receive a non-citizen’s passport.

Footnote 2: In line with its notification of the Treaty establishing the European Community to the WTO (WT/REG39/1), the European Union understands that the concept of "effective and continuous link" with the economy of a Member State of the European Union enshrined in Article 54 of the TFEU is equivalent to the concept of "substantive business activities".]

**Albania, Georgia and Switzerland** propose to introduce additional criteria such as “substantive business activity” in the definition of “investor”.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the Definition of investor should be maintained.

**Kazakhstan** drew attention to the fact that the concept of “non-citizen” is used in the proposed text for inclusion as a footnote in the text of the Treaty. There is no definition of “non-citizens” under international law. The EU and its Member States, as the authors of Footnote 1, should propose a wording for the definition of “non-citizen”, which must be included in the draft text of the Treaty. The Contracting Parties will then be able to determine their position on including Footnote 1 in the text of the Treaty.



**5. CLARIFICATION OF 'MOST CONSTANT PROTECTION AND SECURITY',  
UMBRELLA CLAUSE, DEFINITION OF FAIR AND EQUITABLE  
TREATMENT**

**EU and its Member States, TUR**

~~(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.~~

(1) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their (TUR investment) related activities and to Investors of other Contracting Parties with respect to such Investments fair and equitable treatment and the most constant protection and security in accordance with sub-paragraphs (i) to (iv).

(i) A Contracting Party breaches the obligation of fair and equitable treatment referenced above through measures or series or measures (GEO which have a (TUR direct) adverse effect on the investment) that constitute:

(a) denial of justice in criminal, civil or administrative proceedings; or

(b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; or

(c) manifest arbitrariness; or

(d) targeted discrimination on (EU+ its Member States manifestly wrongful grounds, such as gender, race or religious belief; or/ TUR the grounds of nationality)

(e) abusive treatment (TUR of investors) such as harassment, duress or coercion.

(ii) When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Contracting Party subsequently frustrated.

(iii) For greater certainty, “most constant protection and security” refers to the Contracting Party’s obligations relating to ensure the physical security of investors and investments.

(iv) For greater certainty, a breach of another provision of this Treaty, or of any other international agreement, does not constitute a breach of this paragraph.

[...]

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations. Where a Contracting Party has entered into any specific written commitment with Investors of the other Contracting Parties or with their Investments in its Area, that Contracting Party shall not breach the said commitment through the exercise of governmental authority.

[EU and its Member States: Former Article 10(12), first sentence (placement to be decided)]

General comments:

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the ‘most constant protection and security’, definition of FET and umbrella clause should be maintained.

Regarding ‘most constant protection and security’

**Albania, Azerbaijan, Georgia and Switzerland** also support a clarification that the “most protection and security” refers only to physical protection.

Regarding ‘Fair and Equitable Treatment’ (FET)

**Albania** proposes to clarify FET.

**Georgia** suggests to consider a provision allowing for a future revision of a potential closed list of elements that could constitute a violation of FET. It also supports the protection of legitimate expectations to the extent they are grounded on specific representations and that the frustration of these legitimate expectations amounts to a violation of FET on the grounds foreseen in the aforementioned list containing elements that could constitute a FET violation.

**Georgia and Turkey**, support the text proposal of the EU and its Member States in (iv) with the understanding that it excludes automatic breach of FET if there's a breach of another provision of the ECT or of any other international agreement.

**Japan** raised serious concerns over text proposals which contain a closed list of elements that could constitute a violation of FET and could be open to discuss an open-ended list without prejudice.

**Switzerland** is open to include an open-ended list of elements that could constitute a violation of FET.

#### Regarding umbrella clause

**Albania** is open to discuss the clarification the scope of the umbrella clause.

**Azerbaijan, Georgia, Turkmenistan and Turkey** propose to remove the umbrella clause as a matter of general policy. However, these delegations are open for a discussion on limiting its scope in line with the proposal of the EU.

**Switzerland** supports maintaining an umbrella clause and is open to discuss a reduced coverage to only "specific" or "written" commitments.

## 6. COMPENSATION FOR LOSSES

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is [TUR, GEO, EU and its Member States: ~~the most favourable of that which~~ no less favourable than] that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the provision on compensation for losses should be maintained.

7. DEFINITION OF INDIRECT EXPROPRIATION

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by the payment of prompt, adequate and effective compensation.

[EU and its Member States: For greater certainty, this paragraph shall be interpreted in accordance with Annex X (Expropriation).]

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

[EU and its Member States, CHE: Valuation criteria shall be based on internationally recognised principles and norms to determine fair market value.]

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

EU and its Member States, GEO	AZE	TUR
<p><b><u>Annex X (Expropriation)</u></b></p> <p><u>The Parties confirm their shared understanding that:</u></p> <p><u>1. Expropriation may be either direct or indirect:</u></p> <p><u>(a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.</u></p> <p><u>(b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially</u></p>	<p><u>The non-discriminatory regulatory actions or measures taken by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as environment, public health, safety, and labor rights, do not constitute an “indirect expropriation”</u></p>	<p><u>The situation addressed paragraph 1 of this A (Expropriation) is in expropriation, where an action or series of actions by a Party has an effect equivalent to expropriation without formal transfer of title or outright seizure.</u></p> <p><u>(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry</u></p>

deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

2. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.

(b) the duration of the measure or series of measures by a Party;

(c) the character of the measure or series of measures, notably their object and context.

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of the environment, including combatting climate change, the protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations.

within the meaning of this Article.

considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to

protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

**Albania** is open to discuss a clear definition of indirect expropriation and to set rules for compensation.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the provision on expropriation should be maintained.

**Georgia** and **Switzerland** suggested that a cross reference to the general provision on valuation of damages in Part V could be included later on to make sure that the potential wording on valuation in article 13 is not read in isolation.

**Switzerland** is open to discuss a clear definition for indirect expropriation.

8. DENIAL OF BENEFITS

<p style="text-align: center;"><b>AZE + EU and its Member States</b></p> <p>(5) Each Contracting Party <del>reserves the right to</del> <u>may deny the application advantages of this Part [EU and its Member States: and of Articles 26 and 27 of this Treaty]</u> to an investor of another Contracting Party <del>[EU and its Member States: or to</del></p> <p>(1) <del>a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised;</del> <del>or</del></p> <p>(2) <del>an Investment,] if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:</del></p> <p><del>— (a) does not maintain a diplomatic relationship; or</del></p> <p><del>— (b) adopts or maintains measures related to the maintenance of international peace and security, [AZE: and to protection of national security interests,] [EU and its Member States: including the protection of human rights,] that:</del></p> <p>(i) <del>prohibit transactions with Investors of that state; or</del></p> <p>(ii) <del>would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments, including where the measures prohibit transactions with a legal entity or a national who owns or controls either of them.</del></p> <p><u>For greater certainty, a Contracting Party may deny such benefits without any prior publicity or additional formality related to its intention to exercise the right conferred by this Article.</u> (+GEO)</p>	<p><u>(TUR + GEO) 1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Contracting Party and to investments of such investor if:</u></p> <p><u>(a) the company has no effective business activities in the territory of the Contracting Party under whose law it is constituted or organized and investors of a non-Contracting Party, or investors of the denying Contracting Party, own or control the company.</u></p> <p><u>(TUR + GEO) (b) the host Contracting Party does not maintain diplomatic relations with the non-Contracting Party; or adopts or maintains measures with respect to the non-Contracting Party or a natural person or company of the non-Contracting Party that prohibit transactions with such natural person or company or that would be violated or circumvented if the benefits of this Agreement were accorded to such investor or to its investments.</u></p> <p><u>(TUR + AZE) 2. The denying Contracting Party shall, to the extent practicable, notify the other Contracting Party before denying the benefits</u></p>
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**Albania** proposes to include in the ECT a clear procedure for the application of the “Denial of benefits” clause and also specify that the benefits from the ECT will be denied to an investor of a Contracting Party gaining ownership or control over an investment with the sole purpose of submitting a request for arbitration or through the planning of nationality where the investor has its investment structures through the States intermediaries for the sole purpose of benefiting from this Treaty, including settlement of disputes between the investor and the State (ISDS).

**Azerbaijan:** Energy Charter Treaty contains provisions that bind Contracting Parties and their entities to non-Contracting Parties (third countries). In principle, **Azerbaijan** believes that the ECT should merely regulate the relations among the Contracting Parties and should lay down rights and obligations for those parties only.

**Japan** proposes to broaden the scope of application of Article 17(1) to cover not only a third State’s entities but also the host State’s investors in order to avoid the so-called ‘round-tripping’.

**Switzerland** is open to discuss a clarification of the denial of benefits clause.

## 9. MFN Clause

(2) Each Contracting Party shall endeavour to accord [**AZE: , in similar situations,**] to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords [**EU and its Member States, CHE, GEO, TUR: , in like situations,**] [**AZE: in similar situations,**] to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

[**EU and its Member States, CHE, GEO, TUR: For greater certainty:**

(i) the “treatment” referred to in this paragraph does not include dispute settlement procedures provided for (**GEO: in this or**) in other international agreements;]

[**EU and its Member States: (ii) substantive provisions in other international agreements concluded by a Contracting Party with a third state do not in themselves constitute the “treatment” referred to in this Paragraph. Measures of a Contracting Party pursuant to those provisions [Footnote] may constitute such treatment and thus give rise to a breach of this Paragraph.**

[Footnote] For greater certainty, the mere transposition of those provisions into domestic law, to the extent that it is necessary in order to incorporate them into the domestic legal order, does not in itself qualify as a measure.]

**Albania** is open to discuss the ways to prevent investors to use in dispute settlement procedures provisions from other agreements which they consider more favourable for their interests. It also proposes the exclusion of dispute settlement procedures or procedural issues in general from the application of MFN clause.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the provision on MFN should be maintained.

## 10. RIGHT TO REGULATE

Preamble:

[TUR: Acknowledging the rights and responsibilities of the Contracting Parties to regulate investments within the territories of their States in order to meet their own policy objectives.]

**[New article] [EU and its Member States + AZE Regulatory Measures] [TUR Right to Regulate]**

**[AZE + TUR + EU and its Member States]**

1. The Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as [AZE+TUR: the provision of national security,] the protection of the environment, including combatting climate change, protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity.]

**[EU and its Member States + TUR]**

2. For greater certainty, the provisions of Part III of the Treaty shall not be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Contracting Party's decision not to issue, renew or maintain a subsidy

(a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or

(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,

shall not constitute a breach of the provisions of Part III of the Treaty.

4. For greater certainty, the provisions of Part III of the Treaty shall not be construed as preventing a Contracting Party from discontinuing the granting of a subsidy [Understanding] or requesting its reimbursement, where such action is necessary to comply with obligations imposed upon the Contracting Party concerned by an international agreement establishing a Regional Economic Integration Organisation or been ordered by a competent court, administrative tribunal or other competent authority [Understanding], or as requiring that Contracting Party to compensate the investor therefore.]

**[Understanding**

**In the case of the EU:**

- i) “subsidy” includes “state aid” as defined in EU law;
- ii) the competent authorities entitled to order the actions mentioned in Article (x) are the European Commission or a court or tribunal of a Member State when applying EU law on state aid.]

**Article 24: Exceptions**

**[EU and its Member States: (1) ~~This Article shall not apply to Articles 12, 13 and 29.~~**

**(2) The provisions of this Treaty other than**

**~~(a) those referred to in paragraph (1); and~~**

**~~(b) Article 10(1), 10(12), 12, 13, 14, 15 and 29 with respect to subparagraph (i), Part III of the Treaty~~**

**shall not preclude any Contracting Party from adopting or enforcing any measure:**

- (i) necessary to protect public security, public order or public morals;
- (ii) ~~(i)~~ necessary to protect human, animal or plant life or health;
- (iii) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (A) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
  - (B) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
  - (C) safety;
- (iv) ~~(ii)~~ essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
  - (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
  - (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist;

or

(v) ~~(iii)~~ designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure

(A) has no significant impact on that Contracting Party's economy; and

(B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, ~~provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties.~~ Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end;

(vi) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on commerce or investment promotion or protection covered by the Treaty.

(32) The provisions of this Treaty other than ~~those referred to in paragraph (1)~~ Article 29 shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

(a) for the protection of its essential security interests including those

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in time of war, armed conflict or other emergency in international relations;

(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; ~~or~~

~~(c) for the maintenance of public order.~~

Such measure shall not constitute a disguised restriction on Transit.

(43) The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:

(a) resulting from its membership of a free-trade area or customs union; or

(b) which is accorded by a bilateral or multilateral agreement concerning economic

cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.]

**Albania** is open to discuss the inclusion of a separate provision referencing the “Right to Regulate”.

**Azerbaijan** considers that as the International Energy Charter Final Act (The Hague II) respects all relevant international commitments of each State, as well as its sovereignty over its energy resources and the right to regulate energy transportation from its territory, the same approach should be reflected in the ECT. Additionally, the proper balance between the rights of investors and the state's regulatory function will play an important role. Regarding the non-interpretation of the provisions of Part III of the Treaty as a commitment from a Contracting Party that it will not change the legal and regulatory framework, Azerbaijan considers that such provision may cause damage to investors' activities in Contracting Parties' territory. Azerbaijan believes that the amendments to relevant legislation should be determined by specific conditions and circumstances, not by general content. If the goal is to direct or transform the investments through the transition to clean energy, this should be clearly stated. In this regard, Luxembourg's proposal can be considered.

**Georgia** proposes to include separate provision on the right to regulate that would underline powers of the Contracting Parties to exercise their legislative and regulatory authority on a non-discriminatory, non-arbitrary and proportional basis in order to satisfy its essential security, public policy and regulatory goals. In addition, Georgia would also be open to discuss inclusion of a relevant language reflecting on this issue in the Preamble of the ECT.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that already articles 18 and 24 of the ECT cover the right to regulate. Proposals seem to be tilting the scales of balance overly to state concerns or right to regulate and such a direction of discussion brought Japan's serious concerns as it would inappropriately undermine the level of investment protection to be achieved. However, Japan is open to discuss the issue.

**Switzerland** proposes to include in the Preamble or in a provision a reference to the Right to Regulate. Open to discuss review of Article 24 to make it more readable.

## 11. TRANSFERS RELATED TO INVESTMENTS

[EU and its Member States, TUR: (4) Notwithstanding Paragraphs (1) to (3) shall not be construed as preventing a Contracting Party from applying its laws and regulations relating to may protect

- (a) bankruptcy, insolvency, or the protection of the rights of creditors, or ensure compliance with laws on the
- (b) issuing, trading and dealing in securities, or futures, options and other financial instruments;
- (c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;
- (d) criminal or penal offenses, deceptive or fraudulent practices;
- (e) the satisfaction of ensuring compliance with orders or judgements in civil, administrative and criminal adjudicatory proceedings through the equitable, non-discriminatory, and good faith application of its laws and regulations;
- (f) social security, public retirement or compulsory savings schemes.

Such laws and regulations shall not be applied in an arbitrary or discriminatory manner, or otherwise constitute a disguised restriction on transfers.]

[paragraphs 5-6]

[EU and its Member States, TUR: (7) Notwithstanding paragraphs (1) to (3), where a Contracting Party experiences serious balance-of-payments or external financial difficulties, or threat thereof, it may adopt or maintain restrictive measures [Footnote]. Such measures shall:

- (a) be consistent with the Articles of the Agreement of the International Monetary Fund, as applicable;
- (b) not exceed those necessary to deal with the circumstances described in this Paragraph;
- (c) be temporary and phased out progressively as the situation specified in this Paragraph improves;
- (d) avoid unnecessary damage to the commercial, economic and financial interests of the other Contracting Parties;
- (e) be non-discriminatory compared to third states in like situations.

[EU and its Member States: Footnote: In the case of the EU, such measures may be taken by a Member State of the EU in situations other than those referred to in Article 14 (7),

which affect the economy of that Member State. For greater certainty, serious balance of payments or external financial difficulties, or threat thereof, may be caused among other factors by serious difficulties related to monetary or exchange rate policies, or threat thereof].

EU and its Member States (8) Notwithstanding paragraphs (1) to (3), in exceptional circumstances of serious difficulties for the operation of the Union's economic and monetary union, or threat thereof, the Union may adopt or maintain safeguard measures for a period not exceeding six months. Such measures shall be limited to the extent that is strictly necessary.]

**Azerbaijan** supports to add a provision for the application of temporary restrictions on transfers related to the balance of payments.

**Georgia** proposes to include restrictions to the Transfers Related to Investments through equitable, non-discriminatory and good father application of state measures. Georgia is further open to discuss the need for introducing any exceptions to Transfers. Restrictions and/or exceptions to the Transfers Related to Investments could be introduced as a separate provision.

**Japan** attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection serve well the objectives of the ECT and the current wording of the provision on Transfers related to investments should be maintained.

**Switzerland** is open to include a safeguard clause in Article 14 in order to allow a possibility to adopt restrictive measures in the event of serious balance of payments difficulties, financial difficulties, or monetary difficulties provided that these restrictions are non-discriminatory and equitable.



12. DEFINITION OF 'TRANSIT'

<p>[KAZ:</p> <p>(a) "Transit" means</p> <p>(i) <u>cross-border transportation<sup>1</sup> of Energy Materials and Products from a Contracting Party through the territory of another state, through state borders by means of pipelines and transmission grids and other facilities<sup>2</sup> for transportation of Energy Materials and Products and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party;</u></p> <p>(ii) <del>the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or</del></p> <p>(iii) <del>the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in</del></p>	<p>[TKM:</p> <p>(a) "Transit" means</p> <p>(i) the carriage through the Area of a Contracting Party, <u>by means of Energy Transport Facilities or Transportation Means for Energy Transport</u>, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or</p>
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<sup>1</sup> See Article 7(10)(b)

<sup>2</sup> See Article 7(10)(c)

<p><del>Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification;</del></p> <p>(ii) <u>International energy swap operations</u><sup>3</sup></p> <p>(b) <u>«Cross-border transportation» shall mean transit of Energy Materials and Products that crosses multiple national borders and comprehensively includes Energy Transport Facilities, transport laws and regulations related to border crossing, and organizational systems and resources required or otherwise necessary for operation and maintenance of such Energy Transport Facilities.</u></p> <p>(c) <u>“Energy Transport Facilities” consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, maritime transport<sup>4</sup>, and other fixed and non-fixed facilities specifically for handling Energy Materials and Products.</u></p> <p>(d) <u>“International Energy Swap Agreements” shall mean any agreements relating to or connected with exchange of a quantity of energy in the territory of one Contracting Party for an equivalent quantity of energy of the same type in the territory of another Contracting Party and which is entered into between:</u></p>	<p>(ii) <u>the carriage of Energy Materials and Products through the Areas of Contracting Parties by means of swap operations which are carried out in accordance with international energy swap agreements of Contracting Parties;</u></p> <p>(c) <u>“Transportation Means for Energy Transport” mean any modes of transport intended for transportation of Energy Materials and Products for purposes of promotion and development of international cross-border trade;</u></p> <p>(d) <u>“Swap Operations” mean exchange of a quantity of energy in the area of one Contracting Party for an equivalent quantity of energy of the same type in the area of another Contracting Party. A Contracting Party on which area the energy is being exchanged, shall take all measures that are necessary to prohibit and review the problem of unauthorized taking of such energy;</u></p> <p>(e) <u>“International Energy Swap Agreement” means any international agreement entered into by and legally binding for the Contracting Parties with respect to swap operations;</u></p>
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<sup>3</sup> See Article 7(10)(d)

<sup>4</sup> See Article 7(10)(e)

<p><u>(i) a Contracting Party and an entity of another Contracting Party; or</u></p> <p><u>(ii) an entity of a Contracting Party and an entity of another Contracting Party.</u></p> <p><u>(e) "Maritime Transport" shall mean non-fixed facilities for the transportation of energy materials and products (oil, liquefied natural gas).</u></p> <p><u>(f) "Entity" shall mean:</u></p> <p><u>(i) with respect to a Contracting Party:</u></p> <ul style="list-style-type: none"><li><u>- a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;</u></li><li><u>- a company or other organisation set up in accordance with the law applicable in that Contracting Party.</u></li></ul> <p><u>(ii) with respect to a "third state", a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.]</u></p>	
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**Kazakhstan and Turkmenistan** would consider working on a joint proposal.

**Japan** is open to discuss the impact of advantages and disadvantages of including maritime transport such as ships.

**Switzerland** could support a discussion on maritime transport and swap operations.

**Turkey** is considering comments on coverage of maritime transport and inclusion of swap operations.

**13. ACCESS TO INFRASTRUCTURE (INCLUDING DENIAL OF ACCESS AND AVAILABLE CAPACITIES)**

**Article 7: Transit**

- (1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to [~~TKM: the mode of transport and transportation,~~] the origin, destination or ownership of such Energy Materials and Products [~~AZE: except in circumstances, which generate concerns regarding international and national security,~~] or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.

<p>[KAZ:</p> <p>(1.1) <u>Each Contracting Party or its entities shall take all necessary measures to ensure transparent and non-discriminatory Access<sup>5</sup> to other Contracting Parties with respect to existing and future facilities for cross-border transportation of Energy Materials and Products used for Transit and shall not in any way restrict the right of access or the right to deny access<sup>6</sup> to other Contracting Parties to Energy Transport Facilities used for Transit of Energy Materials and Products.</u></p> <p>(a) <u>“Access to Facilities for cross-border transportation of Energy Materials and Products shall mean a permission or ability to enter or pass through such Facilities on the basis of good faith negotiations by and between Contracting Parties or entities of Contracting Parties requesting access to and use of Available Capacity<sup>7</sup> for Transit. Such negotiations shall be based on transparent procedures, on commercial terms, and be non-discriminatory as to the origin, destination or ownership of the Energy Materials and Products;</u></p> <p>(b) <u>Depending on the nature of the Energy Materials and Products transiting through the Facilities for cross-border transportation of Energy Materials and</u></p>	<p>[TKM: <u>New paragraph 7:</u></p> <p>(7) <u>For purposes of ensuring freedom of transit of Energy Materials and Products, Contracting Parties shall grant access to the Energy Transport Facilities:</u></p> <p>(a) <u>For purposes of fulfilment of the provisions of paragraph 7 hereof, Contracting Parties shall take necessary measures to ensure that owners or operators of the Energy Transport Facilities conducted good faith negotiations with any other Contracting Parties or Entities of Contracting Parties requesting access to and use of the Energy Transport Facilities. Such negotiations shall be based on transparent procedures, on commercial terms, and be non-discriminatory as to the origin, destination or ownership of the Energy Materials and Products;</u></p> <p>(b) <u>Contracting Parties shall ensure that owners or operators be obliged to duly produce justified explanation in case of denial of access to the Energy Transport Facilities;</u></p>
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<sup>5</sup> See Article 7 (1.1) (a) (b)

<sup>6</sup> See Article 7(1.1) (d)

<sup>7</sup> See Article 7(1.1) (c)

Products, access to such Facilities may be subject to exemptions;

(c) “Available Capacity” shall mean the total physical operating capacity of the Energy Transport Facilities, less the physical operating capacity:

(i) necessary for the fulfilment of obligations by the owner or operator of the cross-border Energy Transport Facilities under any valid and legally binding agreements relating to the transportation of Energy Materials and Products in accordance with any valid and legally binding agreements related to cross-border transportation of Energy Materials and Products;

(ii) necessary for the fulfilment of any other binding obligations pursuant to laws and regulations to the extent those laws and regulations are intended to ensure the supply of Energy Materials and Products within the territory of a Contracting Party;

(iii) regarding hydrocarbons, necessary to account for the reasonable requirements, including forecasted requirements, for the cross-border transportation of Energy Materials and Products which are owned

<p><u>by the owners or operators of the Energy Transport Facilities or their Affiliates<sup>8</sup>; and</u></p> <p>(iv) <u>necessary for the efficient operation of the cross-border Energy Transport Facilities, including any operating margin necessary to ensure the security and reliability of the system.</u></p> <p>(d) <u>“Denial of Access” shall mean the refusal to satisfy a request for access to Energy Transport Facilities by a Contracting Party or an entity of a Contracting Party in case:</u></p> <p>(i) <u>the transmission system lacks the free capacity;</u></p> <p>(ii) <u>of incompatibility of technical specifications, including quality specifications of concerned Energy Materials and Products, which cannot be reasonably overcome by the owner or operator of concerned Energy Transport Facilities;</u></p> <p>(iii) <u>if the access to the system would prevent the owner or operator of concerned Energy Transport Facilities from carrying out the public service obligations [AZE:</u></p>	<p>(c) <u>Contracting Parties shall have the right to deny access to the Energy Transport Facilities in the following circumstances:</u></p> <p>(i) <u>in case of technical limitations related to internal supplies and/or lack of available capacity;</u></p> <p>(ii) <u>in case of demands by other Contracting Party concerning property rights to the Energy Transport Facilities used for Transit or concerning any part thereof, except for the volumes identified in a commercial agreement on transportation or transit, to which it is a party;</u></p> <p>(iii) <u>in case of harmful environmental consequences of transit which threaten energy security within the Area of a Contracting Party, for purposes of minimizing negative impact of transit on the environment.</u></p>
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<sup>8</sup> “Affiliate” shall mean a legal person which has the right to directly and (or) indirectly make decisions and (or) influence decisions made by the owner of a pipeline or by a producer including by virtue of any contract as well as any legal person with respect to which the owner of a pipeline has such right.

<p><u>and foreign policy objectives];</u></p> <p><u>(iv) the access would result in serious economic and financial difficulties with take-or-pay contracts in case of Energy Transport Facilities related to natural gas.</u></p> <p><u>(e) Understanding with Respect to Allocation of Available/Transit Capacities</u></p> <p><u>It is understood that the following procedures or a combination thereof shall a priori be considered as bona fide negotiations:</u></p> <p><u>i) First come first served, i.e., the allocation of capacity in order of date of receipt by the owner or operator of Energy Transport Facilities of a bona fide request for capacity;</u></p> <p><u>ii) Pro rata application, in case where total requests exceed available capacity, i.e., the allocation of capacity to prospective users in proportion to the transport volumes respectively requested bona fide by them;</u></p> <p><u>For the purpose of paragraphs (i) and (ii) above, a request for capacity shall only be considered bona fide if supported by a credible commitment having regard to the volume, duration and commercial value of the requested capacity.</u></p> <p><u>It is also being understood that transparent procedures for purposes of Article 7(1.1)(i) shall include a procedure under which prospective users of the Energy Transport Facilities may obtain timely access to all information relating to existing and future Available Capacity in such Energy Transport Facilities as well as to requested but not yet allocated capacity.</u></p>	<p><u>[New subparagraphs into Article 7(10) as follows:]</u></p> <p><u>(f) “Access to Energy Transport Facilities” means a permission of the owner or operator of the Energy Transport Facilities to use available capacities of the Energy Transport Facilities.]</u></p>
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It is also being understood that the obligation under Article 7(1.1)(a) to ensure that owners or operators of the Energy Transport Facilities participate in bona fide negotiations includes an obligation to ensure that such owners or operators would adopt procedures to prevent speculative hoarding and blocking of capacity including, inter alia, appropriate “use it or lose it” rules which may however reallocate lost capacity to the original shipper as soon as that shipper uses it.

(f) Understanding with Respect to Congestion Management Mechanism

It is understood that the “Congestion Management Mechanism” shall mean that the cumulative demand for Available Capacity within a given period of time from all prospective users exceeds Available Capacity for this period:

- (i) The congestion management mechanisms, including auctions, may be used for allocation of Available Capacity only with respect to congested Points or sections within relevant Energy Transport Facilities and only in a fair, transparent and non-discriminatory manner between all potential users seeking access to that Available Capacity. Contracting Parties, in accordance with relevant provisions of the Energy Charter Treaty, shall take all reasonable measures to mitigate congestion and to use congestion management mechanism related therewith.
- (ii) No Contracting Party shall permit auctions in relation to a specific congestion point or section for longer than is reasonable having due regard to:
  - (a) the extent to which measures for

<p><u>relieving the relevant congestion are technically feasible;</u></p> <p>(b) <u>the economic costs and benefits of such measures; and</u></p> <p>(c) <u>the environmental or other substantively justifiable restrictions upon such measures.</u></p> <p>(iii) <u>Where sustained or recurrent use of a congestion management mechanism and notably the use of auctions causes a Transit Tariff to be in excess of that required under this Article, the excess revenues generated to this extent shall be used:</u></p> <p>a) <u>for reducing or mitigating current or foreseeable congestion, including, where appropriate, reasonable measures for maintaining or restoring physical operating capacity, if not already included in the Transit Tariffs envisaged under this Agreement; and/or</u></p> <p>b) <u>for reducing, within reasonable period of time, Transit Tariffs envisaged for the use of the relevant Energy Transport Facilities.]</u></p> <p>[...]</p>	
<p>(4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1) [AZE: as well as limitations set for in 5(b)].</p> <p>(5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to:</p> <p>(a) permit the construction or modification of Energy Transport Facilities; or</p> <p>(b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply [AZE: ]</p>	

safety implications].

Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties. [EU and its Member States: This shall not be construed as an obligation to renew expired contracts for the use of Energy Transport Facilities in the Area of Contracting Parties.]

(6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision, [AZE: as well as if it may lead to the Party's national security and serious safety implications].

[EU and its Member States: New paragraph 7a-9a

This Article shall not be interpreted to restrict Contracting Parties from organising their energy systems based on virtual flows of Energy Materials and Products. Where Contracting Parties organise their energy systems based on virtual flows, this Article does not grant a right to receiving the physical Energy Materials and Products injected into the system.]

**Turkey** considers that, in principle, existing IGAs and HGAs should remain unaffected by any proposed changes to be made with respect to access to infrastructure.

**Azerbaijan** believes that all relevant international commitments of each Contracting Party, as well as its sovereignty over its energy resources and energy transportation from its territory should be considered. In this regard, the principle of freedom of transit should be conducted in connection with international and national security concerns of a Contracting Party. Obligations on granting access to the energy infrastructure should not prejudice or diminish the sovereign right of the respective Contracting Party to deny such access.

14. DEFINITION AND PRINCIPLES OF TARIFF SETTING

[KAZ:

(7) [...]

(c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved. The decision regarding interim tariffs shall be made taking into account the provisions of paragraph (11) hereof.

[...]

(11) For purposes of this Article, "Transit Tariffs" shall mean the payments required by the owner or operator of the Energy Transport Facilities for the Transit of Energy Materials and Products taking into account the following:

1. Each Contracting Party shall take all measures that are necessary to ensure that Transit tariffs and methodologies used for their calculation are objective, reasonable, transparent and do not discriminate on the basis of origin, destination or ownership of Energy Materials and Products in Transit.
2. Each Contracting Party shall ensure that Transit Tariffs and other conditions are not affected by market distortions, in particular those resulting from abuse of

[TKM + UZB: New paragraph 6

(6) Contracting Parties and their entities, in their respective legislation, shall set Transit Tariffs for the transportation of Energy Materials and Products through their Energy Transport Facilities.

(a) Contracting Parties shall take all measures that are necessary to ensure that setting of the Transit Tariffs and other conditions are objective, reasonable, transparent and do not discriminate on the basis

<p><u>a dominant position by any owner or operator of Energy Transport Facilities used for Transit .</u></p> <p>3. <u>Subject to Article 7(1.1)(f), Transit Tariffs shall be based on operational and investment costs, including a reasonable rate of return.</u></p> <p>4. <u>Subject to paragraphs 1, 2 and 3 of this Article, Transit Tariffs may be determined by appropriate means, including regulation, commercial negotiations or congestion management mechanisms.]</u></p>	<p><u>of origin, destination or ownership of Energy Materials and Products in Transit.</u></p> <p>(b) <u>The principles of setting of the Transit Tariffs shall be based on operational and investment costs, including a reasonable rate of return.</u></p> <p>(c) <u>Contracting Parties shall ensure that the setting of the Transit Tariffs and other conditions are not affected by market distortions, in particular those resulting from abuse of a dominant position by any owner or operator of Energy Transport Facilities used for Transit.]</u></p>
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**Turkey** considers that it would be more appropriate to establish only general principles (non-discrimination, transparency, etc.) on tariff setting in order to avoid contradiction with the provisions in existing IGAs and HGAs (which should be kept unaffected).

**15. SUSTAINABLE DEVELOPMENT AND CORPORATE SOCIAL RESPONSIBILITY**

EU and its Member States	GBR
<p align="center"><b><u>[New article/placement to be decided]</u></b> <b><u>Sustainable development - Context and objectives</u></b></p> <p>(1) <u>The Contracting Parties recall the Rio Declaration and Agenda 21 on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the UN 2030 Agenda for Sustainable Development of 2015 with its Sustainable Development Goals [CHE the following Agreements could be reflected to be added in the recitals/preamble or the article: the Paris Agreement under the UNFCCC, the Stockholm Declaration on the Human Environment of 1972, the Johannesburg Plan of Implementation on Sustainable Development of 2002, the ILO Centenary Declaration for the Future of Work of 2019, the Rio+20 Outcome Document “The Future We Want”].</u></p> <p>(2) <u>The Contracting Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. The Contracting Parties affirm their commitment to promote the development of international trade and investment in energy-related sectors in such a way as to contribute to the objective of sustainable</u></p>	<p><u>[The placement of the following articles in the ECT text is to be decided]</u></p> <p align="center"><b><u>Sustainable Development and Corporate Social Responsibility</u></b></p> <p><u>1.The Contracting Parties affirm that Investments should be established in a manner sensitive to the environment. Accordingly, each Contracting Party shall strive to promote Investments and investment practices that contribute to environmental protection.</u></p> <p><u>2.The Contracting Parties recognise the right of each Contracting Party to set its environmental priorities and levels of environmental protection, including with respect to climate change mitigation and adaptation, and to adopt or modify its laws and policies accordingly in a manner consistent with this [Part].</u></p> <p><u>3.Each Contracting Party reaffirms its obligations under the multilateral environmental agreements to which it is a party.</u></p> <p><u>4.The Contracting Parties recognise that it is inappropriate to encourage investment by weakening or reducing the standards of environmental protection enshrined in their domestic law.</u></p>

development.

**[New article/placement to be decided]**  
**Sustainable development - Right to regulate**  
**and levels of protection**

- (1) The Contracting Parties recognise the right of each Contracting Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate, and to adopt or modify its relevant laws and policies. Such levels, laws and policies shall be consistent with each Contracting Party's commitment to the internationally recognised agreements and standards referred to in Article X.3.
- (2) Each Contracting Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection, and shall strive to improve such levels, laws and policies.
- (3) The Contracting Parties shall not encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law and standards as well as in their labour law and standards.
- (4) A Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental or labour law or, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental and labour laws in order to encourage trade or investment.

**[New article/placement to be decided]**  
**Sustainable development - Multilateral**  
**environmental agreements and labour**

**conventions**

- (1) The Contracting Parties recognise the value of international environmental governance and agreements as a response of the international community to sustainable development challenges concerning the environment including climate change, as well as full and productive employment and decent work for all as key elements of sustainable development.
- (2) In this context, each Contracting Party shall effectively implement:
- a. the multilateral environmental agreements (MEAs), protocols and amendments that it has ratified.
  - b. the internationally recognised core labour standards as defined in the fundamental ILO conventions, as well as other ILO conventions that it has ratified.

As reflected in the ILO Centenary Declaration of 2019, the Contracting Parties recognise the importance of working towards the ratification of the ILO fundamental conventions and should periodically consider, in consultation with employers' and workers' organisations, the ratification of other ILO standards.

- (3) The Contracting Parties reaffirm the right of each Contracting Party to adopt or maintain measures to further the objectives of MEAs to which it is a party.

**[New article/placement to be decided]**  
**Sustainable development - Climate change and clean energy transition**

Recognising the urgent need of pursuing the ultimate objective of the United Nations



Framework Convention on Climate Change (UNFCCC) [~~TUR the purpose and goals of the Paris Agreement~~] in order to effectively combat climate change and its impacts, and committed to enhancing the contribution of trade and investment to climate change mitigation and adaptation, each Contracting Party [EU shall/ TUR should]:

- a. [~~TUR effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contribution;~~]
- b. promote and enhance the mutual supportiveness of investment and climate policies and measures, thereby accelerating to the transition towards a low emission, clean energy and resource efficient economy, as well as to climate-resilient development;
- c. promote and facilitate trade and investment of relevance for climate change mitigation and adaptation, including, inter alia, by removing obstacles to trade and investment concerning low carbon energy technologies and services such as renewable energy production capacity, and by adopting policy frameworks conducive to this objective;
- d. cooperate, as appropriate, with the other Contracting Parties on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

**[New article: placement to be decided]**  
**Sustainable development - Responsible Business Practices**

The Contracting Parties recognise the importance of responsible business practices in

5. Each of the Contracting Parties reaffirms the importance of encouraging Investors operating

contributing to the goal of sustainable development. Accordingly, they shall promote the uptake of corporate social responsibility or responsible business conduct, in line with relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and the UN Guiding Principles on Business and Human Rights.

**[New article: placement to be decided]**  
**Sustainable development – Transparency**

Each Contracting Party shall ensure that it develops, enacts and implements any measures aimed at protecting the environment and labour conditions that may affect trade or investment, or trade or investment measures that may affect the protection of the environment or labour conditions, in a transparent manner, thereby ensuring awareness and providing reasonable opportunities for interested persons and stakeholders to submit views.

**[New article: placement/further amendments to Article 19 (j) to be decided]**  
**Sustainable development – Impact Assessment**

(1) Each Contracting Party shall ensure in its legislation that an environmental impact assessment is carried out prior to granting authorisation for a project for the production of energy goods, where the project may have a significant impact on the environment relating to any or all of the aspects listed in paragraph 2.

(2) The environmental impact assessment shall identify and assess as appropriate the significant effects of the project on

- (a) population and human health;
- (b) biodiversity;

within its territory or subject to its jurisdiction voluntarily to incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Contracting Party, such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights.

(c) land, soil, water, air and climate; and  
(d) cultural heritage and landscape,  
including the expected effects deriving  
from the vulnerability of the project to  
risks of major accidents and/or disasters  
that are relevant to the project  
concerned.

(3) Each Contracting Party shall ensure in its  
legislation that an early and effective  
opportunity and an appropriate time period  
is given to the public concerned, including  
relevant non-governmental organisations, to  
participate in the environmental impact  
assessment and an appropriate time period  
to provide comments on the environmental  
impact assessment report carried out  
pursuant to paragraph 1.

(4) Each Contracting Party shall ensure in its  
legislation that the findings of the  
environmental impact assessment are taken  
into account and that the results of the  
process referred to in paragraph 3 are made  
available to the public prior to granting  
authorisation for the project. The outcome  
findings of the environmental impact  
assessment and of the authorisation granted  
shall be made available to the public in an  
appropriate manner.

**New Article 28A: Settlement of disputes on**  
**trade and sustainable development**  
**provisions between Contracting Parties**

(1) In the event of a disagreement between the  
Contracting Parties on any matter regarding  
the interpretation or application of Articles  
[Sustainable development – Context and  
Objectives; Sustainable development –  
Right to regulate and levels of protection;

Sustainable development – Multilateral environmental agreements and labour conventions; Sustainable development – Climate change and clean energy transition; Sustainable development – Responsible Business Practices; Sustainable development – Transparency; Sustainable development – Impact Assessment], the procedures established under this Article and Article 27 paragraphs (1), (2), (3)(a) to (3)(g) and (3)(j) shall apply. [FN]

[FN: For greater certainty, the Contracting Parties agree to not apply Section IV of the Arbitration Rules of UNCITRAL, if the Arbitration Rules of UNCITRAL apply pursuant to Article 27(3)(f) to a dispute under this Article.]

- (2) The tribunal may obtain information from any source it deems appropriate. With regard to matters related to compliance with multilateral agreements and instruments referred to in Part IV of this Treaty, the opinions of external experts or information requested by the tribunal should include information and advice from the ILO or relevant bodies or organisations established under the MEAs. The tribunal shall forward such opinions, information or advice to each Contracting Party allowing them to submit their comments within 20 days of its receipt.
- (3) The tribunal shall issue a report to the Contracting Parties that are parties to a dispute under this article, unless they agree otherwise, no later than 180 days after the date of its establishment. The report shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. The report shall be made

<p><u>publicly available.</u></p> <p>(4) <u>The Contracting Parties referred to in paragraph (3) shall discuss appropriate actions or measures to be implemented taking into account the report of the tribunal and the recommendations therein. The Secretariat shall monitor the implementation of any such measures and shall keep the matter under review and report to the Charter Conference.</u></p> <p><b>[EU and its Member States] Article 27: Settlement of Disputes between Contracting Parties</b></p> <p>(3)(e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty <u>including, where appropriate, labour or environmental law,</u> of the members to be appointed.</p>	
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**Georgia** proposes to introduce a language supporting and reiterating the commitments for sustainable development and corporate social responsibility in the Preamble of the Treaty. Georgia is ready to engage in further discussion regarding the need to include separate provision on this topic in the ECT. Georgia also considered that taking into account the nature of the ECT, it could support the discussion of the newly proposed Article 28.A

**Japan** sees the need for further discussions including on its concerns regarding overall impacts on investment protection as well as the issues on ratification of international agreements and those on impact assessment.

**Switzerland** also welcomes the introduction of preambular text or a provision with reference to Corporate Social Responsibility and Sustainable Development instruments

16. FRIVOLOUS CLAIMS

EU and its Member States	GBR
<p><b>New Article: Frivolous claims [placement to be decided]</b></p> <p>1. <u>A Contracting Party which is a party to the dispute may, no later than 30 days after the establishment of the tribunal or of the division of the court hearing the case, or 30 days after it became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The tribunal, after giving the parties to the dispute an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection, stating the grounds therefor. In the event that the objection is received after the first session, the tribunal shall issue such decision as soon as possible, and no later than 120 days after the objection was filed. In doing so, the tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute. The decision of the tribunal shall be without prejudice to the right of a party to object, pursuant to paragraph [xx] or in the course of the proceeding, to the legal merits of a claim and without prejudice to the tribunal's authority to address other objections as a preliminary question.</u></p> <p>2. <u>Without prejudice to the tribunal's authority to address other objections as a preliminary question or to the right of a Contracting Party to raise any such objections at any appropriate time, the tribunal shall address and decide as a preliminary question any objection by the Contracting Party that, as a matter of law, a claim, or any part thereof, is not a claim for which an award in favour of</u></p>	<p><u>[The placement of the following articles in the ECT text is to be decided]</u></p> <p><u>Frivolous Disputes – Disputes Manifestly without Legal Merit</u></p> <p>1. <u>The disputing Contracting Party may, no later than 30 days after the constitution of the tribunal established under [Article 26(4)] and in any event before its first session, file an objection that the dispute is manifestly without legal merit.</u></p> <p>2. <u>An objection shall not be submitted under paragraph (1) if the disputing Contracting Party has filed an objection under [Article/Paragraph X] [Disputes Unfounded as a Matter of Law].</u></p> <p>3. <u>On receipt of an objection under this [Article/Paragraph], the tribunal shall suspend the proceedings on the merits and set a timetable for considering such objection consistent with any timetable it has set for considering any preliminary question.</u></p> <p>4. <u>The tribunal, after giving the Investor and the disputing Contracting Party an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the tribunal shall assume the alleged facts to be true.</u></p> <p><u>Frivolous Disputes – Disputes Unfounded as a Matter of Law</u></p> <p>1. <u>Without prejudice to the authority of the tribunal established under [Article 26(4)]</u></p>

the Investor may be made, even if the facts alleged were assumed to be true. The tribunal may also consider any relevant facts not in dispute. Such an objection shall be submitted to the tribunal as early as possible, and in any event not later than the expiration of the time limit fixed for the filing of the counter-memorial or statement of defence, unless the facts on which the objection is based are unknown to the party at that time. On receipt of an objection under paragraph [xx], and unless it considers the objection manifestly unfounded, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision on the objection, stating the grounds therefor.

3. For greater certainty, the tribunal shall decline jurisdiction if the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting a claim under Article 26(2)(c). The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the tribunal.

4. Without prejudice to the applicable rules on cost allocation in other circumstances, where a claim or parts of a claim are dismissed on application of this Article, the Tribunal shall order that all costs relating to such claim or to parts thereof, including the costs of the proceedings and other reasonable costs, including the costs of legal

to address other objections as a preliminary question or to the right of the disputing Contracting Party to raise any such objections at any appropriate time, the tribunal shall address and decide as a preliminary question any objection by the disputing Contracting Party that, as a matter of law, the dispute or any part thereof, is not a dispute in respect of which an award in favour of the Investor may be made under this [Article/Part], even if the facts alleged were assumed to be true.

2. An objection under paragraph (1) shall be submitted to the tribunal as soon as possible after the tribunal is constituted and, in any event, no later than the date the tribunal determines is the date for the disputing Contracting Party to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal determines of the disputing Contracting Party to submit its response to the amendment.

3. On receipt of an objection under this [Article], the tribunal shall suspend any proceedings on the merits, set a timetable for considering the objection consistent with any timetable it has set for considering any other preliminary question, and issue a decision or award on the objection stating the grounds therefor.

<u>representation and assistance, shall be borne by the unsuccessful disputing party.</u>	
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**Azerbaijan** supports the inclusion of the provisions regarding frivolous claims to the Treaty in order to prevent emerging non-essential expenses for Contracting Parties.

**Albania** is open to discuss the inclusion of a specific provision on the proper procedure/mechanism for early dismissal of frivolous and unmeritorious claims.

**Georgia** considers it useful to have a provision on frivolous claims.

**Switzerland** is open to discuss the way of handling frivolous claims since a provision is needed for the system, and suggests to take into account recent discussions at ICSID and UNCITRAL on this topic.

**Turkey** considers important to have an article on frivolous claims and could support a combined proposal from the EU and the UK.

**Japan** and **Switzerland** considered that the proposed paragraph 4 of the EU proposal could be a basis for future deliberations but would still need time to consult understanding that now is not the time to take final decisions.



17. SECURITY FOR COSTS

EU and its Member States	TUR + TKM	GBR
<p><b>New article: Security for Costs</b></p> <p>1. <u>For greater certainty, on request, and after hearing the disputing parties, the tribunal may order the Investor to post security for all or a part of the costs of the proceedings if there are reasonable grounds to believe that the Investor risks not being able or willing to honour a possible decision on costs issued against it.</u></p> <p>2. <u>If the security for costs is not posted in full within 30 days after the issuance of an order pursuant to paragraph 1 or within any other time period set by the tribunal, the tribunal shall so inform the parties to the dispute. The tribunal may order the suspension or termination of the proceedings.</u></p>	<p><b>New Article on Security for Costs in Part V of the ECT</b></p> <p>(1) <u>The arbitral tribunal may order security for costs at a proposal [TUR: by a respondent Contracting Party ]/[TKM: of the Contracting Party which is the party to the dispute.]</u></p> <p>(2) <u>The arbitral tribunal shall order security for costs where:</u></p> <p>(a) <u>there is a reason to believe that the investor will be unable to pay, if ordered to do so, a reasonable part of attorney fees and other costs to the Contracting Party which is the party to the dispute; or</u></p> <p>(b) <u>there is a reason to believe that the investor has structured the enterprise or divested assets to avoid the consequences of the arbitral proceedings. [TKM: or</u></p> <p>(c) <u>the investor has disclosed the existence of a third-party funding arrangement in which the third-party funder has not committed to irrevocably undertake adverse costs liability.</u></p> <p>(3) <u>Should the investor fail to pay the security for costs ordered by the arbitral tribunal, the arbitral tribunal shall terminate the arbitral proceedings.]</u></p>	<p><u>[The placement of the following articles in the ECT text is to be decided]</u></p> <p><b>Security for Costs</b></p> <p>1. <u>For greater certainty, at the request of the disputing Contracting Party and after hearing the Investor and the disputing Contracting Party, the tribunal established under [Article 26(4)] may order the Investor to post security for all or part of the costs of the proceedings if the tribunal has reasonable grounds to conclude that the Investor risks not being able or willing to honour a possible decision on costs being made against it.</u></p> <p>2. <u>The existence of third-party funding is not by itself reasonable grounds for the tribunal to conclude that the Investor risks not being able or willing to honour a possible decision on costs being made against it.</u></p> <p>3. <u>If the security for costs is not posted in full within [30] days of the making of the order under paragraph (1), or within such other time period</u></p>

		<u>set by the tribunal, the tribunal shall so inform the _____ disputing Contracting Party and may _____ order the suspension _____ or termination of the proceedings.</u>
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**Albania** is open to discuss the inclusion in the Treaty of a specific provision on “Security for costs”.

**Switzerland** and **Georgia** see the need for a provision on security for costs, which should be more balanced (e.g. the investor should also been given the right to request security for costs), and suggest to take into account recent discussions at ICSID and UNCITRAL on this topic.

**Georgia** suggested to include as additional ground (apart from the lack of willingness of the investor to honour a possible decision on costs) the situation in which the investor indulges in dilatory/disrupting practices that result in high costs for the defendant.

## 18. THIRD PARTY FUNDING

<p><b>[EU and its Member States + TUR: Article 1: Definitions</b></p> <p><b>[New paragraph] [+ TKM to include as part of the article on TPF]</b></p> <p><u>“Third Party funding” means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a party to a dispute under Article 26 in order to finance, directly or indirectly, part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.</u></p> <p><b>[EU and its Member States + TUR + TKM: New article: Third Party Funding</b></p> <ol style="list-style-type: none"> <li><u>1. Where there is third party funding, the disputing party benefiting from it shall [EU and its MS: notify] / [TUR+TKM: disclose] to the other disputing party and to the tribunal, the name and address of the third party funder and of its beneficial owner.</u></li> <li><u>2. [EU and its MS: Such notification] [TUR+TKM: The disclosure] shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.</u></li> </ol> <p><b>[TKM + TUR:</b></p> <ol style="list-style-type: none"> <li><u>3. The arbitrators shall determine whether the information disclosed may, in the eyes of a reasonable third person, give rise to doubts as to the arbitrator’s impartiality, freedom</u></li> </ol>	<p style="text-align: center;"><b>GBR</b></p> <p><u>[The placement of the following articles in the ECT text is to be decided]</u></p> <p style="text-align: center;"><u>Third-Party Funding</u></p> <ol style="list-style-type: none"> <li><u>1. Each of the Investor and the disputing Contracting Party shall notify the other and the tribunal of the name and address of any person or entity (including, without limitation, any other Contracting Party or third State) from which the Investor or the disputing Contracting Party, directly or indirectly, has received funds for the pursuit or defence of the proceedings through a donation or grant, or in return for remuneration dependent upon the outcome of the dispute (“third-party funding”).</u></li> <li><u>2. Such notification shall be made at the time of the submission of the dispute or, if later, without delay on the earliest of the date when the third-party funding is agreed, donated or granted, as applicable.</u></li> </ol>
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<p><u>from conflicts of interest, or independence.</u></p> <p>4. <u>Where there is third-party funding, the disputing party benefiting from the third-party funding shall disclose to the other disputing party and to the Tribunal whether or not the third-party funder has irrevocably committed to undertake adverse costs liability.</u></p>	
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**Georgia** supports the inclusion of a provision on TPF similar to the EU proposal, including a definition, but extending the disclosure obligation also to states, international organisations and NGOs that might be involved in the dispute. Due regard shall be paid to the practice of arbitral tribunals as well as the work undertaken by other institutions, including especially work under the ICSID and the UNCITRAL.

19. TRANSPARENCY

EU and its Member States	GBR + CHE
<p style="text-align: center;"><b>Article 1: Definitions</b></p> <p><b><u>[New paragraph]</u></b>  “UNCITRAL Transparency Rules” means the <u>UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.</u></p> <p><b><u>[New paragraph]</u></b>  “Non-disputing Party” means the Contracting Party whose investor is party to a dispute with another Contracting Party pursuant to Article 26.</p> <p style="text-align: center;"><b>New article: Transparency</b></p> <p>1. <u>The UNCITRAL Transparency Rules shall apply to disputes under Article 26, with the following additions:</u></p> <p style="padding-left: 20px;">a. <u>The following documents shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules: the request for amicable settlement pursuant to Article 26(1); the request for arbitration where applicable; the notice of challenge and the decision on challenge of any member of the tribunal; a request for consolidation of claims in accordance with the applicable arbitration rules.</u></p> <p style="padding-left: 20px;">b. <u>Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.</u></p> <p style="padding-left: 20px;">c. <u>Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the parties to a dispute shall make publicly available in a timely manner prior to the constitution of the</u></p>	<p><u>[The placement of the following articles in the ECT text is to be decided]</u></p> <p style="text-align: center;"><u>Transparency</u></p> <p><u>1. Any arbitration under this [Part][Article] shall be conducted in accordance with the UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration of 1 April 2014.</u></p>

tribunal or of the division of the court hearing the case, relevant documents pursuant to paragraph 1(a), subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.

d. A party to the dispute may disclose to other persons, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings. The party to the dispute shall ensure that those persons protect the confidential or protected information in those documents.

2. The UNCITRAL Transparency Rules shall apply to disputes under Articles 27 and 28A mutatis mutandis.

**New article: The non-disputing Party to the Treaty and other Contracting Parties**

1. A Contracting Party which is a party to a dispute shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information [FN] has been resolved, deliver to the non-disputing Party to the Treaty:

a. the request pursuant to Article 26(1), the notice or request for arbitration or claim pursuant to Article 26(4) and any other documents that are appended to such documents;

b. on request:

- i. pleadings, memorials, briefs, requests and other submissions made to the tribunal by a party to the dispute;
- ii. written submissions made to the tribunal by a third person;
- iii. minutes or transcripts of hearings of the tribunal, where available; and
- iv. orders, awards and decisions of the tribunal.

- c. on request and at the cost of the non-disputing Party to the Treaty, all or part of the evidence that has been submitted to the tribunal.

*[FN: For greater certainty, the term confidential or protected information shall be understood as defined in and determined pursuant to Article 7 of the UNCITRAL Transparency Rules.]*

2. A Contracting Party has the right to attend a hearing held in relation to a dispute under Article 26, 27 or 28A.
3. The tribunal shall accept or, after consultation with the parties to the dispute, may invite written or oral submissions from the non-disputing Party to the Treaty in accordance with Article 5 of the UNCITRAL Transparency Rules, as well as submissions on issues of treaty-interpretation from other Contracting Parties.

**New article: Intervention by Third Parties**

1. The tribunal shall permit any natural or legal person that can demonstrate a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties.
2. An application to intervene must be lodged within 90 days after the publication of submission of the claim pursuant to Article [xx]. The tribunal shall decide on the application within 90 days, after giving the disputing parties an opportunity to submit their observations.
3. If the application to intervene is granted, the intervener shall receive a copy of every procedural document submitted to the disputing parties, subject to the redaction of confidential or protected information. The intervener may submit an intervention within a time period set by the

<p><u>tribunal. The disputing parties shall have an opportunity to reply to the intervention. The intervener shall be permitted to attend the hearings held in relation to a dispute pursuant to Article 26 and to make an oral statement.</u></p> <p>4. <u>The right of intervention pursuant to this Article is without prejudice to the possibility for the tribunal to accept amicus curiae briefs from third [parties/persons] in accordance with the UNCITRAL Transparency Rules.</u></p> <p>5. <u>For greater certainty, the fact that a natural or legal person is a creditor of the Investor party to the dispute shall not be considered sufficient in itself to demonstrate that the person has a direct and present interest in the result of the dispute.</u></p>	
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**Azerbaijan and Kazakhstan** support that the repository of the information mentioned in paragraph 1(c) of the EU proposal could be the Energy Charter Secretariat since it is already providing all publicly available information on investment cases under the ECT and Article 27(1) requests to deposit a copy of the state-state award within the Energy Charter Secretariat.

Instead of straight incorporation of UNCITRAL Rules on Transparency, **Georgia** proposes to work on a specific transparency regime for the ECT. Georgia further does not agree to extend the application of wide transparency provisions to State-to-State dispute settlement under the ECT.

**Japan** supports transparency in general terms, but considered that it should be balanced with other interests and ensure that arbitral proceedings would not be politicised and exposed to undue pressure from the outside to keep enabling arbitrators to make appropriate decisions. Japan also questioned the uniformed application of UNCITRAL Rules on Transparency and impacts of the interventions by third party on integrity of the arbitral proceedings.

**Turkey** removed its proposal and considered that the proposal of the EU deserved more discussion since it was very detailed. Nevertheless, the UNCITRAL Rules on Transparency have very high standards and some Contracting Parties may have difficulties implementing them.



## 20. VALUATION OF DAMAGES

### EU and its Member States

#### New article: Valuation of damages

1. Monetary damages shall not be greater than the loss suffered by the Investor as a result of the breach of the provisions referred to in Part III, reduced by any prior damages or compensation already provided by the Contracting Party concerned.
2. The tribunal shall not award punitive damages.
3. Valuation criteria shall be based on internationally recognised principles and norms.

[Note: The EU reserves the right to propose more detailed rules on valuation at a later stage.]

**Switzerland** considers that, in general, the award should be limited to monetary damages and restitution of property when possible (and not other remedies).

**The United Kingdom** reserved its right to table a text proposal at a later stage.

**Turkey** suggest to amend Article 12 and 13 of the ECT to incorporate more detailed valuation standards.

**21. OUTSTANDING ISSUES RELATED TO THE DEFINITION OF INVESTMENT  
AND THE RIGHT TO REGULATE, SUCH AS PUBLIC DEBT**

**EU and its Member States**

**Article 26: Settlement of Disputes between an Investor and a Contracting Party**

[...]

(9) A claim with respect to the restructuring of debt issued by a Contracting Party may only be submitted under Article 26(4) in accordance with Annex [X] (Public Debt).

[...]

**ANNEX X**

**PUBLIC DEBT**

1. No claim that a restructuring of debt of a Contracting Party breaches an obligation under Part III (Investment Protection) may be submitted to, or if already submitted, be pursued under Article 26(4) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 10(7) (National Treatment and Most Favoured Nation Treatment).
2. Notwithstanding Article 26(2), and subject to paragraph (1) of this Annex, an investor may not submit a claim under Article 26(4) that a restructuring of debt of a Contracting Party breaches an obligation under Part III (Investment Protection) other than Article 10(7) (National Treatment and Most Favoured Nation Treatment) [FNI], unless 270 days have elapsed from the date of submission by the Investor of the written request for amicable settlement pursuant to Article 26(1).  
[FNI: For greater certainty, a breach of Article 10(7) (National Treatment and Most Favoured Nation Treatment) does not occur merely by virtue of a different treatment provided by a Contracting Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spill over effects, or on grounds of eligibility for debt restructuring.]
3. For the purposes of this Annex:
  - (a) “negotiated restructuring” means the restructuring or rescheduling of debt of a Contracting Party that has been effected through (i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt subject to restructuring, excluding debt held by that Contracting Party or by entities owned or

controlled by it, have consented to such debt exchange or other process.

(b) “governing law” of a debt instrument means a jurisdiction’s legal and regulatory framework applicable to that debt instrument.

4. For greater certainty, “debt of a Contracting Party” includes, in the case of the European Union, debt of a government of a Member State at the central, regional or local level.

Turkey suggested the EU to clarify further (reflecting the very specific scenario covered by the Annex) in an explanatory note to be attached to the annex.

## 22. PRE-INVESTMENT

**Albania** suggests to maintain the approach of covering investments only in the post-establishment phase, and is open to discuss the possibility to include a provision to explicitly exclude the coverage of pre-establishment phase.

**The European Union** and its **Member States** supported listing the topic of pre-investment under the condition that such topic would not include ISDS.

**Georgia** proposes that coverage of pre-establishment and establishment phases shall be explicitly excluded. This said, Georgia is open to discuss the inclusion in the Treaty or the adoption as a separate instrument of soft law provisions/recommendations regarding any matter on the pre-establishment phase of investment.

**Japan** referred to the discussion paper submitted in preparation to this round of negotiations. Japan does not believe that there is an urgent need to amend, at this moment, the current ECT provisions, including Article 10(1) through (3). However, to further promote investments in the Area of ECT Contracting Parties, Japan believes it would be worth discussing among the Contracting Parties whether pre-investment phase should also be protected under ECT, and Japan is open to the discussion without prejudging the outcome.

**Kazakhstan** stated that pre-investment phase should not be deleted from the ECT coverage.

**Turkey** proposes to amend the ECT to include a provision expressly excluding the application of ISDS to the pre-investment phase.

### 23. REIO

#### ARTICLE 24 EXCEPTIONS

[...]

[ KAZ:

(5) Articles 7, 26, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations.

A Regional Economic Integration Organization undertakes to ensure that its provisions treat Energy Materials and Products originating in another Contracting Party and in free circulation in its Area no less favourably than Energy Materials and Products originating in its constituent member-states. At the same time, REIO is obliged to provide information on the legal framework related to the movement of its Energy Materials and Products within the REIO, as well as trade provisions and provisions for the resolution of investment disputes at least once a year to other Contracting Parties that are not members of that REIO.]

Turkey suggests to clarify the legal relationship between the members of a REIO.

## 24. OBSOLETE PROVISIONS

### *Understandings*

~~4. With respect to Article 1(8)—Consistent with Australia’s foreign investment policy, the establishment of a new mining or raw materials processing project in Australia with total investment of \$A 10 million or more by a foreign interest, even where that foreign interest is already operating a similar business in Australia, is considered as the making of a new investment.<sup>9</sup>~~

~~10. With respect to Article 10(4) The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, *inter alia*, provisions relating to the sale or other divestment of state assets (privatisation) and to the dismantling of monopolies (demonopolisation).<sup>10</sup>~~

~~11. With respect to Articles 10(4) and 29(6) Contracting Parties may consider any connection between the provisions of Article 10(4) and Article 29(6).<sup>2</sup>~~

~~19. With respect to Article 33—The provisional Charter Conference should at the earliest possible date decide how best to give effect to the goal of Title III of the European Energy Charter that Protocols be negotiated in areas of cooperation such as those listed in Title III of the Charter.<sup>11</sup>~~

~~20. With respect to Article 34 (a)—The provisional Secretary General should make immediate contact with other international bodies in order to discover the terms on which they might be willing to undertake tasks arising from the Treaty and the Charter. The provisional Secretary General might report back to the provisional Charter Conference at the meeting~~

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<sup>9</sup> The present legal framework might have been changed. The stipulation at issue is not reflected in Australia’s Foreign Investment Policy (1.01.2018) and Foreign Acquisitions and Takeovers Act 1975 (as of 12.04.2018).

<sup>10</sup> The supplementary treaty foreseen in Article 10(4) ECT was not adopted (see below footnote 21).

<sup>11</sup> It refers to the period before the entry into force of the ECT.

which Article 45(4) requires to be convened not later than 180 days after the opening date for signature of the Treaty.<sup>3</sup>

**22. With respect to Annex TFU(1)**<sup>12</sup>

*Declarations*

**1. With respect to Article 1(6)** The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).<sup>13</sup>

**3. With respect to Article 7** The **European Communities**<sup>14</sup> and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law. They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.

**4. With respect to Article 10** Canada and the United States each affirm that they will apply the provisions of Article 10 in accordance with the following considerations: [...] <sup>15</sup>

**5. With respect to Article 25**

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<sup>12</sup> The applicability of Annex TFU terminated on 1 December 1999 in accordance with Article 29(2)(b).

<sup>13</sup> The status of the Russian Federation as a 'Signatory' is currently under discussion. Furthermore, the supplementary treaty foreseen in Article 10(4) ECT was not adopted (see below footnote 21)

<sup>14</sup> The European Coal and Steel Community ceased to exist in 2002 when its founding treaty expired. As of 1 December 2009, the European Union replaced and succeeded the 'European Community'. The European Atomic Energy Community (EURATOM) remained an independent entity though represented by the European Commission. Austria, Finland and Sweden became Member States in 1995. It is suggested that the EU proposes a different wording for updating the text highlighted in green.

<sup>15</sup> Canada and the United States are not Signatories.

The **European Communities** and their Member States recall that, in accordance with **article 58 of the Treaty establishing the European Community**:

a) companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the right of establishment pursuant to Part Three, Title III, Chapter 2 of the Treaty establishing the European Community, be treated in the same way as natural persons who are nationals of Member States; companies or firms which only have their registered office within the Community must, for this purpose, have an effective and continuous link with the economy of one of the Member States;

(b) “companies and firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.

The **European Communities** and their Member States further recall that:

Community law provides for the possibility to extend the treatment described above to branches and agencies of companies or firms not established in one of the Member States; and that, the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the **Treaties establishing the European Communities**.<sup>16</sup>

## **7. With respect to Annex G(4)**<sup>17 18</sup>

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<sup>16</sup> See footnote 14. It is suggested that the EU proposes a different wording for updating the text highlighted in green.

<sup>17</sup> Annex G was Replaced with Annex W by the Trade Amendment of 24 April 1998.

<sup>18</sup> See footnote 14 in relation to ‘the European Communities’.



(a) ~~The European Communities and the Russian Federation declare that trade in nuclear materials between them shall be governed, until they reach another agreement, by the provisions of article 22 of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, signed at Corfu on 24 June 1994, the exchange of letters attached thereto and the related joint declaration, and disputes regarding such trade will be subject to the procedures of the said Agreement.~~<sup>19</sup>

(b) ~~The European Communities~~ European Atomic Energy Community (EURATOM) and Ukraine declare that, in accordance with the Agreement on Partnership and Cooperation signed at Luxembourg on 14 June 1994 and the Interim Agreement thereto, initialled there the same day, trade in nuclear materials between them shall be exclusively governed by the provisions of the Agreement between the EURATOM and the Cabinet of Ministers of Ukraine for Co-operation in the Peaceful Uses of Nuclear Energy a specific agreement to be concluded between the European Atomic Energy Community and Ukraine.<sup>20</sup>

~~Until entry into force of this specific agreement, the provisions of the Agreement on Trade and Economic and Commercial Cooperation between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics signed at Brussels on 18 December 1989 shall exclusively continue to apply for trade in nuclear materials between them.~~

(c) The European Atomic Energy Community (EURATOM) ~~European Communities~~ and Kazakhstan declare that, in accordance with the Agreement on Partnership and Cooperation initialled at Brussels on 20 May 1994, trade in nuclear materials between them shall be exclusively governed by the provisions of the Agreement for Co-operation

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<sup>19</sup> The status of the Russian Federation as a 'Signatory' is currently under discussion.

<sup>20</sup> The Agreement between the European Atomic Energy Community (EURATOM) and the Cabinet of Ministers of Ukraine for Co-operation in the Peaceful Uses of Nuclear Energy was adopted on 28 April 2005. It entered into force on 1 September 2006. Therefore, it is suggested to simply refer to such Agreement.

~~in the Peaceful Uses of Nuclear Energy between the EURATOM and the Government of the Republic of Kazakhstan a specific agreement to be concluded between the European Atomic Energy Community and Kazakhstan.<sup>21</sup>~~

~~Until entry into force of this specific agreement, the provisions of the Agreement on Trade and Economic and Commercial Cooperation between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics signed at Brussels on 18 December 1989 shall exclusively continue to apply for trade in nuclear materials between them.~~

- (d) ~~The European Atomic Energy Community (EURATOM) European Communities and Kyrgyzstan~~ declare that, in accordance with the Agreement on Partnership and Cooperation initialled at Brussels on 31 May 1994, trade in nuclear materials between them shall be exclusively governed by the provisions of a specific agreement to be concluded between the European Atomic Energy Community and Kyrgyzstan.

Until entry into force of this specific agreement, the provisions of the Agreement on Trade and Economic and Commercial Cooperation between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics signed at Brussels on 18 December 1989 shall exclusively continue to apply for trade in nuclear materials between them.<sup>22</sup>

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<sup>21</sup> The Agreement for Co-operation in the Peaceful Uses of Nuclear Energy between the European Atomic Energy Community (EURATOM) and the Government of the Republic of Kazakhstan was adopted on 5 December 2006. The Agreement entered into force on 1 September 2009. Therefore, it is suggested to simply refer to such Agreement.

<sup>22</sup> The Interim Agreement on trade and trade-related matters between the European Community, the European Coal and Steel Community and the European Atomic Energy Community, of the one part, and the Kyrgyz Republic, of the other part, adopted on 28 November 1996, provides for the commitments of the parties to conclude a specific agreement on the trade in nuclear materials. Such agreement has seemingly not been concluded so far.

- (e) The European Atomic Energy Community (EURATOM) ~~European Communities~~ and Tajikistan declare that trade in nuclear materials between them shall be exclusively governed by the provisions of a specific agreement to be concluded between the European Atomic Energy Community and Tajikistan.<sup>23</sup>

Until entry into force of this specific agreement, the provisions of the Agreement on Trade and Economic and Commercial Cooperation between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics signed at Brussels on 18 December 1989 shall exclusively continue to apply for trade in nuclear materials between them.

- (f) The European Atomic Energy Community (EURATOM) ~~European Communities~~ and Uzbekistan declare that trade in nuclear materials between them shall be exclusively governed by the provisions of the Agreement for Co-operation in the Peaceful Uses of Nuclear Energy between the EURATOM and the Government of the Republic of Uzbekistan ~~a specific agreement to be concluded between the European Atomic Energy Community and Uzbekistan.~~<sup>24</sup>

~~Until entry into force of this specific agreement, the provisions of the Agreement on Trade and Economic and Commercial Cooperation between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist~~

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<sup>23</sup> Article 16 of the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part (adopted on 11 November 2004) provides for the following: 'Trade in nuclear materials shall be conducted in accordance with the provisions of the Treaty establishing the European Atomic Energy Community. If necessary, trade in nuclear materials shall be subject to the provisions of a specific Agreement to be concluded between the European Atomic Energy Community and the Republic of Tajikistan.' The latter has seemingly not been concluded so far.

<sup>24</sup> The Agreement for Co-operation in the Peaceful Uses of Nuclear Energy between the European Atomic Energy Community (EURATOM) and the Government of the Republic of Uzbekistan was adopted on 6 October 2003. The Agreement entered into force on 1 August 2004. Therefore, it is suggested to simply refer to such Agreement.

~~Republics signed at Brussels on 18 December 1989 shall exclusively continue to apply for trade in nuclear materials between them.~~

***Energy Charter Treaty*** (as amended in 1998)

**Article 1: Definitions**

Original text of the ECT	ECT modified by the Trade Amendment
(4) “Energy Materials and Products”, based on the Harmonised System of the <del>Customs-Co-Operation Council</del> <u>World Customs Organization</u> and the Combined Nomenclature of the <u>European Communities</u> , means the items included in Annexe EM. <sup>25</sup>	(4) “Energy Materials and Products”, based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the <u>European Communities</u> , means the items included in Annexes EM I or EM II. <sup>26</sup>

**Article 5: Trade-Related Investment Measures**

(4) Notwithstanding paragraph (1), a Contracting Party may temporarily continue to maintain trade-related investment measures which were in effect more than 180 days before its signature of, or accession to, this Treaty, subject to the notification and phase-out provisions set out in Annex TRM.<sup>27</sup>

**Article 14: Transfers Related to Investments**

<sup>25</sup> The Customs Co-Operation Council changed its name to World Customs Organization in 1994. See also footnote 14 in relation to ‘the European Communities’.

<sup>26</sup> See footnote 14 in relation to ‘the European Communities’.

<sup>27</sup> Should be modified to expressly cover accession (as foreseen in Section 6 of Annex TRM).

~~(5) Notwithstanding paragraph (2), Contracting Parties which are states that were constituent parts of the former Union of Soviet Socialist Republics may provide in agreements concluded between them that transfers of payments shall be made in the currencies of such Contracting Parties, provided that such agreements do not treat Investments in their Areas of Investors of other Contracting Parties less favourably than either Investments of Investors of the Contracting Parties which have entered into such agreements or Investments of Investors of any third state.<sup>28</sup>~~

### Article 10: Promotion, Protection and Treatment of Investments

~~(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organisations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.<sup>29</sup>~~

[...]

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<sup>28</sup> It could be considered whether such exception is still needed or whether it should be considered for other groups of states.

<sup>29</sup> In 1998 the adoption session of the supplementary treaty was adjourned. After some additional consultations at the then Investment Group, discussions were put on hold and in 2016 the Conference (CCDEC 2016 21) requested the Secretariat to focus on non-binding instruments which could remove non-discriminatory and de facto barriers to the establishment of energy investments. Even if Article 10(4) is removed from the ECT, pre-investment would still be covered:

- Articles 10(2) and 10(5) ECT still require Contracting Parties to *endeavour* to accord non-discriminatory treatment as regards the Making of Investments and to limit to the minimum the exceptions to such non-discriminatory treatment and progressively remove existing restrictions
- Article 10(6) ECT allows Contracting Parties to *voluntarily* declare, as regards the Making of Investments, their intention not to introduce new exceptions to the non-discriminatory treatment and even to accord such non-discriminatory treatment in some or all Economic Activities in the Energy Sector (concept defined in Article 1.5 of the ECT).

~~(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.<sup>30</sup>~~

#### Article 24: Exceptions

(4) The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment: [...]

~~(b) which is accorded by a bilateral or multilateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.<sup>31</sup>~~

#### Article 29: Interim Provisions on Trade-Related Matters

~~(2) (b) Such trade of a Contracting Party which is a state that was a constituent part of the former Union of Soviet Socialist Republics may instead be governed, subject to the provisions of Annex TFU, by an agreement between two or more such states, until 1 December 1999 or the admission of that Contracting Party to the [WTO/GATT],-~~

<sup>30</sup> No supplementary treaty (art. 10.4) exists.

<sup>31</sup> The establishment of their mutual economic relations took place with the Treaty on Establishment of Economic Union (CIS, adopted on 24 September 1993) and Agreement on Free Trade Zone (CIS, adopted on 18 October 2011). In addition, the Eurasian Economic Union came into force on 1 January 2015. Similarly, if countries in other regions of the world accede to the ECT their regional economic relations would be covered by Arts. 24.4.a and 25 ECT (e.g. ASEAN Economic Community, ECOWAS or African Continental Free Trade Area).

~~whichever is the earlier.~~<sup>32</sup>

### **Article 30: Developments in International Trading Arrangements**

~~Contracting Parties undertake that in the light of the results of the Uruguay Round of Multilateral Trade Negotiations embodied principally in the Final Act thereof done at Marrakesh, 15 April 1994, they will commence consideration not later than 1 July 1995 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference.~~<sup>33</sup>

### **Article 31: Energy-Related Equipment**

~~The provisional Charter Conference shall at its first meeting commence examination of the inclusion of energy-related equipment in the trade provisions of this Treaty.~~<sup>34</sup>

### **Article 32: Transitional Arrangements**<sup>35</sup>

#### **Article 34: Energy Charter Conference**

- (3) The functions of the Charter Conference shall be to: [...]
- (g) encourage cooperative efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in those Contracting Parties ~~countries of Central and Eastern Europe and the former Union of Soviet Socialist Republics~~ undergoing economic transition;

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<sup>32</sup> The wording is the same in the original version of the ECT and after its trade amendment except for the reference to WTO or GATT. The applicability of such Agreements terminated on 1 December 1999 in accordance with Art. 29 (2) (b).

<sup>33</sup> Done with the Trade Amendment in 1998.

<sup>34</sup> Done with the Trade Amendment in 1998.

<sup>35</sup> The applicability of the transitional arrangements terminated on 1 July 2001 in accordance with Article 32(3).

### Article 45: Provisional Application

- ~~(3) (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.<sup>36</sup>~~
- ~~(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.<sup>37</sup>~~
- ~~(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.<sup>38</sup>~~
- [...]
- ~~(7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.<sup>39</sup>~~

### *Annexes to the ECT*

~~Annex PA: List of Signatories which do not accept the provisional application obligation of Article 45 (3) (b)<sup>40</sup>~~

~~Annex TFU: Provisions regarding Trade Agreements between States which Were Constituent Parts of the Former Union of Soviet Socialist Republics<sup>41</sup>~~

<sup>36</sup> Signatories initially listed in Annex PA became full Contracting Parties. There can be no more Signatories.

<sup>37</sup> The ECT already entered into force. After that, Art. 34 (1) refers to meetings of the Conference.

<sup>38</sup> The ECT already entered into force. After that, Art. 35 regulates the Secretariat.

<sup>39</sup> The ECT already entered into force. After that, Art. 36 covers voting for acceding states and REIOs.

<sup>40</sup> Signatories initially listed in Annex PA became full Contracting Parties. There can be no more Signatories.



~~Annex T: Contracting Parties' Transitional Measures~~<sup>42</sup>

*Decisions with Respect to the ECT*

~~2. With respect to Article 10(7) The Russian Federation may require that companies with foreign participation obtain legislative approval for the leasing of federally owned property, provided that the Russian Federation shall ensure without exception that this process is not applied in a manner which discriminates among Investments of Investors of other Contracting Parties.~~<sup>43</sup>

~~3. With respect to Article 14~~<sup>44</sup>

~~4. With respect to Article 14(2)~~<sup>45</sup>

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<sup>41</sup> The applicability of Annex TFU was terminated on 1 December 1994 in accordance with Article 29(2)(b).

<sup>42</sup> The applicability of Annex T terminated on 1 July 2001 in accordance with Article 32(3).

<sup>43</sup> The status of the Russian Federation as a 'Signatory' is currently under discussion.

<sup>44</sup> Only the Russian Federation notified the Secretariat within the deadline (para. 3 of the Decision) of its intention to apply restrictions in accordance with this Decision. Therefore, the Decision does not apply anymore.

<sup>45</sup> The applicability of the Decision terminated with the introduction of the full convertibility of Romanian currency.