

**ENERGY CHARTER  
SECRETARIAT**

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Brussels, 6 October 2019

Related documents: CC 651, Mess 1602/19
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**DECISION OF THE ENERGY CHARTER CONFERENCE**

**Subject: Adoption by Correspondence – Policy Options for Modernisation  
of the ECT**

By document CC 651, dated 17 September 2019, delegations were invited to approve the attached document as suggested policy options for modernisation of the ECT.

As specified by Rule 19 of the Rules of Procedure concerning the adoption of decisions by correspondence, members of the Energy Charter Conference were informed that any delegation that wished to object to this proposal should notify the Secretariat of its position in writing by 6 October 2019.

Having received no objections within the specified time limit, on 6 October 2019, the Conference approved the attached document as suggested policy options for modernisation of the ECT with immediate effect.

# **POLICY OPTIONS FOR MODERNISATION OF THE ECT**

## **GENERAL COMMENTS**

### **Azerbaijan**

We are aware that Article 5 is not a part of modernisation, but we would like to state that GATT 1994 has not been signed by the Republic of Azerbaijan.

Although Article 21 is not included in the list of topics selected for modernisation, we would like to note that the tax legislation of the Republic of Azerbaijan applies the different approach in relation to the domestic production and the imported products.

### **European Union**

On 15 July 2019, the Council adopted the negotiation directives for the Modernisation of the ECT.<sup>1</sup> Against this backdrop, the European Union and its Member States wish to complement and refine their contribution which was circulated on 14 March 2019 by the ECT Secretariat as message 1500/19.

#### *General Principles and Objectives*

The objective of the Modernised ECT should be to facilitate investment in the energy sector in a sustainable way between the ECT Contracting Parties by creating a coherent and up-to-date legally binding framework that provides for legal certainty and ensures a high level of investment protection while respecting the ECT Contracting Parties' right to regulate.

The Modernised ECT should aim at establishing clear rules on a broad number of investment-related issues. This in turn will allow the ECT Contracting Parties to strengthen their institutional capabilities, public policies and legislative frameworks in the energy sector.

The modernised ECT should clarify that the EU can require market participants from third countries operating within the internal market to comply with applicable Union and Member States' laws, including those concerning environmental and safety policy.

The Modernised ECT should reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement.

#### *Dispute settlement provisions*

The European Union and its Member States would like to recall that several initiatives for the reform of the investor-State dispute settlement (ISDS) system are currently ongoing at the multilateral level in the UNCITRAL Working Group III and in ICSID. Several of the Contracting Parties to the ECT are actively involved in these processes and share with the EU common concerns regarding various aspects of the current ISDS system. Most of the dispute settlement-related items that have been listed for modernisation of the ECT by the Contracting Parties are covered by the ongoing multilateral reform efforts in UNCITRAL and ICSID and have been identified as issues requiring reform.

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<sup>1</sup> <https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf>

In the context of the UNCITRAL Working Group III discussions, the European Union and its Member States are pursuing the establishment of a standing mechanism to resolve investment disputes (i.e. the Multilateral Investment Court) which would bring about systemic structural change to ISDS, including on the topics identified for ECT modernisation. The EU and its Member States are also pursuing bilaterally with their trading partners the establishment of an Investment Court System (ICS) for the resolution of investment disputes arising under EU bilateral trade and/or investment protection agreements.

As set out in the negotiation directives, the EU and its Member States intend to engage in the modernisation of the dispute settlement topics in the ECT in line with their approach in its EU bilateral agreements and the position taken in UNCITRAL Working Group III and ICSID, to ensure that such approaches are reflected in the Modernised ECT. In particular, the EU and its Member States will ensure that ongoing multilateral reforms of investor-to-state dispute settlement, such as those within the UNCITRAL Working Group III and ICSID, will be applied to the ECT. This includes ensuring that a future Multilateral Investment Court applies to the ECT.

### **Georgia**

Pursuant to the decision made by the Sub-Group on Modernisation, in this document Georgia offers its preliminary observations and policy considerations regarding various topics identified in the context of modernisation of Energy Charter Treaty (ECT, Treaty). Georgia offers its views on the majority of items under the ECT modernisation agenda and remains committed to actively participate in the modernisation process on all topics to be discussed within this important exercise. The observations, comments and suggestions provided in this document shall be without prejudice to Georgia's position during the second phase of modernisation exercise where the actual work for the modernisation, through whatever instrument agreed by the Contracting Parties, will be discussed and executed.

Investment activities as well as the practice of investor-state dispute settlement and thus, the interpretation of various legal concepts of investment protection under the ECT have greatly evolved since the conclusion of the ECT; therefore, the modernisation of the Treaty is necessary and timely.

In view of the modern developments in the domain of investment protection and investor-state dispute settlements, discussions are pending in various international fora and framework. Georgia believes that due regard shall be made to the pending discussions and reforms in the above-mentioned field, especially considering the work of UNCITRAL and ICSID the results of which can have direct impact on the application of disputes settlement procedures under the ECT.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. On that premise, we propose the following options for the Modernisation of the ECT, as well as an option to keep all ECT provisions as they are. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Luxembourg**

Luxembourg urges parties/secretariat to conduct sound impact assessments on any and all major changes that will be proposed in the modernized Treaty.

## **Switzerland**

The Sub-Group on Modernisation decided in its Meeting of 21 February 2019 to discuss policy options at the meeting of 15 March 2019. The ECT Members were asked to submit possible policy options until 14 March 2019. The topics below are listed in the order used by the ECT Secretariat during previous discussions. Where deemed appropriate, Switzerland offers a policy option and a reasoning therefor (as suggested by Message 1493/19 of the ECT Secretariat). These options, comments and suggestions made are without prejudice to Switzerland's position i.e. in the context of the modernisation of the Energy Charter Treaty.

## **Turkey**

Turkey believes that it is timely to review some of the current ECT provisions based on her past experience on the implementation of the ECT Treaty and the current developments both in the energy sector and the investment treaty law.

Today, countries and REIOs, have engaged in reform processes to amend their regional and bilateral investment treaties as a result of recent decisions of the arbitral tribunals to prevent the wide interpretations given by the arbitral tribunals and provide for more policy space to the host Contracting Parties. Additionally, international organizations, such as UNCITRAL, OECD and ICSID, have started reform studies and debates to reform the whole ISDS system after the widespread complaints had risen for the reliability of the current system and unbalanced structure of the Agreements. In this context, Turkey has been following all these developments closely, and taking all the necessary measures, such as the renegotiation of its BITs, signed during 80s and 90s under the revision of its BIT template to balance the rights and liabilities of investors and the State.

In summary, it is thought that the current modernisation process of the ECT should be undertaken by the participation of all Contracting States, given the recent changes in the energy sector, the international investment law, and the ISDS system.

## 1. PRE-INVESTMENT

### Albania

*Reasoning:* Referring to the BITs signed by Albania, as well as the national legislation on foreign investments, Albania prefers to cover investments only in the post-establishment phase, which is in accordance with the current version of the ECT.

*Proposed policy option:* Albania would like to suggest to maintain this approach and is open to discuss the possibility to include a provision to explicitly exclude the coverage of pre-establishment phase.

### Georgia

*Reasoning:* current version of the ECT does not extend treaty protection and the investor-state dispute settlement to pre-establishment phases of investments covered by the Treaty.

*Proposed policy option:* Georgia proposes to maintain this approach. In particular investment protection and investor-state dispute settlement shall extend to the investments that have been established i.e. from the post-establishment phase of the investment. 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

Japan believes that it is not necessary to amend the current ECT provisions. On that premise, we propose the following options for the Modernisation of the ECT, as well as an option to keep all ECT provisions as they are.

*Reasoning:* Article 10(2) refers to only Contracting Party's endeavor to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3) (NT and MFN), but the pre-establishment phase should be protected as obligation.

*Proposed policy option:* Amend the ECT to include a provision expressly including the pre-establishment phase in the ECT's Part III protection.

Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Turkey (Message 1520)

*Reasoning:* In its BITs, Turkey prefers to cover investments only in the post-establishment phase. Additionally, under its notification submitted to ICSID on March 3, 1989, under Article 25/4 of the ICSID Convention, Turkey states that:

*"I also have the honour to hereby notify, pursuant to Article 25(4) of the 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of the Centre that only the disputes arising directly out of investment activities which have obtained*

*necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, **and that have effectively started** shall be subject to the jurisdiction of the Center...”*

*Proposed policy option:* Amending the ECT to include a provision expressly excluding the pre-establishment period from the Treaty, and thus amending ECT’s Part III, Article 10 (1), (2), (3),(4), (5) and (6).

## **2. DEFINITION OF ‘CHARTER’**

### **Albania**

*Reasoning:* Referring to Article 1 (1) of the ECT, the definition of "Charter" means the "European Energy Charter adopted in the Concluding Document of the Hague Conference signed at the Hague on 17 December 1991", meanwhile, on 2015 it was also adopted the International Energy Charter as a political declaration aiming to strengthen energy cooperation between the signatory states.

*Proposed policy option:* Albania is open to discuss the possibility to modify Article 1(1) of the ECT to also include reference to the International Energy Charter in the definition of "Charter".

### **European Union**

The definition is relevant for several key provisions of the ECT. In 2015, the International Energy Charter was adopted in order to update the original 1991 European Energy Charter. The ECT Contracting Parties were unable to agree whether the reference to the Charter in the ECT could be understood to also referring to the International Energy Charter. The EU was in favour of such an interpretation. Therefore, the Modernised ECT should include the 2015 International Energy Charter inside the definition of the 'Charter'.

### **Georgia**

*Reasoning:* It is our understanding that the International Energy Charter was adopted in 2015 in order to Modernize European Energy Charter to which the reference is made in the Definition of the 'charter'.

*Proposed policy option:* Georgia is open to discuss the possibility of amending Article 1(1) of the ECT to also include reference to the International Energy Charter.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Switzerland**

*Reasoning:* Switzerland is open to include the 2015 International Energy Charter.

*Policy option:* Modify Article 1(1) to include 2015 International Energy Charter in the definition of 'Charter'.

### **Turkey**

*Reasoning:* -

*Proposed policy option:* Modifying Article 1(1) so as to include 2015 International Energy Charter inside the definition of 'Charter'.

### **3. DEFINITION OF ‘ECONOMIC ACTIVITY IN THE ENERGY SECTOR’**

#### **Albania**

*Reasoning:* Albania is open to discuss the possibility to align the modernisation process of the ECT with the Energy Transition/Decarbonisation Processes and Contracting Parties’ Climate Change Commitments.

*Proposed policy option:* Albania is 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”.

#### **Azerbaijan**

*Reasoning:* It is necessary for international energy trade and investments to be renewed, in particular with respect to energy transit requirements in line with the modern era and technologies.

*Proposed policy option:* To modify Article 1, paragraph 5 of the Treaty to cover new investment trends and new technologies.

#### **European Union**

Investments covered by the ECT must be associated with ‘economic activity in the energy sector’. Such economic activity is associated with products and materials that are largely fossil fuels-related (listed in Annex EMI of the ECT). The definition may not cover new trends in investment, in particular with regard to renewable energy nor the energy efficiency tools and on-going digitalisation of the energy sector. Therefore, 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**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

#### **Luxembourg**

*Reasoning:* Luxembourg would like to praise the initiative taken by the Secretary General of the Charter on the modernisation of the Treaty. The world is evolving, and the energy/climate world is disrupting.

Contracting parties have taken engagements in Paris towards Climate objectives and the ultimate goal as demonstrated in the last IPCC report is now about 1,5 ° C and a net zero carbon world in 2050. Luxembourg shares the view that these major evolutions need to be horizontally reflected in the revised Treaty.

Therefore, in the aim to align the modernisation process of the Energy Charter Treaty with the Energy transition and the contracting parties’ commitments in the fight against Climate Change, Luxembourg proposes - aiming at facilitating everyone’s understanding - the options below.

*Proposed policy option:* 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**

*Reasoning:* Switzerland is open to discuss.

*Policy option:* To modify 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’. Amend Annex EM to cover energy carriers/technologies not covered so far (e.g. biogas, other biogenic feedstock, hydrogen).

### **Turkey**

*Reasoning:* -

*Proposed policy option:* 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’.

## 4. DEFINITION OF INVESTMENT

### Albania

*Reasoning:* Referring to the BITs signed by Albania, as well as the national legislation on foreign investments, Albania prefers to use a non-exhaustive and illustrative list of what is considered an investment. Albania is open to discuss the possibility to amend the definition of “investment” to include additional characteristics in order to align it with recent developments.

*Proposed policy option:* 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.

### Azerbaijan

*Reasoning:* To add the additional characters, exceptions and provisions for defining the term more precisely.

*Proposed policy option:* “Investment” means every kind of asset established or acquired directly by an investor of one Contracting Party wholly or exclusively in the territory of the state of the other Contracting Party in accordance with the national legislation of the latter Contracting Party, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, an expectation of gain or profit, or an assumption of risk and includes, in particular, though not exclusively:

- a. movable and immovable property or any property rights such as mortgages, liens, pledges, leases, usufruct and similar substantial laws;
  - b. a company, or shares, stocks or other form of participation in a company;
  - c. money, claims to money or claims to performance under contract having a financial value;
  - d. intellectual property rights - copyright, related rights, rights to topologies of integrated circuits and databases and industrial property rights to inventions, utility models, industrial designs, trademarks, geographical indications, technical processes, trade names, "know-how" and "business reputation", as well as other relevant rights recognized by the national legislations of both Contracting Parties;
  - e. concessions conferred by law, by administrative act or under a contract by a competent authority, including concessions to search for, develop, extract or exploit natural resources.
- 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.

## **European Union**

The definition of investment should be aligned to recent EU agreements to ensure that investments must have been made in accordance with the law of the host State; that the investment should fulfil certain characteristics such as the commitment of capital, the expectation of profit and the assumption of risk; and that certain types of assets are excluded (such as claims to money that arise solely from commercial contracts for the sale of goods or services and an order or judgment entered in a judicial or administrative action or an arbitral award).

## **Georgia**

*Reasoning:* Georgia is open to discuss the amendment to the definition of investment in order to modernize it in view of the recent developments and the best practice in the interpretation of the term investment.

*Proposed policy option:* 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**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Switzerland**

*Reasoning:* In principle, Switzerland agrees to introduce characteristic such as established by the Salini criteria. It also agrees to incorporate a legality requirement at the time the investment is made.

*Policy option:* 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 (BIT Switzerland-Georgia).

## Turkey

*Reasoning:* Turkey uses a non-exhaustive, illustrative list of “investment” definition; giving reference to characteristics of investment (Salini Test) including; such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, contribution to economy, or a certain duration in order to exclude one-time speculative type of investments from the scope of its treaties.

*Proposed policy options:* 1- Require “investment” to fulfil specific characteristics, such as the commitment of capital, the expectation of profit, the assumption of risk, the contribution to host economy and a certain duration.

2 - Specify that investment must be made in accordance with the laws and regulations of the host State at the time the investment is made.

## **5. DEFINITION OF INVESTOR**

### **Albania**

*Reasoning:* Albania finds it necessary to introduce additional criteria for the definition of “investor” in order to exclude investors that are lacking substantive business activities and to prevent these type of companies to bring disputes under the ECT.

*Proposed policy option:* Albania proposes to introduce additional criteria such as “substantive business activity” or/and other relevant criteria in the definition of “investor”.

### **Azerbaijan**

*Reasoning:* To include the provision of double nationality with regard to natural person and further improve the provision related to legal entity.

*Proposed policy option:* Investor means:

- 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;
- 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.

### **European Union**

The definition of investor should include an appropriate mechanism to exclude investors and businesses that are lacking substantive business activities in their country of origin in order to prevent that mailbox companies bring disputes under the ECT.

### **Georgia**

*Reasoning:* Georgia is open to discuss the amendment to the definition of investor in order to modernize it in view of the recent developments and the best practice in the interpretation of the term investor.

*Proposed policy option:* Georgia proposes to include requirement of “substantive business activity” with respect to “a company or other organization” in the definition of investor.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Switzerland**

*Reasoning:* Switzerland is open to introduce additional criteria for the definition of covered investors (seat, substantial business activities).

*Proposed policy option:* Include additional criteria in the definition of ‘investor’, such as the requirement for ‘substantial business activity’ or the commitment of a substantial amount of capital.

## **Turkey**

*Reasoning:* Turkey adopts a combination of all of the policy options listed below in its IIAs in order to protect real investors having made investments in the territory of the host State. Therefore, the definition of “investor” should contain all of the criteria mentioned below:

*Proposed policy options:*

- 1- Including additional criteria in the definition of “investor”, such as the requirement for having its seat/headquarters” and/or engage in “substantial/real business/real economic” activities in the territory of other Contracting Party.
- 2- Strengthen the Denial of Benefits clause of Article 17 ECT.
- 3- Accept dominant and effective nationality in case of dual nationality.

## **6. RIGHT TO REGULATE**

### **Albania**

*Reasoning:* Albania considers that it is very essential to ensure and preserve the governments' right to regulate for public policies.

*Proposed policy option:* Albania is open to discuss the inclusion of a separate provision referencing the "Right to Regulate".

### **Azerbaijan**

*Reasoning:* It is commendable to include the concept taking into regard the international commitments of each State.

*Proposed policy option:* As the International Energy Charter Final Act (HAAQA 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.

### **European Union**

Safeguarding governments' right to regulate, i.e. ensuring that governments' right to regulate for public policies such as the protection of health, safety, or the environment is fully preserved. Moreover, in the EU approach, it is clarified that investment protection provisions cannot be interpreted as a commitment by governments not to change their laws in the future, even if that may negatively affect the investor's expectations of profits. Lastly, EU bilateral investment protection agreements typically also clarify that the application of EU's state aid law does not constitute a breach of investment protection standards.

Moreover, the European Union and its Member States understand that the on-going modernisation of the ECT covers with respect to safeguarding the ECT Contracting Parties' right to regulate, inter alia, the issue of the scope and applicability of Article 24 (Exceptions) to other provisions of the Treaty, notably to the non-discrimination principles stipulated in Article 10 (7) of the ECT.

### **Georgia**

*Reasoning:* Georgia is convinced that the ECT in general and particularly Chapter on Investment Promotion and Protection shall be designed in a way to strike balance between the protection of investors and their investments and Contracting Parties' sovereign regulatory, legislative and policy interests.

*Proposed policy option:* 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**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Luxembourg**

*Reasoning:* Luxembourg would like to praise the initiative taken by the Secretary General of the Charter on the modernisation of the Treaty. The world is evolving, and the energy/climate world is disrupting.

Contracting parties have taken engagements in Paris towards Climate objectives and the ultimate goal as demonstrated in the last IPCC report is now about 1,5 ° C and a net zero carbon world in 2050. Luxembourg shares the view that these major evolutions need to be horizontally reflected in the revised Treaty.

Therefore, in the aim to align the modernisation process of the Energy Charter Treaty with the Energy transition and the contracting parties' commitments in the fight against Climate Change, Luxembourg proposes - aiming at facilitating everyone's understanding - the options below.

*Proposed policy option:* Include a stand-alone article specifying the right to regulate with a non-stabilisation clause (i.e. CETA Article 8.9; EU-Singapore and Vietnam investment protection agreements; 2018 Dutch Model BIT) taking into account especially the energy transition process and the specific context of implementation/fulfilment of the Paris Agreement contracting parties' commitments.

## **Switzerland**

*Reasoning:* Switzerland does welcome to mention the concept of the Right to Regulate in the Treaty.

*Proposed policy option:* Include in the Preamble or in a provision a reference to the Right to Regulate.

## **Turkey**

*Reasoning:* Turkey prefers to provide a reference to "the right to regulate" in the Preamble as well as within the Articles in its recent IIAs to provide policy space for the protection of health, safety, and the environment.

*Proposed policy option:* Include in the Preamble, as well as in a stand-alone Article specifying the right to regulate with a non-stabilization clause.

## **7. DEFINITION OF FAIR AND EQUITABLE TREATMENT (FET)**

### **Albania**

*Reasoning:* Past experiences have shown that it is necessary to include in the ECT a clear definition of the fair and equitable treatment in order to avoid a wide interpretation of FET meaning.

*Proposed policy option:* Albania proposes to clarify “Fair and Equitable Treatment” in the spirit of the most recent developments of IEC, since 2015.

### **Azerbaijan**

*Reasoning:* To introduce further criteria in relevance to the provisions of Article 10 for describing the term in detail.

*Proposed policy option:*

1. In Article 10, paragraph 1, of the Treaty, a list of actions that are considered a breach of the fair and equitable treatment should be added (the description of fair and equitable treatment).
2. Fair and equitable treatment should be based in accordance with international law minimum standard of treatment of aliens.
3. It should be confirmed that the violation of the other article of the treaty is not a violation of a fair and equitable regime.

### **European Union**

Clear definition of the fair and equitable treatment (FET) standard based on a closed list of elements which are appropriately circumscribed for interpretation purposes. In particular, a denial of justice, a fundamental breach of due process, manifest arbitrariness, targeted discrimination on grounds such as gender, race or religious belief and abusive treatment of investors such as coercion, duress and harassment could be listed as breaches of FET; whereas the frustration of the investor’s expectations would only be considered a breach of FET if a Party made a specific representation which the investor relied in making or maintaining the investment.

### **Georgia**

*Reasoning:* Investor-state arbitration practice has demonstrated that there are serious inconsistencies in the determination of the content and level of obligations under the standard of Fair and Equitable Treatment (FET). In addition, context in which the FET provision is found in the ECT needs to be clarified.

*Proposed policy option:* Georgia proposes to make reference to customary international law minimum standards of treatment with the idea to limit the scope of the FET provision to customary international law minimum standards.

Georgia proposes to discuss the context in which the FET clause is found in Article 10(1) of the ECT, especially the wording and location of First and fourth sentences of the provision.

Georgia is open to discuss inclusion of list of obligations defining FET, considering that the (1) items on the list are consistent with the understanding of the minimum standards of treatment under customary international law, (2) are relevant in the context of investment activities and investor-state relationships.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Switzerland**

*Reasoning:* Switzerland is open to integrate a list of FET obligations.

*Policy option:* Clarify the standard through open-ended list of FET obligations.

### **Turkey**

*Reasoning:* Turkey prefers to establish a closed list of measures that are considered as a breach of the FET standard as it is done under recent IIAs to prevent the wide interpretations of the arbitral tribunals with regard to the meaning of “fair and equitable” treatment.

*Proposed policy option:* Establishing a closed list of measures that are considered as a breach of the FET standard.

## **8. MFN CLAUSE**

### **Albania**

*Reasoning:* Through the ECT we find the MFN clause to be expressed very generally, something that has created space for conflicting interpretations and has also created space for investors seeking to use the most favourable procedural and dispute resolution provisions of different treaties and agreements. Also, referring to its recent BITs (e.g. Albania-United Arab Emirates BIT), Albania follows the practice which excludes the application of the MFN clause to procedural issues or litigation.

*Proposed policy option:* 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. Also, Albania proposes the exclusion of dispute settlement procedures or procedural issues in general from the application of MFN clause.

### **Azerbaijan**

*Reasoning:* To consider adding below-mentioned phrase in order to align with Non-discriminatory trade policy commitment.

*Proposed policy option:* In Article 10, paragraph 2 and 7, of the Treaty, it should be added a condition to apply in “similar situations”

### **European Union**

Most favoured nation treatment provision, which under the ECT covers also national treatment: recent EU agreements clarify that there should not be any discrimination based on nationality if the investors or investments are in like situations. To prevent abuses, EU agreements also do not allow investors to "import" and use in the dispute settlement procedures the substantive provisions from other agreements (e.g. from Treaties of EU Member States) that they consider as more advantageous to their interests.

### **Georgia**

*Reasoning:* Georgia is convinced that the reform is required with respect to the MFN clause in the ECT from technical as well as from substantive point of view. Various aspects of MFN clause are scattered across the Treaty making its application very confusing and its content somewhat ambiguous. Georgia further supports the substantive revision of the clause to reflect on the recent developments in practice and jurisprudence and avoid conflicting interpretations of the clause and the MFN concept in general or even abusive application of MFN.

*Proposed policy option:* Georgia proposes to consolidate various MFN related provisions provided in the Treaty in one Article.

Georgia further proposes to exclude dispute settlement procedures or procedural issues in general from the application of MFN. Similarly, Georgia proposes to exclude application of MFN clause to any treaty obligations of Contracting Parties found in their International Agreements regarding contractual commitments, in order to avoid importing Umbrella Clause or comparable provisions from those other Treaties. Georgia is open to discuss the need of defining “treatment” for the purposes of MFN clause with the idea to limit it to particular state measures.

## **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Switzerland**

*Reasoning:* Switzerland is open to undertake discussions in this regard. It should not be possible that procedural and substantive provisions from other agreements that were concluded before are used in a dispute.

*Policy option:* Clarify the MFN obligation requires comparison of investors/investments (such as ‘in like situations’) and is forward looking. Procedural issues should be excluded from MFN treatment.

## **Turkey**

*Reasoning:* It has been observed that some investors have tried to use the more favourable procedural and dispute resolution provisions in a country’s web of investment treaties through the use of MFN clause in order to benefit from these more favourable provisions.

*Proposed policy options:*

- 1- Specifying that MFN treatment does not include procedural and dispute resolution provisions, or mechanisms found in other IIAs, either existing or future IIAs.
- 2- Clarifying that the MFN obligation requires comparison of investors/investments that are “in like circumstances” or “in like situations”.

## **9. CLARIFICATION OF ‘MOST CONSTANT PROTECTION AND SECURITY’**

### **Albania**

*Reasoning:* Albania finds it necessary to clarify the scope of the “Most Constant Protection and Security” in order to avoid wide interpretations of the term, to avoid the inclusion of protection of legal security and also to avoid future claims by investors based on the wide interpretations of the term.

*Proposed policy option:* Albania proposes to clarify the scope of the “Most Constant Protection and Security” by limiting the scope to the protection of only physical security.

### **European Union**

Clarification that the “most constant protection and security” standard refers to the physical protection of the investor and the covered investment.

### **Georgia**

*Reasoning:* In practice the comparable clauses (sometimes referred to as Full Protection and Security) have been interpreted widely to also include protection of legal security. Georgia believes that in view of inconsistent interpretations it would be useful to clarify the scope of the Most Constant Protection and Security.

*Proposed policy option:* Georgia proposes to limit the scope of the Most Constant Protection and security to the protection of physical security of investments i.e. police protection under customary international law.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Switzerland**

*Reasoning:* Switzerland is open to discuss whether the standard could refer to physical security only.

*Policy option:* Clarify that ‘most constant protection and security’ refers only to the physical security.

### **Turkey**

*Reasoning:* Clarification of the ‘most constant protection and security’ refers only to physical protection introduced in the recent IIAs would seem to codify the dominant opinion of the ECT arbitral tribunals. Furthermore, under its IIAs, Turkey follows a method of linking “full protection and security” to customary international law in order to limit broad interpretations by the arbitral tribunals.

*Proposed policy option:* It could be clarified that ‘most constant protection and security’ refers only to the physical security. Accordingly, Article 10(1) of the ECT could be amended in order to reflect such a clarification.

## 10. DEFINITION OF INDIRECT EXPROPRIATION

### Albania

*Reasoning:* In its recent BITs, Albania has followed the practice of clear definition of the notion “expropriation - direct and indirect”, and also the establishment of the rules about the compensation for expropriation.

*Proposed policy option:* Albania is open to take into consideration the necessity to clearly define in the ECT “indirect expropriation” and to set rules about the compensation for expropriation.

### Azerbaijan

*Reasoning:* To set out the term thoroughly with additional provisions in the treaty and in comparison with the State's regulatory law.

*Proposed policy option:*

1. In Article 13 of the Treaty, to add criteria for determining indirect expropriation (economic effects of the movement of the State, the nature of the interference with reasonable expectations of capital);
2. Article 13 shall be amended to read as regards the non-exclusive expropriation of the State's regulatory law:

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” within the meaning of this Article.

### European Union

Rules on expropriation, covering direct and indirect expropriation, should be appropriately defined to clarify, in particular, the nature of indirect expropriation and the standards of compensation. In the EU approach, it is clarified with regard to indirect expropriation that only regulatory measures which are manifestly excessive in light of their objective may amount to indirect expropriation. Indirect expropriation can only occur when the investor is substantially deprived of the fundamental attributes of property such as the right to use, enjoy and dispose of its investment. A tribunal needs to carry out a detailed case-by-case analysis to determine whether an indirect expropriation has taken place. The sole fact that a measure increases costs for investors cannot give rise in itself to a finding of expropriation. In addition, the rules about the compensation for expropriation should be based on appropriate valuation standards and methods.

### Georgia

*Reasoning:* Georgia is cognizant of the new trends to define notion of “indirect expropriation” in recent IIAs, which essentially follow the practice of the investor-state arbitration tribunals.

*Proposed policy option:* Georgia is open to consider the necessity to define indirect expropriation. Due regard should be made to the elements in the definition of indirect expropriation considering the prevailing investor-state arbitration practice and the recent trends in other IIAs, in order to avoid conceptual misunderstandings regarding the notion of indirect expropriation.

## **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Switzerland**

*Reasoning:* Switzerland is of the opinion that it makes sense to define the standard of indirect expropriation more precisely.

*Policy option:* Clarify Article 13 of the ECT by establishing criteria for indirect expropriation.

## **Turkey**

*Reasoning:* There is a general trend to clarify the notion of “indirect expropriation”. As a rule, this clarification codifies conclusions reached by the arbitral tribunals.

Turkey follows this policy to clarify “indirect expropriation” in its IIAs.

*Proposed policy option:* Clarifying the notion of indirect expropriation within the ECT, or within an Annex on “Indirect Expropriation” as it has been done Turkey-Mexico BIT (2013), and Turkey-Lithuania BIT (2018).

Especially, Article 13 of the ECT could be clarified by establishing criteria for “indirect expropriation”, notably referring to the economic impact and the character of the measure.

## 11. COMPENSATION FOR LOSSES

### **Georgia**

*Reasoning:* In Georgia's view no reform is required with respect to the clause on Compensation for Losses under the ECT.

*Proposed policy option:* Georgia is open to discuss and consider any issue of concern or reform regarding the clause on Compensation for Losses under the ECT.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **12. UMBRELLA CLAUSE**

### **Albania**

*Reasoning:* Albania finds it necessary to clarify the scope of the Umbrella Clause in the view of recent developments and also aiming to avoid wide and conflictual interpretations of the term.

*Proposed policy option:* Albania is open to discuss the clarification of the Umbrella Clause of the Treaty.

### **European Union**

Under the reformed EU approach, the scope of the umbrella clause is clarified to include ‘specific’ or ‘written’ commitments. In the same vein, it only covers breaches of contractual obligations that occur in the exercise of governmental authority.

### **Georgia**

*Reasoning:* Georgia is open to discuss the need of maintaining umbrella clause in the ECT or alternatively, specifying its scope in the view of recent developments, the legal framework in which the clause operates and with the aim to avoid conflicting interpretations in future.

*Proposed policy option:* Georgia proposes to discuss the possibility of removing umbrella clause from the Treaty, or alternatively limiting its scope only to those contractual or other commitments that have been entered into or violated by sovereign act of the Contracting Party concerned.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Switzerland**

*Reasoning:* Switzerland is open to discuss to cover only ‘written commitments’ in the Umbrella clause.

*Proposed policy option:* Reduce the scope of the Umbrella clause to include ‘specific’ or ‘written’ commitments.

### **Turkey**

*Reasoning:* Turkey is open to discuss to cover only “written commitments” in the Umbrella clause.

*Proposed policy option:* Reduce the scope of the Umbrella Clause to include “written commitments” only.

### 13. DENIAL OF BENEFITS

#### Albania

*Reasoning:* Article 17 of the ECT provides for the non-application of Part III in certain circumstances, which means each Contracting Party reserves the right to deny the advantages of Part III to investors/covered investments. Meanwhile, the Treaty does not define when and how a Contracting Party can apply this clause, in this way bringing the necessity to clearly define the procedure that Contracting Parties need to follow in order for them to apply the “Denial of benefits” clause.

*Proposed policy option:* 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).

#### European Union

Under the revised EU approach, a Party may deny the benefits of the agreement to an investor of the other Party or to a covered investment if the denying Party adopts or maintains measures related to the maintenance of international peace and security, including the protection of human rights, which prohibit transactions with that investor or covered investment or if these measures would be violated or circumvented if the benefits were accorded to that investor or covered investment, including where the measures prohibit transactions with a natural or juridical person who owns or controls either of them. The modernisation could also be used to modify Article 17 of the ECT according to similar considerations.

#### Georgia

*Reasoning:* The application of the Denial of Benefits clause in the ECT is limited to Chapter III. Denial of benefits clause provides possibility to “deny advantages” only to “legal entities” owned or controlled by “third state”.

It has been proved in practice that Denial of Benefits under the ECT clause does not apply automatically and requires additional action from the Contracting Party to “reserve” this right. One of the problematic issues regarding the application of the Denial of Benefits clause under the ECT is an ambiguity as to what is the appropriate form and procedure whereby a Contracting Party can notify/declare the application of the provision on Denial of Benefits under the ECT.

*Proposed policy option:* Georgia proposes to extend the scope of application of the Denial of Benefits clause in Article 17 of the ECT to investor-state dispute settlement under the Treaty.

Georgia proposes to further clarify the application of the Denial of Benefits clause to ‘investor’ and to their ‘investments’, as well as provide the possibility to “deny the advantages” to investors and their investments owned or controlled by persons of the host Contracting Party.

Georgia proposes to clarify procedure and instrument whereby Contracting Parties can notify/declare application of Denial of Benefits under the ECT.

## **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. On that premise, we propose the following options for the Modernisation of the ECT, as well as an option to keep all ECT provisions as they are.

*Reasoning:* Currently, Article 17(1) refers to owners and controllers only from a third State but not from the host State.

*Proposed policy option:* Apply denial of benefits also to host country investors to avoid 'roundtripping' (e.g. Japan-Armenia, Iran-Japan BIT).

Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## **Switzerland**

*Reasoning:* Switzerland is open to discuss a specification of the denial of benefits clause.

*Policy option:* Clarify Article 17 of the ECT to provide more certainty as to what constitute 'substantial business activity' in the context of the denial of benefits clause.

## **Turkey**

*Reasoning:* Turkey is open to discuss denial of benefits clause. Having faced with litigations brought by its own investors under the ECT and its BITs, Turkey has adopted a policy to incorporate a comprehensive and detailed "Denial of Benefits Clause" in its IIAs to exclude shell companies, as well as third country investors and its own investors from the coverage of the term "investor" to prevent frivolous claims.

The definition of "own or control" may also be provided to define who the real owner of an investment is.

*Proposed policy options:* 1- Rephrase Article 17 of the ECT in order to prevent a Contracting Party's own investors to benefit from the ECT and bring claims against its own State.

## 14. TRANSFERS RELATED TO INVESTMENTS

### Azerbaijan

*Reasoning:* In Article 14, of the Treaty, to add a provision for the application of temporary restrictions on transfers related to the balance of payments.

*Proposed policy option:* In case of a serious balance of payments difficulty or of a threat thereof, a Contracting Party may temporarily restrict transfers provided that such a Contracting Party implements measures or a program in accordance with international standards. These restrictions should be imposed on an equitable, non-discriminatory and in good faith basis.

### European Union

Under the EU approach, a safeguard clause is included for the 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 limited in time. At the same, additional criteria as to when a Contracting Party may provide exception to transfers related to investment could be envisaged.

### Georgia

*Reasoning:* Georgia is open to discuss on the need to amend clause related to Transfers with a view to balance competing interests of investor and host Contracting Party.

*Proposed policy option:* 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

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Switzerland

*Reasoning:* In principle, Switzerland is open to include a clause that permits to adopt restrictive measures in certain circumstances.

*Policy option:* 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.

### Turkey

*Reasoning:* Turkey is of the view that the inclusion of a (Balance of Payments) BoP clause would be useful to give a policy space to host countries and let them take temporary measures in line with the IMF Agreement in case they face serious BoP difficulties.

*Proposed policy options:* 1-Including a Safeguard Clause in Article 14 for the possibility to adopt restrictive measures in the event of serious balance of payments difficulties, provided that these restrictions are non-discriminatory and limited in time, and in line with the IMF Agreement.

## 15. FRIVOLOUS CLAIMS

### Albania

*Reasoning:* The dispute settlement clause of the ECT does not provide the proper procedure/mechanism to avoid or early dismiss frivolous and unmeritorious claims. Many Contracting Parties are facing cases of frivolous and unmeritorious claims which bring unnecessary costs and other problems for the Contracting Parties. Early dismissal of these types of claims makes it necessary to provide for a specific provision/regulation in the ECT.

*Proposed policy option:* 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

*Reasoning:* In Georgia's experience frivolous and unmeritorious investment cases initiated for various tactics to put pressure on the host Contracting Party is a serious problem. The possibility of initiating such cases causes Contracting Party concerned to incur unnecessary costs and resources as well as face adverse reputational consequences.

*Proposed policy option:* Georgia proposes to include mechanism and procedure for early dismissal of frivolous or unmeritorious claims, i.e. preliminary objection, in the dispute settlement clause of the ECT. This mechanism would be in addition to the power of the Arbitral Tribunal to decide its jurisdiction and any issue regarding the admissibility of a case at this or at a later stage.

Based on Georgia's practice in its latest BITs, Georgia proposes to consider inclusion of the statute of limitation clause whereby investor would lose its right to dispute settlement under the ECT after the laps of the limitation period provided in the clause, which shall be reasonable, balancing the interest of the investor and the Contracting Party concerned. In Georgia's practice such statute of limitation varies from 3 to 5 years from the moment investor knew or should have known about the alleged breach and the loss or damage that it has allegedly incurred.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Switzerland

*Reasoning:* Switzerland is open to discuss the way of handling Frivolous Claims. The existing reference to the ICSID rules might not suffice for the other procedures mentioned under Art. 26 [4].

*Proposed policy option:* Address frivolous claims.

### Turkey

*Reasoning:* Turkey has been subject to many cases based on frivolous claims. Early discharge of frivolous claims is important and ordering security costs for the litigant would be contributing to prevent such cases. Furthermore, provisions on Third Party Funding may help to decrease the number of frivolous and unmeritorious claims that are submitted to international arbitration.

*Proposed policy options:*

1- Introduce a specific provision for an early objection that a claim is manifestly without merit.

2- It could also be considered to have an additional protocol on dispute resolution topics to cover security for costs, third party funding, transparency and valuation for damages.

## 16. TRANSPARENCY

### Georgia

*Reasoning:* Georgia is open to discuss introduction of a transparency regime in the ECT. In general Georgia supports a reasonable degree of transparency in investor-state arbitration in order to meet the growing interest of the public regarding investor-state cases and to facilitate uniform and consistent practice of arbitral tribunals. However, Georgia believes that certain balance should be maintained between the need and desire for more publicity on investor-state disputes and related proceedings, on the one hand, and the integrity of arbitral proceedings and effective resolution of the disputes, on the other hand.

*Proposed policy option:* Georgia proposes to work on a specific transparency regime for the ECT considering the scope and specificity of the Treaty, practice of investor-state dispute settlement under the ECT and the balance of different interests as described above.

Georgia does not support straight incorporation of UNCITRAL Rules on Transparency in the ECT. Georgia believes that there are proper mechanisms available to the Contracting Parties to the ECT if they wish to make UNCITRAL Transparency Rules applicable to the cases involving them or their respective investors, as the case maybe, such as by accession to the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Switzerland

*Reasoning:* Switzerland supports transparency in arbitral proceedings and would therefore welcome a reference to the UNCITRAL Rules on Transparency.

*Proposed policy option:* Make a declaration to refer to the application of the UNCITRAL Rules on Transparency in arbitral proceedings (BIT Switzerland-Georgia etc.)

### Turkey

*Reasoning:* Since Turkey is not a member to Mauritius Convention laying the ground for Transparency Rules, Turkey gives a specific reference to applicability of UNCITRAL Rules as adopted in 2010 in its IIAs.

Nonetheless, in IIAs with Parties which ratified Mauritius Convention, the other Party may prefer applicability of UNCITRAL Transparency Rules to the disputes to which it is a Party.

Example: (Turkey-Lithuania BIT-2018):

*Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party*

*“4. If these disputes cannot be settled by means of consultations within six (6) months following the date of the written notification mentioned in paragraph 2, the disputes can be submitted, as the investor may choose, to:*

*(c) an ad hoc arbitral tribunal established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL) approved by the United Nations General Assembly on December 15, 1976, as revised in 2010. The parties to the dispute may agree in writing to modify those Rules.*

*15. The UNCITRAL rules on transparency in treaty-based investor-State arbitration shall apply to international arbitration proceedings initiated against the Republic of Lithuania under this Agreement. Nothing in this Agreement or the applicable arbitration rules shall prevent the exchange of information related to a dispute between the European Union and the Republic of Lithuania.”*

*Proposed policy option:* Amend Part V of the ECT to include an Article on Transparency.

## 17. SECURITY FOR COSTS

### Albania

*Reasoning:* Inclusion in the Treaty of a provision on “Security for costs” is an important measure to discourage frivolous and unmeritorious claims.

*Proposed policy option:* Albania is open to discuss the inclusion in the Treaty of a specific provision on “Security for costs”.

### Georgia

*Reasoning:* Georgia highly supports the inclusion of the provision on the security for costs in the dispute settlement clause under the ECT. This is an important tool against the frivolous and unmeritorious claims. Furthermore, Georgia believes that it is important to give clear and precise guidance to both the arbitral tribunal and the parties to investor-state disputes as to what should be an applicable threshold for the use of the security for costs in order to promote effective use of this mechanism in practice. We are strongly convinced that the lack of practice regarding the use of the security for costs to date is the result of the absence of proper legal basis and authority of the arbitral tribunal and the lack of relevant guidance as to when and in what circumstances should this mechanism be applied.

*Proposed policy option:* Georgia proposes to discuss the possibility of including the mechanism of security for costs in the dispute settlement procedure under the Treaty. When discussing this issue due regard shall be paid to the practice of arbitral tribunals as well as the work undertaken by other institutions to promote this mechanism, including particularly the ICSID and the UNCITRAL.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Switzerland

*Reasoning:* Switzerland sees the need of a Security for Costs provision.

*Policy option:* Amend the ECT to introduce a specific provision including Security for Costs as a specific Interim Measure or a general provision that the tribunal will interpret as covering Security for Costs.

### Turkey

*Reasoning:* Ordering of security for costs would help to discourage frivolous claims submitted on unmerited claims, as well as help to maintain an interim measure in case of any insolvency as well.

*Proposed policy options:*

1- Encourage the institutions referred to in Art. 26 of the ECT to adopt specific provisions for Security for Costs, as per the current ICSID Amendment.

2- Clarify that interim measures also include orders for security for costs.

3- It could also be considered to have an additional protocol on dispute resolution topics to cover this topic, third party funding, transparency, frivolous claims and valuation for damages.

On procedural aspects of the use of this mechanism it might be useful to adopt some soft law instrument that could give parties to the dispute and the arbitral tribunal guidance as regards the threshold and the procedure for the application of this mechanism.

## 18. VALUATION OF DAMAGES

### Georgia

*Reasoning:* Georgia is open to consider any issue of concern or reform regarding the valuation of damages.

*Proposed policy option:* Georgia proposes to first discuss the concerns or ideas for reform as regards the valuation of damages and based on this discussion agree on the need for modernisation/reform and the appropriate legal mechanisms thereto.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Switzerland

*Reasoning:* In general, the award should be limited to monetary damages and restitution of property when possible (and not other remedies).

*Proposed policy option:* The award should be limited to monetary damages.

### Turkey

*Reasoning:* Turkey incorporates valuation standards such as fair market value in its IIAs. Additionally, the award should be limited with monetary damages and should not include lost profits.

*Proposed policy option:* It could be considered to have an additional protocol on dispute resolution topics to cover this topic, security for costs, transparency, frivolous claims and third party funding.

## **19. THIRD PARTY FUNDING**

### **Georgia**

*Reasoning:* Institute of Third Party Funding (TPF) has caused extensive debate during past years in the context of creating certain procedural as well as legitimacy problems in investor-state arbitration proceedings. Therefore, the regulation regarding the TPF seems to be timely and necessary. At the same time Georgia believes that the regulation of the TPF shall preserve important balance between the rights of the investor to gain access to justice with the third party financing and the legitimacy and integrity of arbitral proceedings.

*Proposed policy option:* Georgia is open to discuss the possibility of including obligation of compulsory disclosure of the TPF under the dispute settlement clause of the ECT. Georgia is likewise open to consider elaborating additional soft law mechanism to regulate other issues or procedural aspects related to the TPF. When discussing this issue 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.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Switzerland**

*Reasoning:* Switzerland is open to discuss a clarification regarding Third Party Funding. To avoid contradictory provisions, Switzerland would prefer a reference to the result of the ICSID discussions over the implementation of a substantive provision.

*Policy option:* Draft a Declaration on Third Party Funding with reference to the result of the ICSID discussions.

### **Turkey**

*Reasoning:* Turkey is closely following the recent review of ICSID rules, the discussions under the UNCITRAL, and supports the amendments regarding third party funding. Turkey welcomes the amendment of “New Rule 21 of the Arbitration Rules and new Rule 32 of the Additional Facility Arbitration Rule will impose an obligation on the parties to disclose whether they have Third Party Funding, the source of the funding as well as keeping such disclosure of information current through the proceedings.” Transparency on third party funding will reduce the number of frivolous cases.

*Proposed policy option:* Draft a Declaration on Third Party Funding with substantive content or with reference to the result of the UNCITRAL discussions.

## **20. SUSTAINABLE DEVELOPMENT AND CORPORATE SOCIAL RESPONSIBILITY**

### **Azerbaijan**

*Reasoning:* It is worth to cover the new actions related to the sustainable development and climate change in the modernized treaty.

*Proposed policy option:* Taking into account the numerous new initiatives on sustainable development, environment and climate change, energy saving and efficient use at the international level over the past period, global development platforms such as the UN Sustainable Development Goals and the Paris Convention on Climate Change and the universal acceptance of the "Sustainable Energy for All" initiative of UN, modern ECT must comply with the global agenda and its key elements, and complement the goals and targets set forth therein. At the same time, modernized ECT should aim not to repeat the provisions of other documents and initiatives but to give them added value.

Particular attention should be given to key components such as sustainable energy issues, including energy efficiency and alternative energy, the relevant points of the ECT should be strengthened.

### **European Union**

EU investment protection agreements promote investment in a manner mindful of high levels of environmental (including climate) and labour protection and relevant internationally-recognised standards and agreements adhered to by the parties; as well as sustainable development principles in more general. The adherence of companies to such standards and responsible business conduct is ensured through the parties' domestic law consistent with internationally recognised standards. It should also be aimed at reflecting this approach in the modernised ECT.

### **Georgia**

*Reasoning:* Georgia is keen to promote investment and business activities that are in line with internationally recognized principles of sustainable development and responsible business conduct and therefore is open to discuss the need to refer to sustainable development and corporate social responsibility commitments within the ECT.

*Proposed policy option:* 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.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## Luxembourg

*Reasoning:* Luxembourg would like to praise the initiative taken by the Secretary General of the Charter on the modernisation of the Treaty. The world is evolving, and the energy/climate world is disrupting.

Contracting parties have taken engagements in Paris towards Climate objectives and the ultimate goal as demonstrated in the last IPCC report is now about 1,5 ° C and a net zero carbon world in 2050. Luxembourg shares the view that these major evolutions need to be horizontally reflected in the revised Treaty.

Therefore, in the aim to align the modernisation process of the Energy Charter Treaty with the Energy transition and the contracting parties' commitments in the fight against Climate Change, Luxembourg proposes - aiming at facilitating everyone's understanding - the options below.

Most of the Contracting Parties to the Charter Treaty have signed the UN Framework Convention on Climate Change, done at New York on 9 May 1992 and reconfirmed/reinforced their commitments under the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session.

*Proposed policy option:* Establish a stand-alone article with reference to Climate Change Commitments, Decarbonisation process, Corporate Social Responsibility and Sustainable Development instruments. Recent instruments shall include:

- The revised OECD Guidelines for Multinational Enterprises (2011) (i.e. as in the CETA or the Agreement between the EU and Georgia).
- General Assembly Resolution entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015.
- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
- The UN Global Compact
- The UN Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework
- UN Framework Convention on Climate Change, done at New York on 9 May 1992 and the Paris Agreement, done at Paris on 12 December 2015 by the Conference of the Parties to the UNFCCC at its 21st session.

## Switzerland

*Reasoning:* Switzerland welcomes the possibility of including a non-binding language in the Treaty referring to the responsible business conduct.

*Policy option:* Introduce preambular text or a provision with reference to Corporate Social Responsibility and Sustainable Development instruments.<sup>2</sup>

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<sup>2</sup> Recent instruments *may* include the revised OECD Guidelines for Multinational Enterprises (2011), General Assembly Resolution entitled "Transforming our world: the 2030 Agenda for Sustainable Development" adopted by the General Assembly of the United Nations on 25 September 2015, ILO Tripartite Declaration of Principles concerning Multinational

## Turkey

*Reasoning:* Turkey incorporates environmental protection, labour rights and socially responsible investor conduct in its IIAs.

*Proposed policy option:* Establish a Declaration with reference to Corporate Social Responsibility and Sustainable Development instruments. Recent instruments may include:

- the revised OECD Guidelines for Multinational Enterprises (2011).
- General Assembly Resolution entitled “Transforming our world: the 2030 Agenda for Sustainable Development” adopted by the General Assembly of the United Nations on 25 September 2015.
- ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
- the UN Global Compact
- the UN Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework

## 21. DEFINITION OF ‘TRANSIT’

### Azerbaijan

*Reasoning:* To discuss the provisions of Article 7 of the treaty in order to specify the term clearly.

*Proposed policy option:*

1. In Article 7, paragraph 1, of the Treaty, should be changed as “Each Contracting Party takes necessary measures to the development of competitive, transparent and efficient energy markets allowing third parties on a case-by-case basis with non-discriminatory access to networks and consumers following EU and international standards including the development of the relevant regulatory framework as required except for circumstances, agreed by the Parties, which generate concerns regarding international and national security of the Parties”
2. In paragraph 4, at the end of the paragraph, “as well as limitations set for in 5(b)” should be added.
3. In paragraph 5(b), at the end of the paragraph, “safety implications” should be added.
4. In paragraph 6, at the end of the paragraph, “as well as if it may lead to the Party’s national security and serious safety implications” should be added.

### European Union

The provisions of the transit chapter should be clarified to better take into account the requirements of integrated energy markets with third party access rights such as in the EU.

In relation to gas, it should make clear that the concept of “transit” in the Energy Charter does not contradict the principle of open access and unrestricted exchange of gas without territorial restrictions, with energy trading being based on virtual flows and not on the exchange of physical molecules, as applied by the EU. Any rule or commitment agreed upon by the European Union should be in line with the EU legal framework and EU international commitments, notably in relation to third-party access and tariffs for infrastructure use.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Kazakhstan

*Reasoning:* Based on recent developments and the discussions at the Subgroup on transit

*Proposed policy option:* Review the definition of transit in order to reflect recent developments. For example, swap operations could be considered since some swap operations are considered as virtual transit if they combine a contract at the entry point of one country with a contract at the exit point of that country.

### Turkey

*Comments on coverage of maritime transport into the definition of Energy Transport Facilities and inclusion of swap operations into the Definition of Transit will be communicated in due course.*

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

### **European Union**

The provisions of the transit chapter should be clarified to better take into account the requirements of integrated energy markets with third party access rights such as in the EU.

In relation to gas, it should make clear that the concept of “transit” in the Energy Charter does not contradict the principle of open access and unrestricted exchange of gas without territorial restrictions, with energy trading being based on virtual flows and not on the exchange of physical molecules, as applied by the EU. Any rule or commitment agreed upon by the European Union should be in line with the EU legal framework and EU international commitments, notably in relation to third-party access and tariffs for infrastructure use.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Kazakhstan**

*Reasoning:* Based on recent developments and the discussions at the Subgroup on transit:

*Proposed policy option:*

- ) Introduce clear rules governing transparent and non-discriminatory access to existing infrastructure and available capacity .
- ) Introduce specific criteria when access to infrastructure could be refused.
- ) Introduce definitions of ‘Access to Infrastructure’, ‘Available Capacity’, and ‘Capacity Allocation’.

### **Turkey**

*Reasoning:* According to national laws of some of the Contracting Parties including Turkey, cross border and transit pipelines are realized via IGAs and HGAs.

*Proposed policy option:* In principle, existing IGAs and HGAs should remain unaffected by any proposed changes to be made with respect to access to infrastructure.

## 23. DEFINITION AND PRINCIPLES OF TARIFF SETTING

### European Union

Any rule or commitment agreed upon by the European Union should be in line with the EU legal framework and EU international commitments, notably in relation to third-party access and tariffs for infrastructure use.

### Japan

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### Kazakhstan

*Reasoning:* Based on recent developments and the discussions at the Subgroup on transit:

*Proposed policy option:* Define and introduce major principles for transit tariff setting to reflect recent developments.

### Turkey

*Reasoning:* In some countries including Turkey, transit and transmission are two different operations and tariff methodologies and principles in transmission operations may differ from tariff methodologies and principles in transit operations. Moreover, cross border pipelines and transit pipelines are realized via IGAs and HGAs. In this context as the IGAs and HGAs establish a legal framework for the transit pipelines in some of the Contracting Parties, they also include specific provisions concerning the principles and methodologies of tariff setting. Therefore, 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 IGAs and HGAs.

*Proposed policy option:* Define and introduce general principles for transit tariff setting while having an explicit wording stating the existing provisions of IGAs and HGAs would be kept unaffected.

## **24. REIO**

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

### **Kazakhstan**

*Reasoning:* Considering (i) the position of the EU regarding the non existence of energy transit (as defined in Art. 7 of the ECT) within EU Member States and (ii) the 2018 communication from the European Commission as well as the 2019 Declaration of some EU Members States about the intra-EU application of the ECT, it is important and urgent to clarify which ECT articles apply within members of a REIO.

*Proposed policy option:* To clarify the legal relationship under the ECT between the members of a REIO.

### **Turkey**

*Reasoning:* Turkey adopts a policy to refer to REIO clause in its IIAs.

*Proposed policy option:* To clarify the legal relationship between the members of a REIO.

## **25. OBSOLETE PROVISIONS**

*(Comments)*

### **Albania**

*Reasoning:* The ECT has been adopted almost three decades ago, meaning so that some of the provisions and clauses in this Treaty do not reflect today's reality and are too obsolete.

*Proposed policy option:* Albania is open to discuss the possibility of modification or removal of obsolete provisions and clauses from the ECT.

### **Georgia**

*Reasoning:* Almost three decades have passed since the Treaty has been adopted, hence, there are a list of provisions in the Treaty that are either outdated or otherwise obsolete.

*Proposed policy option:* Georgia is open to discuss the removal of obsolete clauses and provisions from the ECT.

### **Japan**

Japan believes that it is not necessary to amend the current ECT provisions. Japan would like to confirm that the Contracting Parties retain the possibility to propose further options in the process of the modernisation of the ECT.

## 25. OBSOLETE PROVISIONS

### *Understandings*

4. With respect to Article 1(8)
10. With respect to Article 10(4)
11. With respect to Articles 10(4) and 29(6)
19. With respect to Article 33
20. With respect to Article 34 (a)
22. With respect to Annex TFU(1)

### *Declarations*

1. With respect to Article 1(6)
3. With respect to Article 7
4. With respect to Article 10
5. With respect to Article 25
7. With respect to Annex G(4)

*Energy Charter Treaty (as amended in 1998)*

### Preamble

Art. 1(4)

Art. 1(5)

Art. 14 (5)

Art. 10 (4) and (8)

Art. 24 (4) (b)

Art. 29 (2) (a-b), (3) (a)

Arts. 30-32

Art. 34 (3) (g)

Art. 45 (3) (c), (4), (5) and (7)

### *Annexes to the ECT*

Annex PA

Annex TFU

Annex T

### *Decisions with Respect to the ECT*

2. With respect to Article 10(7)
3. With respect to Article 14
4. With respect to Article 14(2)

1. The [Final Act of the European Energy Charter Conference](#) (an international agreement) contains (i) the [Energy Charter Treaty and its Annexes](#) (Annex 1), (ii) Decisions with respect to the ECT (Annex 2), (iii) Understandings (Section IV of the Final Act), and (iv) Declarations (Sections V and VI of the Final Act). There is also a Chairman's statement made during the [adoption session](#) on 17.12.1994, as reported in the Note from the Secretariat CONF 115. A [Protocol of Correction](#) was signed on 2 August 1996.
2. According to Article 48 ECT, Annexes and Decisions 'are integral parts of the Treaty.' At the same time, the Final Act states that 'by signing the Final Act, the representatives agree to adopt' the Understandings contained in its Point IV. On the contrary, Section VI of the Final Act merely takes note of the Declarations made in relation to the Treaty while Article 1(13)(b) ECT defines "Declaration" as a non-binding instrument entered into by two or more Contracting Parties to "complement or supplement" the provisions of the ECT.
3. Therefore, the following compilation of obsolete provisions of the ECT contains also reference to Decisions or Understandings. In addition, some Declarations are also included. While Declarations can only be changed by the entity who made them (i) some Declarations contained in the Final Act were made by states which finally did not sign it (USA and Canada) or withdrew their signature (Russia) so they could be removed and (ii) other Declarations may need to be updated (e.g. those made by the then European Communities). Furthermore, it could be considered to have a consolidated version of the Treaty incorporating in the right place the relevant Understanding and/or Decision.

## *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>3</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>4</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>5</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.

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

**22. With respect to Annex TFU(1)**<sup>5</sup>

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<sup>3</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>4</sup> The supplementary treaty foreseen in Article 10(4) ECT was not adopted. Further efforts of the Secretariat to resume negotiations have not been supported by the Conference.

<sup>5</sup> The applicability of Annex TFU terminated on 1 December 1999 in accordance with Article 29(2)(b).

## *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>6</sup>

**3. With respect to Article 7** The European Communities<sup>7</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<sup>8</sup> each affirm that they will apply the provisions of Article 10 in accordance with the following considerations: [...]

### **5. With respect to Article 25**

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;

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<sup>6</sup> The status of the Russian Federation as a 'Signatory' is currently under discussion.

<sup>7</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.

<sup>8</sup> Canada and the United States are not Signatories.

(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>9</sup>

**7. With respect to Annex G(4)**<sup>10 11</sup>,

(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>12</sup>

(b) The European Communities 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 a specific agreement to be concluded between the European Atomic Energy Community and Ukraine.<sup>13</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

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<sup>9</sup> See footnote 8; provisions of the mentioned Part Three, Title III, Chapter 2 of the Treaty establishing the European Community (former Article 48) are reflected in Article 54 of the Treaty on the Functioning of the European Union.

<sup>10</sup> Annex G was Replaced with Annex W by the Trade Amendment of 24 April 1998.

<sup>11</sup> See footnote 8 in relation to ‘the European Communities’.

<sup>12</sup> The status of the Russian Federation as a ‘Signatory’ is currently under discussion.

<sup>13</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.

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 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 a specific agreement to be concluded between the European Atomic Energy Community and Kazakhstan.<sup>14</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 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>15</sup>

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<sup>14</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>15</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 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>16</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 Communities and Uzbekistan 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 Uzbekistan.<sup>17</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.

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<sup>16</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>17</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.

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

### **Preamble**

[...] Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects;<sup>18</sup>

### **Article 1: Definitions**

(4) “Energy Materials and Products”, based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities, means the items included in Annexes EM I or EM II.<sup>19</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 this Treaty, subject to the notification and phase-out provisions set out in Annex TRM.<sup>20</sup>

### **Article 14: Transfers Related to Investments**

(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>21</sup>

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<sup>18</sup> The Preamble refers to the Convention on Long-Range Transboundary Air Pollution and its protocols. Since then, two protocols and several decisions were introduced into the UNFCCC.

<sup>19</sup> See footnote 8.

<sup>20</sup> Should be modified to expressly cover accession (as foreseen in Section 6 of Annex TRM).

<sup>21</sup> It could be considered whether such exception is still needed or whether it should be considered for other groups of states.

## **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>22</sup>

[...]

(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>23</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>24</sup>

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<sup>22</sup> Negotiations took place but the supplementary treaty was not adopted. Further efforts of the Secretariat to resume negotiations have not been supported by the Conference. Even if Art. 10 (4) ECT is removed, Contracting Parties can always include obligations regarding the pre-investment phase by amending Art. 10 ECT or by a specific Protocol.

<sup>23</sup> No supplementary treaty (art. 10.4) exists.

<sup>24</sup> 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).

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

- (2) (a) Trade in Energy Materials and Products and Energy-Related Equipment between Contracting Parties at least one of which is not a member of the WTO shall be governed, subject to subparagraph (b) and to the exceptions and rules provided for in Annex W, by the provisions of the WTO Agreement, as applied and practised with regard to Energy Materials and Products and Energy-Related Equipment by members of the WTO among themselves, as if all Contracting Parties were members of the WTO.
- (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, whichever is the earlier.<sup>25</sup>
- (3) (a) Each signatory to this Treaty, and each state or Regional Economic Integration Organisation acceding to this Treaty before 24 April 1998, shall on the date of its signature or of its deposit of its instrument of accession provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy Materials and Products, notifying the level of such customs duties and charges applied on such date of signature or deposit. Each signatory to this Treaty, and each state or Regional Economic Integration Organisation acceding to this Treaty before 24 April 1998, shall on that date provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy-Related Equipment, notifying the level of such customs duties and charges applied on that date.<sup>26</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

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<sup>25</sup> The applicability of such Agreements terminated on 1 December 1999 in accordance with Art. 29 (2) (b).

<sup>26</sup> Obligation refers only to Signatories to the ECT or acceding countries/REIOs before 24 April 1998.

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>27</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>28</sup>

### **Article 32: Transitional Arrangements<sup>29</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 countries of Central and Eastern Europe and the former Union of Soviet Socialist Republics undergoing economic transition;<sup>30</sup>

### **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>31</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>32</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>33</sup>

[...]

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<sup>27</sup> Done with the Trade Amendment in 1998.

<sup>28</sup> Done with the Trade Amendment in 1998.

<sup>29</sup> The applicability of the transitional arrangements terminated on 1 July 2001 in accordance with Article 32(3).

<sup>30</sup> A different wording could be used to refer to other countries undergoing economic transition.

<sup>31</sup> Signatories initially listed in Annex PA became full Contracting Parties. There can be no more Signatories.

<sup>32</sup> The ECT already entered into force. After that, Art. 34 (1) refers to meetings of the Conference.

<sup>33</sup> The ECT already entered into force. After that, Art. 35 regulates the Secretariat.

- (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>34</sup>

### *Annexes to the ECT*

**Annex PA: List of Signatories which do not accept the provisional application obligation of Article 45 (3) (b)<sup>35</sup>**

**Annex TFU: Provisions regarding Trade Agreements between States which Were Constituent Parts of the Former Union of Soviet Socialist Republics<sup>36</sup>**

**Annex T: Contracting Parties' Transitional Measures<sup>37</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>38</sup>

**3. With respect to Article 14<sup>39</sup>**

**4. With respect to Article 14(2)<sup>40</sup>**

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<sup>34</sup> The ECT already entered into force. After that, Art. 36 covers voting for acceding states and REIOs.

<sup>35</sup> Signatories initially listed in Annex PA became full Contracting Parties. There can be no more Signatories.

<sup>36</sup> The applicability of the Annex TFU was terminated on 1 December 1994 in accordance with Article 29(2)(b).

<sup>37</sup> The applicability of Annex T terminated on 1 July 2001 in accordance with Article 32(3).

<sup>38</sup> The status of the Russian Federation as a 'Signatory' is currently under discussion.

<sup>39</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>40</sup> The applicability of the Decision terminated with the introduction of the full convertibility of Romanian currency.