ENERGY CHARTER SECRETARIAT **MOD 24**
Restricted

26 June 2020

NEGOTIATION DRAFT

FIRST ROUND OF NEGOTIATIONS 6-9 JULY 2020

According to point (b) of the conference decision (CCDEC 2019 10) on the procedural issues for the negotiation on the modernisation of the ECT:

> *Delegations are invited to send to the Secretariat and Chair and Vice-Chair of the Modernisation Group any comments, messages or additions they wish to put forward on the negotiation drafts at least 15 days before the next meeting. The Secretariat will distribute amongst all delegations these comments as messages as soon as they are received and any new negotiation drafts (with track changes) compiling all the comments received within the deadline, at least 10 days in advance of the meeting. Any comments received less than 15 days before or at the next meeting will be distributed as a message but not included in the new negotiation draft for that meeting.*

On 2 June 2020, the Modernisation Group agreed to discuss the following topics in the first round of negotiations (6-9 July 2020):

- *Definitions*
  - *Definition of 'charter'*
  - *Definition of 'economic activity in the energy sector'*

- *Investment protection*
  - *Definition of investment*
  - *Definition of investor*
  - *Clarification of 'most constant protection and security'*
  - *Compensation for losses*
  - *Definition of Fair and Equitable Treatment*
  - *Definition of indirect expropriation*
  - *Denial of benefits*
  - *MFN clause*
  - *Right to regulate*
  - *Transfers related to investments*
  - *Umbrella clause*

Delegates can find attached the negotiation draft for the first round of negotiations based on the comments, messages or additions submitted by delegations by 21 June 2020 (Messages 1675, 1686 and 1687) and the suggested policy options approved by the Conference (CCDEC 2019 08).

In addition, delegations are reminded of the communication from Kazkahstan (Message 1688):

> *Currently, Kazakhstan does not have the possibility to submit its proposals for the modernisation of the ECT before the indicated deadline – by the first round of negotiations – due to the fact that the Decree of the Ministry of Healthcare of the Republic of Kazakhstan has strengthened the quarantine regime in our capital, Nur-Sultan.*
>
> *80% of public officials work remotely, therefore, there is no possibility to receive proposals from state bodies on time.*
>
> *In the upcoming first round of negotiations to take place on 6-9 July, Kazakhstan will reserve its position on the main provisions. Proposals will be submitted later.*

The structure of the negotiation draft aims to facilitate the negotiations. It is without prejudice to the substantive discussions and it does not prioritize the different proposals/comments. Each topic follows the same structure/format:

- the current wording of the relevant ECT article (if any)
- comments, messages or additions sent by delegations by 21 June 2020 listed in alphabetical order. If delegations have proposed new wording, or a new article, an overview of the text proposals is also included. The proposed new text is <u>underlined</u> while the text suggested to be deleted is shown in ~~strikethrough~~. In both cases, the wording is showed between brackets and identifying the delegation who proposed them. The objective of this overview is to visualise differences among text proposals
- the suggested policy options contained in CCDEC 2019 08, listed in alphabetical order

Overview

1. DEFINITION OF CHARTER

Current wording of Article 1(1) ECT
(1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.

1.1. Comments, messages or additions sent by delegations by 21 June 2020

1.1.1. Overview of text proposals

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

1.1.2. European Union (Message 1675)

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

1.1.3. Japan (Message 1686)

This non-paper intends to present possible points of discussion on the above topic with a view to building a common ground among the Parties before entering into a more substantial stage of the negotiations.

A. Background

1. Article 1(1) of the Energy Charter Treaty ("ECT") defines the 'Charter' as 'the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.'

2. On 20 May 2015, the 'International Energy Charter', a declaration of political intention with no legally binding rights and obligations, was adopted as an update of the European Energy Charter.

3. According to the Policy Options for Modernisation of the ECT (CCDEC 2019 08), some countries and REIO proposed to modify Article 1(1) so that the International Energy Charter would be included in the definition of the 'Charter'.

B. Related Provisions

1. The following Articles refer to the 'Charter', and due attention should be paid in association with such a possible modification;

- Preamble
- Article 1(1) and Article 1(13)(a)
- Article 2
- Article 8(1)
- Article 19(1)(c)
- Article 33(1), Article 33(2) and Article 33(3)
- Article 34(3)(b) and Article 34(3)(c)
- Article 36(1)(b)
- Article 38
- Article 41
- Article 43(1)
- Article 44(1)

2. Firstly, it should be considered whether any substantial problems would arise in the implementation of the ECT if the definition of 'Charter' of Article 1(1) is not modified.

3. Secondly, since the reference to 'Charter' in ECT is made most frequently in the context of its 'objective', attention should be paid to the difference between the objectives of European Energy Charter and those of International Energy Charter.

4. Finally, in case of modifying Article 1(1) to include the International Energy Charter in the definition of the 'Charter', the following institutional Articles seem to be more substantially affected than the rest since there are some countries and REIO who are signatories to the International Energy Charter and not signatories to the European Energy Charter.

- Article 33(2): Energy Charter Protocols and Declarations

It needs to be considered whether possible incorporation of the International Energy Charter into the definition of 'Charter' would enable any signatory of the International Energy Charter to participate in the negotiation of a number of Energy Charter Protocols or Declarations authorised by the Charter Conference.

- Article 36(1)(b): Voting

It needs to be considered whether the possible incorporation of the International Energy Charter into the definition of 'Charter' would require any modification of Article 36(1)(b) providing that decision by the Charter Conference with unanimity shall be required to 'approve accessions to this Treaty under Article 41 by states or Regional Economic Integration Organizations which were not signatories to the Charter as of 16 June 1995'.

- Article 41: Accession

It needs to be clarified whether the possible incorporation of the International Energy Charter into the definition of 'Charter' would enable accession to the ECT by states and Regional Economic Integration Organizations which have signed the International Energy Charter. This would make difference in the scope of parties which are entitled to the accession.

1.2. Suggested policy options (CCDEC 2019 08)

1.2.1 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".

1.2.2 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'.

1.2.3 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.

1.2.4 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.

1.2.5 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'.

1.2.6 Turkey

Reasoning: -

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

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

Current wording of Article 1(5) ECT
(5) "Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises. *[UNDERSTANDING With respect to Article 1(5)* *(a) It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.* *(b) The following activities are illustrative of Economic Activity in the Energy Sector:* *(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;* *(ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;* *(iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;* *(iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;* *(v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;* *(vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and* *(vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.]*[1]

[1] Final Act of the European Energy Charter Conference, Understanding 2.

2.1. Comments, messages or additions sent by delegations by 21 June 2020

2.1.1. European Union (Message 1675)

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

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

2.1.2. Japan (Message 1686)

This non-paper intends to present possible points of discussion on the above topic with a view to building a common ground among the Parties before entering into a more substantial stage of the negotiations.

A. Background

1. Article 1(5) of the Energy Charter Treaty ("ECT") defines 'Economic Activity in the Energy Sector' as 'an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.'

2. The aforesaid definition is associated with an economic activity of Energy Materials and Products listed in Annex EM.

3. According to the Policy Options for Modernisation of the ECT (CCDEC 2019 08), some countries proposed to modify Article 1(5) to cover new investment trends and new technologies.

B. Related Provisions

1. The term 'Economic Activity in the Energy Sector' is relevant to the following provisions and annexes, and due attention should be paid in association with such a possible modification;

- Article 1(5) and Article 1(6)
- Article 6(1) and Article 6(2)
- Article 9(1), Ariticle 9(2) and Ariticle 9(3)
- Article 10(6)(b)
- Article 24(2)
- Annex EM
- Annex NI

2. In particular, the following aspects require careful discussion.

- Article 1(5): Definitions

  It should be considered, at the first place, whether there are any other economic activities to be included in the 'Economic Activity in the Energy Sector'. Article 1(5) defines 'Economic Activity in the Energy Sector' as 'an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.'

- Article 1(6)(f): Definitions

  If the definition of 'Economic Activity in the Energy Sector' is modified to cover new investment trends and new technologies, such modification entails the change of the scope of 'investment' protected under ECT as 'investment' includes 'Economic Activity in the Energy Sector' as stipulated in Article 1(6) (f).

- Annex EM

  If the definition of 'Economic Activity in the Energy Sector' is modified to cover new investment trends and new technologies, new items could be added to the 'Energy Materials and Products' listed in Annex EM in line with the actual situation. In this regard, it would be of relevance to discuss whether the items not listed in Annex EM will be added with the currently listed items maintained.

2.2. Suggested policy options (CCDEC 2019 08)

2.2.1. 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".

2.2.2. 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.

2.2.3. 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.

2.2.4. 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.

2.2.5. 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 an substantial horizontal amendment of the Treaty.

2.2.6. 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).

2.2.7. 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'.

3. DEFINITION OF INVESTMENT

Current wording of Article 1(6) ECT
(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date. "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat. *[UNDERSTANDING With respect to Article 1(6)* *For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's* *(a) financial interest, including equity interest, in the Investment;* *(b) ability to exercise substantial influence over the management and operation of the Investment; and* *(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. Where there is doubt as to whether an Investor*

controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.][2]

[DECLARATION 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).][3]

3.1. Comments, messages or additions sent by delegations by 21 June 2020

3.1.1. Overview of text proposals

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

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

[2] Final Act of the European Energy Charter Conference, Understanding 3.
[3] ibid, Declaration 1.

(a) [**AZE**: ~~tangible and intangible, and~~ movable and immovable property~~, and~~ or any property rights such as ~~leases,~~ mortgages, liens, ~~and~~ pledges, leases, usufruct and similar substantial laws;

(b) a company ~~or business enterprise~~, or shares, stocks, or other form~~s~~ of ~~equity~~ participation in a company ~~or business enterprise, and bonds and other debt of a company or business enterprise~~;

(c) money, claims to money ~~and~~ or claims to performance ~~pursuant to~~ under contract having a~~n economic~~ financial value ~~and associated with an Investment~~;]

(d) Intellectual Property[**EU**: [1]] [**AZE**: 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) Returns;~~

(f) concessions ~~any right~~ 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 ~~or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector~~.]

[**EU**: For greater certainty:

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

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

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

[**AZE**: Investment does not include:

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

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

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

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

*[**EU**: Footnote 1*

"intellectual property rights" means:

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

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

NB: ECT Article 1(12) already contains a definition of "Intellectual Property":

"Intellectual Property" includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.

[UNDERSTANDING With respect to Article 1(12)

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

3.1.2. European Union (Message 1675)

(6) "Investment" means every kind of asset <u>that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other</u> characteristics such as the commitment of capital or other resources, <u>the expectation of gain or profit</u> <u>or the assumption of risk</u> ~~and~~. <u>Forms that an investment may take,</u> include~~s~~:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property[1];

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

For greater certainty:

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

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

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

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments made in accordance with the applicable law and the domestic law of the host Contracting Party, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

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

[*Footnote 1: "intellectual property rights" means:*

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

(i) copyright and related rights;

(ii) patents (which, in the case of the Union, include rights derived from supplementary protection certificates); (iii) trademarks;

(iv) designs;

(v) layout-designs (topographies) of integrated circuits;

(vi) geographical indications; (vii) protection of undisclosed information; and

(b) plant variety rights.]

3.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on Definition of investment, […]

3.1.4. Turkey (Message 1687)

Modifying the ECT ARTICLE 1(1), the definition of "investment" as:

"investment" means every kind of asset, invested or acquired in the territory of the State of the Contracting Party in conformity with its laws and regulations and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, contribution to the economy of the host Contracting Party, or a certain duration, and shall include in particular, but not exclusively:…."

3.2. Suggested policy options (CCDEC 2019 08)

3.2.1. 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.

3.2.2. 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:

c. claims to payment that are immediately due and result from the sale of goods or services;

d. public debt operations.

3.2.3. 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).

3.2.4. 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.

3.2.5. 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.

3.2.6. 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).

3.2.7. 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.

4. DEFINITION OF INVESTOR

Current wording of Article 1(7) ECT
(7) "Investor" means: (a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law; (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party; (b) with respect to a "third state", a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

4.1. Comments, messages or additions sent by delegations by 21 June 2020

4.1.1. Overview of text proposals

(7) "Investor" means:		
(a) with respect to a Contracting Party:	[**AZE**: ~~(a) with respect to a Contracting Party:~~	[**TUR**: ~~(a)~~ ~~with respect to a Contracting Party:~~
(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law [**EU**: Footnote 1;	~~(i)~~a. any natural person having the nationality of a Contracting Party in accordance with its national legislation. In cases of double nationality, a person shall be considered to be a national exclusively of the State in which it has a dominant and effective nationality. Dominant and effective nationality refers to the place in which the physical person pays its taxes, receives its social security, exercises its voting rights and/or can hold public office;	(~~ia~~) ~~a~~ natural persons having the ~~citizenship or~~ nationality of ~~or who is permanently residing in that~~ a Contracting Party ~~in accordance with~~ according to its ~~applicable~~ laws;

(ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party and engaged in substantive business activities [Footnote 2] in the territory of that Contracting Party;]	~~(ii)~~b. a legal entity incorporated or duly constituted for profit in accordance with applicable national legislation of one Contracting Party and having its seat and conducting substantial business activities within the territory of the state of that Contracting Party.]	(~~ii~~b) ~~a~~ company~~y~~ies, corporations, firms, business partnerships incorporated or constituted under the law in force of ~~or other organisation organised in accordance with the law applicable in that~~ a Contracting Party and having their registered offices together with substantial business activities in the territory of that Contracting Party;]

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

[**EU**: Footnote 1: The definition of "investors" includes persons permanently residing in the Republic of Latvia who are not citizens of the Republic of Latvia or any other state but who are entitled, under the law of the Republic of Latvia, to receive a non-citizen's passport.

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

4.1.2. European Union (Message 1675)

(7) "Investor" means:

(a) with respect to a Contracting Party:

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

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

(b) with respect to a “third state”, a natural person, company or other organisation which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

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

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

4.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: “the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter”;
European Energy Charter (EEC): “the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed”; or
International Energy Charter (IEC): “the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes.”

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Definition of investor […]

4.1.4. Turkey (Message 1687)

Replacing the ECT ARTICLE 1(7), the definition of "investor" with the text given below:

"Investor" means:
(a) natural persons having the nationality of a Contracting Party according to its laws;
(b) companies, corporations, firms, business partnerships incorporated or constituted under the law in force of a Contracting Party and having their registered offices together with substantial business activities in the territory of that Contracting Party;
who have made an investment in the territory of the other Contracting Party.

A natural person who has the nationality of the host Contracting Party and the other Contracting Party is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality.

4.2. Suggested policy options (CCDEC 2019 08)

4.2.1. 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".

4.2.2. 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.

4.2.3. 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.

4.2.4. 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.

4.2.5. 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.

4.2.6. 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.

4.2.7. 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.

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

Current wording of Article 10(1) ECT
(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. *[UNDERSTANDING With respect to Articles 9, 10 and Part V* *As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.]*[4] *[DECLARATION With respect to Article 10* *Canada and the United States each affirm that they will apply the provisions of Article 10 in accordance with the following considerations:* *For the purposes of assessing the treatment which must be accorded to Investors of other Contracting Parties and their Investments, the circumstances will need to be considered on a case-by-case basis. A comparison between the treatment accorded to Investors of one Contracting Party, or the Investments of Investors of one Contracting Party, and the Investments or Investors of another Contracting Party, is only valid if it is made between Investors and Investments in similar circumstances. In determining whether differential treatment of Investors or Investments is consistent with Article 10, two basic factors must be taken into account.* *The first factor is the policy objectives of Contracting Parties in various fields insofar as they are consistent with the principles of non-discrimination set out in Article 10. Legitimate*

[4] Final Act of the European Energy Charter Conference, Understanding 9.

policy objectives may justify differential treatment of foreign Investors or their Investments in order to reflect a dissimilarity of relevant circumstances between those Investors and Investments and their domestic counterparts. For example, the objective of ensuring the integrity of a country's financial system would justify reasonable prudential measures with respect to foreign Investors or Investments, where such measures would be unnecessary to ensure the attainment of the same objectives insofar as domestic Investors or Investments are concerned. Those foreign Investors or their Investments would thus not be "in similar circumstances" to domestic Investors or their Investments. Thus, even if such a measure accorded differential treatment, it would not be contrary to Article 10.

The second factor is the extent to which the measure is motivated by the fact that the relevant Investor or Investment is subject to foreign ownership or under foreign control. A measure aimed specifically at Investors because they are foreign, without sufficient countervailing policy reasons consistent with the preceding paragraph, would be contrary to the principles of Article 10. The foreign Investor or Investment would be "in similar circumstances" to domestic Investors and their Investments, and the measure would be contrary to Article 10.][5]

[UNDERSTANDING With respect to Articles 26 and 27

The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.][6]

[CHAIRMAN'S STATEMENT

I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to Making of Investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage.][7]

[5] Final Act of the European Energy Charter Conference, Declaration 4.
[6] ibid, Understanding 17.
[7] Chairman's Statement at Adoption Session on 17 December 1994.

5.1. Comments, messages or additions sent by delegations by 21 June 2020

5.1.1. Overview of text proposals

EU	TUR
~~(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.~~	~~Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.~~
(1) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities and to Investors of other Contracting Parties with respect to such Investments fair and equitable treatment and the most constant protection and security in accordance with sub-paragraphs (i) to (iv).	
(i) A Contracting Party breaches the obligation of fair and equitable treatment referenced above through measures or series or measures that constitute:	A breach of the obligation of fair and equitable treatment referenced in paragraph 1 may be found only where a measure or series of measures constitutes:
(a) denial of justice in criminal, civil or administrative proceedings; or	(a) denial of justice in criminal, civil or

(b) fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings; or (c) manifest arbitrariness; or (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) abusive treatment such as harassment, duress or coercion. (ii) When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that the Contracting Party subsequently frustrated. (iii) For greater certainty, "most constant protection and security" refers to the Contracting Party's obligations relating to ensure the physical security of investors and investments. (iv) For greater certainty, a breach of another provision of this Treaty, or of any other international agreement, does not constitute a breach of this paragraph. […] (12) ~~Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.~~ Where a Contracting Party has entered into any specific written commitment with Investors of the other Contracting Parties or with their Investments in its Area, that Contracting Party	administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) manifest arbitrariness; (d) abusive treatment of investors, such as coercion, duress and harassment; or (e) targeted discrimination on the grounds of nationality. For greater certainty, "full protection and security" refers to the Contracting Party's obligations relating to physical security of investors and investments." Restricted

shall not breach the said commitment through the exercise of governmental authority. [Former Article 10(12), first sentence (placement to be decided)]	

5.1.2. European Union (Message 1675)

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

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

(i) A Contracting Party breaches the obligation of fair and equitable treatment referenced above through measures or series or measures that constitute:

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

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

(c) manifest arbitrariness; or

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

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

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

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

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

[…]

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

[Former Article 10(12), first sentence (placement to be decided)]

5.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the

right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Clarification of 'most constant protection and security', […] Definition of fair and equitable treatment, […] and Umbrella clause. […]

5.1.4. Turkey (Message 1687)

- Integrating below proposal to the ECT "ARTICLE 10: Protection and Treatment of Investments"

  " For greater certainty, "full protection and security" refers to the Contracting Party's obligations relating to physical security of investors and investments."

- Deleting the last sentence of the ECT ARTICLE 10 (1).

- Integrating below proposal to the ECT "ARTICLE 10:Protection and Treatment of Investments"

  "A breach of the obligation of fair and equitable treatment referenced in paragraph 1 may be found only where a measure or series of measures constitutes:

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

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

  (c) manifest arbitrariness;

  (d) abusive treatment of investors, such as coercion, duress and harassment; or

  (e) targeted discrimination on the grounds of nationality.

5.2. Suggested policy options (CCDEC 2019 08)

5.2.1. Regarding 'MOST CONSTANT PROTECTION AND SECURITY'

5.2.1.1 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.

5.2.1.2 European Union

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

5.2.1.3 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.

5.2.1.4 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.

5.2.1.5 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.

5.2.1.6 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.

5.2.2. Regarding 'FAIR AND EQUITABLE TREATMENT'

5.2.2.1 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.

5.2.2.2 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.

5.2.2.3 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.

5.2.2.4 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.

5.2.2.5 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.

5.2.2.6 Switzerland

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

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

5.2.2.7 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.

5.2.3. Regarding UMBRELLA CLAUSE

5.2.3.1 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.

5.2.3.2 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.

5.2.3.3 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.

5.2.3.4 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.

5.2.3.5 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.

5.2.3.6 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.

6. COMPENSATION FOR LOSSES

Current wording of Article 12 of the ECT
(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state. (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from (a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or (b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

6.1. Comments, messages or additions sent by delegations by 21 June 2020

6.1.1. Overview of text proposals

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment [**TUR**: ~~which is the most favourable of that which~~ no less favourable than] that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state. (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from (a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or (b) destruction of its Investment or part thereof by the latter's forces or authorities, which

was not required by the necessity of the situation,

shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective. [**TUR**: Resulting payments shall be freely convertible.]

6.1.2. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Compensation for losses, […]

6.1.3. Turkey (Message 1687)

Modifying the ECT "ARTICLE 12: Compensation for Losses" as:

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution,

indemnification, compensation or other settlement, treatment ~~which is the most favourable of that which~~ no less favourable than that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.

(2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from

(a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or

(b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective. Resulting payments shall be freely convertible.

6.2. Suggested policy options (CCDEC 2019 08)

6.2.1. 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.

6.2.2. 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.

7. DEFINITION OF INDIRECT EXPROPRIATION

Current wording of Article 13(1) ECT
(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

7.1. Comments, messages or additions sent by delegations by 21 June 2020

7.1.1. Overview of text proposals

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

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

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

Such compensation shall amount to the fair market value of the Investment expropriated at the time

immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). [**EU**: Valuation criteria shall be based on internationally recognised principles and norms to determine fair market value.]

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

EU	AZE	TUR
Annex X (Expropriation) The Parties confirm their shared understanding that: 1. Expropriation may be either direct or indirect: (a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. (b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure. 2. The determination of whether a measure or series of measures by a Party, in a specific situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does	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.	The situation addressed by paragraph 1 of this Article (Expropriation) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. (b) Except in rare circumstances, non-discriminatory regulatory

not establish that an indirect expropriation has occurred. (b) the duration of the measure or series of measures by a Party; (c) the character of the measure or series of measures, notably their object and context. 3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of the environment, including combatting climate change, the protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations.	actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

7.1.2. European Union (Message 1675)

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

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

For greater certainty, this paragraph shall be interpreted in accordance with Annex X (Expropriation).

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Valuation criteria shall be based on internationally recognised principles and norms to determine fair market value.

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

[Paragraphs 2-3]

Annex X (Expropriation)

The Parties confirm their shared understanding that:

1. Expropriation may be either direct or indirect:

(a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

(b) indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

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

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

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

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

3. For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate policy objectives, such as the protection of the environment, including

combatting climate change, the protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity do not constitute indirect expropriations.

7.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Definition of indirect expropriation, […]

7.1.4. Turkey (Message 1687)

Integrating below proposal to the ECT " ARTICLE 13:Expropriation"

"The situation addressed by paragraph 1 of this Article (Expropriation) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

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

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

and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations."

7.2. Suggested policy options (CCDEC 2019 08)

7.2.1. 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.

7.2.2. 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.

7.2.3. 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.

7.2.4. 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.

7.2.5. 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.

7.2.6. 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.

7.2.7. 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.

8. DENIAL OF BENEFITS

Current provision of Article 17 ECT
Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party: (a) does not maintain a diplomatic relationship; or (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

8.1. Comments, messages or additions sent by delegations by 21 June 2020

8.1.1. Overview of text proposals

EU	TUR
(5) Each Contracting Party ~~reserves the right to~~ may deny the application ~~advantages~~ of this Part and of Articles 26 and 27 of this Treaty to an investor of another Contracting Party or to ~~(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or~~ ~~(2)~~ an Investment, if the denying Contracting Party ~~establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:~~ ~~(a) does not maintain a diplomatic relationship; or~~	1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Contracting Party and to investments of such investor if: (a) the company has no effective business activities in the territory of the Contracting Party under whose law it is constituted or organized and investors of a non-Contracting Party, or investors of the denying Contracting Party, own or control the company. (b) the host Contracting Party does not maintain diplomatic relations with the non-Contracting Party; or adopts or maintains measures with respect to the

~~(b)~~ adopts or maintains measures related to the maintenance of international peace and security, including the protection of human rights, that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments, including where the measures prohibit transactions with a legal entity or a national who owns or controls either of them. For greater certainty, a Contracting Party may deny such benefits without any prior publicity or additional formality related to its intention to exercise the right conferred by this Article.	non-Contracting Party or a natural person or company of the non-Contracting Party that prohibit transactions with such natural person or company or that would be violated or circumvented if the benefits of this Agreement were accorded to such investor or to its investments. 2. The denying Contracting Party shall, to the extent practicable, notify the other Contracting Party before denying the benefits

8.1.2. European Union (Message 1675)

(5) Each Contracting Party ~~reserves the right to~~ may deny the application ~~advantages~~ of this Part and of Articles 26 and 27 of this Treaty to an investor of another Contracting Party or to

~~(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or~~

~~(2)~~ an Investment, if the denying Contracting Party ~~establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:~~

~~(a) does not maintain a diplomatic relationship; or~~

~~(b)~~ adopts or maintains measures related to the maintenance of international peace and security, including the protection of human rights, that:

(i) prohibit transactions with Investors of that state; or

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments, including where the measures prohibit transactions with a legal entity or a national who owns or controls either of them.

For greater certainty, a Contracting Party may deny such benefits without any prior publicity or additional formality related to its intention to exercise the right conferred by this Article.

8.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Denial of benefits, […]

In the meantime, as for the Denial of benefits, Japan proposes to broaden the scope of application of Article 17(1) to cover not only a third State's entities but also the host State's investors in order to avoid the so-called 'round-tripping'. This is a mere preliminary idea and Japan is open to discuss it with other Contracting Parties in due course of time.

8.1.4. Turkey (Message 1687)

Replacing the ECT "ARTICLE 17: Non-Application of Part III in Certain Circumstances" completely with the text given below:

1. A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party that is a company of such other Contracting Party and to investments of such investor if:

(a) the company has no effective business activities in the territory of the Contracting Party under whose law it is constituted or organized and investors of a non-Contracting Party, or investors of the denying Contracting Party, own or control the company.

(b) the host Contracting Party does not maintain diplomatic relations with the non-Contracting Party; or adopts or maintains measures with respect to the non-Contracting Party or a natural person or company of the non-Contracting Party that prohibit transactions with such natural person or company or that would be violated or circumvented if the benefits of this Agreement were accorded to such investor or to its investments.

2. The denying Contracting Party shall, to the extent practicable, notify the other Contracting Party before denying the Benefits

8.2. Suggested policy options (CCDEC 2019 08)

8.2.1. 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).

8.2.2. 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.

8.2.3. 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.

8.2.4. 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.

8.2.5. 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.

8.2.6. 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.

9. MFN CLAUSE

Current wording of Article 10(2), (7) ECT
(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). […] (7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable. *[DECISION 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.]*[8]

9.1. Comments, messages or additions sent by delegations by 21 June 2020

9.1.1. Overview of text proposals

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

[8] Decision 2 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

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

[**EU**: For greater certainty:

(i) the "treatment" referred to in this paragraph does not include dispute settlement procedures provided for in other international agreements;]

[**TUR**: For the avoidance of any doubt Paragraph … (MFN) of this Article shall not apply to, any provisions of Article … (Settlement of Disputes between a Contracting Party and an Investor of the Other Contracting Party) of this Agreement.]

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

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

9.1.2. European Union (Message 1675)

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

For greater certainty:

(i) the "treatment" referred to in this paragraph does not include dispute settlement procedures provided for in other international agreements;

(ii) substantive provisions in other international agreements concluded by a Contracting Party with a third state do not in themselves constitute the "treatment" referred to in this Paragraph. Measures of a Contracting Party pursuant to those

provisions [Footnote] may constitute such treatment and thus give rise to a breach of this Paragraph.

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

9.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] MFN clause, […]

9.1.4. Turkey (Message 1687)

- Integrating below proposal to the ECT "ARTICLE 10:Promotion, Protection and Treatment of Investments"

"For the avoidance of any doubt Paragraph … (MFN) of this Article shall not apply to, any provisions of Article … (Settlement of Disputes between a Contracting Party and an Investor of the Other Contracting Party) of this Agreement."

- Modifying the ECT ARTICLE 10 (7) as:

"Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favorable than that which it accords, in like situations, to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favorable."

9.2. Suggested policy options (CCDEC 2019 08)

9.2.1. 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.

9.2.2. Azerbaijan

Reasoning: To consider adding below-mentioned phrase in order to align with Nondiscriminatory 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"

9.2.3. 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.

9.2.4. 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 is to particular state measures.

9.2.5. 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.

9.2.6. 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.

9.2.7. 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”.

10. RIGHT TO REGULATE

NB: While there is no stand-alone article in the ECT on the right to regulate, some articles such as Articles 18, 21 or Article 24 ECT refer to the right of Contracting Parties to adopt measures and to regulate.

Current wording of Article 24 ECT
[UNDERSTANDING With respect to Article 24 Exceptions contained in the GATT and Related Instruments apply between particular Contracting Parties which are parties to the GATT, as recognised by Article 4. With respect to trade in Energy Materials and Products governed by Article 29, that Article specifies the provisions relevant to the subjects covered by Article 24.] (1) This Article shall not apply to Articles 12, 13 and 29. (2) The provisions of this Treaty other than (a) those referred to in paragraph (1); and (b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health; (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or (iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure (A) has no significant impact on that Contracting Party's economy; and (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between

Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.

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

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

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

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

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

(c) for the maintenance of public order.

Such measure shall not constitute a disguised restriction on Transit.

(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:

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

[DECISION With respect to Articles 24(4)(a) and 25 An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA or a member of a free-trade area or a customs union, shall be entitled to treatment accorded under such EIA, free-trade area or customs union, provided that the Investment:

(a) has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or

(b) in case it only has its registered office in that Area, has an effective and Continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union.]

(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.

10.1. Comments, messages or additions sent by delegations by 21 June 2020

10.1.1. Overview of text proposals

Preamble:

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

EU	TUR
[New article] Regulatory Measures 1. The Contracting Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of the environment, including combatting climate change, protection of public health, social services, public education, safety, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity. 2. For greater certainty, the provisions of Part III of the Treaty shall not be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits. 3. For greater certainty and subject to paragraph 4, a Contracting Party's decision not to issue, renew or maintain a subsidy (a)in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, shall not constitute a breach of the provisions of Part III of the Treaty. 4. For greater certainty, the provisions of Part III of the Treaty shall not be construed as preventing a	New Article (place to be decided): 1. The Contracting Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection. 2. For greater certainty, the mere fact that a Contracting Party regulates, including through a modification of its laws and regulations, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement.

Contracting Party from discontinuing the granting of a subsidy [Understanding] or requesting its reimbursement, where such action is necessary to comply with obligations imposed upon the Contracting Party concerned by an international agreement establishing a Regional Economic Integration Organisation or been ordered by a competent court, administrative tribunal or other competent authority [Understanding], or as requiring that Contracting Party to compensate the investor therefore.

[**Understanding**
In the case of the EU:
i) "subsidy" includes "state aid" as defined in EU law;
ii) the competent authorities entitled to order the actions mentioned in Article (x) are the European Commission or a court or tribunal of a Member State when applying EU law on state aid.]

Article 24: Exceptions

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

(~~2~~1) The provisions of this Treaty other than

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

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

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

(i) necessary to protect public security, public order or public morals;

(ii) ~~(i)~~ necessary to protect human, animal or plant life or health;

(iii) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(A) the prevention of deceptive and fraudulent practices or to deal with the effects

of a default on contracts;

(B) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or

(C) safety;

(iv) ~~(ii)~~ essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that

(A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and

(B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or

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

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

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

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

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

(~~3~~2) The provisions of this Treaty other than ~~those referred to in paragraph (1)~~ Article 29 shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

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

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

establishment; or

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

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

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

Such measure shall not constitute a disguised restriction on Transit.

(~~4~~3) The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:

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

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

10.1.2. European Union (Message 1675)

[New article] Regulatory Measures

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

2. For greater certainty, the provisions of Part III of the Treaty shall not be interpreted as a commitment from a Contracting Party that it will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.
3. For greater certainty and subject to paragraph 4, a Contracting Party's decision not to issue, renew or maintain a subsidy
   (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
   (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy,
   shall not constitute a breach of the provisions of Part III of the Treaty.

4. For greater certainty, the provisions of Part III of the Treaty shall not be construed as preventing a Contracting Party from discontinuing the granting of a subsidy

[Understanding] or requesting its reimbursement, where such action is necessary to comply with obligations imposed upon the Contracting Party concerned by an international agreement establishing a Regional Economic Integration Organisation or been ordered by a competent court, administrative tribunal or other competent authority [Understanding], or as requiring that Contracting Party to compensate the investor therefore.

[**Understanding**
In the case of the EU:
i) "subsidy" includes "state aid" as defined in EU law;
ii) the competent authorities entitled to order the actions mentioned in Article (x) are the European Commission or a court or tribunal of a Member State when applying EU law on state aid.]

10.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: "the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter";
European Energy Charter (EEC): "the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed"; or
International Energy Charter (IEC): "the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes."

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Right to regulate, […]

10.1.4. Turkey (Message 1687)

Preamble:

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

New Article (place to be decided):

1. The Contracting Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection.
2. For greater certainty, the mere fact that a Contracting Party regulates, including through a modification of its laws and regulations, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement.

10.2. Suggested policy options (CCDEC 2019 08)

10.2.1. 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".

10.2.2. 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.

10.2.3. 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 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.

10.2.4. 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.

10.2.5. 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.

10.2.6. 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.

10.2.7. 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.

10.2.8. 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.

11. TRANSFERS RELATED TO INVESTMENTS

Current wording of Article 14 ECT
(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of: (a) the initial capital plus any additional capital for the maintenance and development of an Investment; (b) Returns; (c) payments under a contract, including amortisation of principal and accrued interest payments pursuant to a loan agreement; (d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment; (e) proceeds from the sale or liquidation of all or any part of an Investment; (f) payments arising out of the settlement of a dispute; (g) payments of compensation pursuant to Articles 12 and 13. (2) Transfers under paragraph (1) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency. (3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor. (4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations. (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. (6) Notwithstanding subparagraph (1)(b), a Contracting Party may restrict the transfer of a Return in kind in circumstances where the Contracting Party is permitted under Article 29(2)(a) or the WTO Agreement56 to restrict or prohibit the exportation or the sale for

export of the product constituting the Return in kind; provided that a Contracting Party shall permit transfers of Returns in kind to be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and either an Investor of another Contracting Party or its Investment.

[DECISION With respect to Article 14 (1)

The term "freedom of transfer" in Article 14(1) does not preclude a Contracting Party (hereinafter referred to as the "Limiting Party") from applying restrictions on movement of capital by its own Investors, provided that:

(a) such restrictions shall not impair the rights granted under Article 14(1) to Investors of other Contracting Parties with respect to their Investments;

(b) such restrictions do not affect Current Transactions; and

(c) the Contracting Party ensures that Investments in its Area of the Investors of all other Contracting Parties are accorded, with respect to transfers, treatment no less favourable than that which it accords to Investments of Investors of any other Contracting Party or of any third state, whichever is the most favourable.

(2) This Decision shall be subject to examination by the Charter Conference five years after entry into force of the Treaty, but not later than the date envisaged in Article 32(3).

(3) No Contracting Party shall be eligible to apply such restrictions unless it is a Contracting Party which is a state that was a constituent part of the former Union of Soviet Socialist Republics, which has notified the provisional Secretariat in writing no later than 1 July 1995 that it elects to be eligible to apply restrictions in accordance with this Decision.[9]

(4) For the avoidance of doubt, nothing in this Decision shall derogate, as concerns Article 16, from the rights hereunder of a Contracting Party, its Investors or their Investments, or from the obligations of a Contracting Party.

(5) For the purposes of this Decision: "Current Transactions" are current payments connected with the movement of goods, services or persons that are made in accordance with normal international practice, and do not include arrangements which materially constitute a combination of a current payment and a capital transaction, such as deferrals of payments and advances which is meant to circumvent respective legislation of the Limiting Party in the field.][10]

[CHAIRMAN'S STATEMENT

Having followed the long and difficult discussions on the Freedom of Transfers, I note that

[9] Notification of the Russian Federation has been received by the provisional Secretariat on 29 June 1995.
[10] Decision 3 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

certain countries in transition have drawn attention to their interpretation of Decision No 3 which I think to be correct: the rights granted to Investors of other Contracting Parties under paragraph 1(a) of Decision No 3 do not preclude these countries from applying, without derogating from paragraphs 1(b) and (c), (2), (3) and (4) of that Decision, restrictions on movement of capital made by their Investors.][11]

[Letter from the European Communities to Russia

The purpose of this letter is to confirm that with regard to Decision No 3 of the Energy Charter Treaty (ECT) concerning transfer of payments and especially to the footnote[12] *to this Decision, Article 105 in our Partnership and Cooperation Agreement (PCA), signed at Corfu, 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision No 3.*

I propose that this letter and your reply will establish a formal agreement between us.

Letter from the Russian Federation

I took note of your letter of 17 December 1994, the purpose of which is the confirmation that with regard to Decision N° 3 of the Energy Charter Treaty (ECT) concerning transfer of payments, and especially to the footnote[13] *to this Decision, Article 105 of the Agreement on Partnership and Cooperation establishing a partnership between the Russian Federation, of the one part, and the European Communities and their Member States, of the other part (PCA), signed at Corfu on 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision N° 3.*

I agree that your letter and this reply will establish a formal agreement between us.][14]

[DECISION With respect to Article 14(2)][15]

[UNDERSTANDING With respect to Article 14(5)

[11] Chairman's Statement at Adoption Session on 17 December 1994.

[12] This footnote which was deleted from the final text reads: "This Decision has been drafted on the understanding that Contracting Parties which intend to avail themselves of it and which have also entered into Partnership and Cooperation Agreements with the European Union and its member states containing an article disapplying those Agreements in favour of this Treaty will exchange letters of understanding which have the legal effect of making Article 16 of this Treaty applicable between them in relation to this Decision. The exchange of letters shall be completed in good time prior to signature."

[13] ibid.

[14] Exchange of Letters with the European Communities on Decision No 3 of the Energy Charter Treaty.

[15] Decision 4 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference). The applicability of this Decision terminated since Romania introduced full convertibility of its currency.

It is intended that a Contracting Party which enters into an agreement referred to in Article 14(5) ensure that the conditions of such an agreement are not in contradiction with that Contracting Party's obligations under the Articles of Agreement of the International Monetary Fund.][16]

11.1. Comments, messages or additions sent by delegations by 21 June 2020

11.1.1. Overview of text proposals

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

(a) bankruptcy, insolvency, or the protection of the rights of creditors, ~~or ensure compliance with laws on the~~

(b) issuing, trading and dealing in securities, or futures, options and other financial instruments;

(c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offenses, deceptive or fraudulent practices;

(e) ~~the satisfaction of~~ ensuring compliance with orders or judgements in civil, administrative and criminal adjudicatory proceedings ~~through the equitable, non-discriminatory, and good faith application of its laws and regulations;~~

(f) social security, public retirement or compulsory savings schemes.

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

[paragraphs 5-6]

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

(a) be consistent with the Articles of the Agreement of the International Monetary Fund, as applicable;

(b) not exceed those necessary to deal with the circumstances described in this Paragraph;

[16] Final Act of the European Energy Charter Conference, Understanding 12.

(c) be temporary and phased out progressively as the situation specified in this Paragraph improves;

(d) avoid unnecessary damage to the commercial, economic and financial interests of the other Contracting Parties;

(e) be non-discriminatory compared to third states in like situations.

[Footnote: In the case of the EU, such measures may be taken by a Member State of the EU in situations other than those referred to in Article 14 (7), which affect the economy of that Member State. For greater certainty, serious balance of payments or external financial difficulties, or threat thereof, may be caused among other factors by serious difficulties related to monetary or exchange rate policies, or threat thereof].

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

11.1.2. European Union (Message 1675)

(4) ~~Notwithstanding~~ Paragraphs (1) to (3) shall not be construed as preventing a Contracting Party from applying its laws and regulations relating to ~~may protect~~

(a) bankruptcy, insolvency, or the protection of the rights of creditors, ~~or ensure compliance with laws on the~~

(b) issuing, trading and dealing in securities, or futures, options and other financial instruments;

(c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;

(d) criminal or penal offenses, deceptive or fraudulent practices;

(e) ~~the satisfaction of~~ ensuring compliance with orders or judgements in civil, administrative and criminal adjudicatory proceedings ~~through the equitable, non-discriminatory, and good faith application of its laws and regulations;~~

(f) social security, public retirement or compulsory savings schemes.

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

[paragraphs 5-6]

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

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

[Footnote: In the case of the EU, such measures may be taken by a Member State of the EU in situations other than those referred to in Article 14 (7), which affect the economy of that Member State. For greater certainty, serious balance of payments or external financial difficulties, or threat thereof, may be caused among other factors by serious difficulties related to monetary or exchange rate policies, or threat thereof].

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

11.1.3. Japan (Message 1686)

Japan attaches great importance to achieving a high standard investment protection with a view to enhancing collaborative developments of the energy sectors. This perspective is reflected in existing clauses of relevant treaties such as:

The Energy Charter Treaty (ECT), Preamble: “the Contracting Parties desired to establish the structural framework required to implement the principles enunciated in the European Energy Charter”;
European Energy Charter (EEC): “the signatories undertook to pursue an objective of enhancing the efficient functioning of the global energy market by joint or co-ordinated action in promotion and protection of investments, ensuring a high level of legal security, enabling the use of investment risk guarantee schemes, and guaranteeing the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed”; or
International Energy Charter (IEC): “the signatories affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level legal security and enable the use of investment risk guarantee schemes.”

The Contracting Parties should recall these objectives, which have been successfully inherited to the current ECT and have firmly confirmed what it aims at achieving. Respecting such historical backgrounds and the inherent nature of the ECT, in which a high standard investment protection was pursued in all energy sectors, Japan considers

that the ECT should not let its standard of investment protection in the energy field be deteriorated.

While open to discuss any proposed amendment without prejudice to the outcome, Japan is of the view that the current provisions of investment protection well serves the abovementioned objectives and that the ECT should consider maintaining the language, including those on […] Transfers related to investments […]

11.1.4. Turkey (Message 1687)

Transfers Article of the ECT should be written again to include new provisions for detailed safeguard clauses and BOP exceptions or measures. Additionally, new text should be simple and comprehensive, and thus excluding understandings, decisions, or statements.

11.2. Suggested policy options (CCDEC 2019 08)

11.2.1. 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.

11.2.2. 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.

11.2.3. 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.

11.2.4. 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.

11.2.5. 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.

11.2.6. 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.