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**WORKING DOCUMENT**

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From: European Commission  
To: Trade Policy Committee (Services and Investment)

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Subject: ECT Modernisation: Revised Draft EU proposal

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## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate B - Services and Investment, Intellectual Property, and Public Procurement  
**Services and Investment**

Brussels, 17 April 2020  
Trade B2/cg/2403041

**SENSITIVE\***: *LIMITED*

### NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE (SERVICES AND INVESTMENT)

**SUBJECT:** ECT Modernisation: Revised Draft EU proposal

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**FOR:** For information

#### REMARKS:

Please find herewith attached the revised draft EU proposal regarding the ECT Modernisation, taking into account the discussions at the technical TPC S&I/EWG meeting on 3 March 2020 and the TPC S&I meeting on 4 March 2020 as well as written comments from Member States. The revisions are highlighted in yellow. As due to the Covid-19 situation for the time being no meetings are being planned, the Commission has considered it useful to explain in an explanatory note the main changes to the initial draft proposal. The explanatory note is attached as well.

The deadline for submitting further comments is 27 April 2020 cob.

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## **Explanatory note**

First of all, the Commission would like to thank the Member States for their questions and comments raised in the context of this draft text proposal for the modernisation of the ECT. The Commission considers it useful in the current Covid-19 situation, which prevents the Commission from explaining the changes to the draft proposed text orally, to explain the main changes to the draft proposal in writing instead.

For your convenience, the changes that have been made are highlighted in the text (in yellow).

### **Part I [ECT]: Definitions and Purpose**

#### **Article 1 Definitions**

As to Article 1(6) concerning the definition of investment, the definition has been brought in line with the CETA text. As brought forward by several Member States, the criteria describing the characteristics of an investment should not all be presented in a facultative manner – as ‘a certain duration’ is indeed mandatory whereas other elements are not and therefore the ‘or’ needs to be replaced by ‘and’.

In the same paragraph, a footnote was added to 1(6)(d) in order to - in line with standing EU practice- explain what should be understood as “intellectual property”. Also in paragraph 6, in the “For greater certainty” text regarding claims to money, a third point (c) was added clarifying that “a simple loan or financial contribution does not constitute an investment”. Like this, as one Member State mentioned, it should be clarified that commercial creditors, including lenders or any other third parties to the investment are not protected under the ECT.

As suggested by several Member States, in the last but one indent under (6), it has been clarified that “Investment” includes all investments “made in accordance with the applicable law and the domestic law of the host Contracting Party”. Given that the applicable law under the ECT to-date is only international law, this addition is indeed necessary to ensure that there is a requirement that the investment is also legal under domestic law at the time of establishment (*especially as there is little international law applicable at the time of establishment*). The inclusion of a reference to domestic law however requires that “CETA language” is added, which clarifies that domestic law can only be taken into consideration as a matter of fact (*see therefore also subsequent changes in Article 26 and 27 below*).

In other new paragraphs to be added to Article 1 - concerning “Non-disputing party” - the definition has further clarified and concerning “Tribunal” has been added indicating that a Tribunal can also be a multilateral court referred to in Article 26(4)d (*see also below*).

### **Part III [ECT] Investment promotion and protection**

#### **Article [New Article] Regulatory Measures**

In this draft article, to stress the importance of environmental objectives in the context of the ECT and to improve the readability of the text, the reference to “environment” was moved up

and the term *combatting* was introduced before climate change. The same change was also made in the Annex on Expropriation.

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

Paragraph 12, which was originally deleted by the Commission will be reintroduced and inserted under Part IV [Miscellaneous Provisions]. It was indeed considered that this paragraph is useful, however, it should be placed somewhere else in the text, as it should not be subject to Investor-to-State-Dispute-Settlement (ISDS).

#### **Part IV [ECT] Miscellaneous provisions**

##### Article [New article/placement to be decided] Sustainable development – Context and objectives

A reference to the Rio Declaration was inserted in paragraph (1) (*The Rio Declaration was agreed at the 1992 UN "Conference on Environment and Development" (UNCED) and consists of 27 principles intended to guide countries in future sustainable development*).

##### Article [New Article/placement to be decided] Sustainable Development – Right to regulate and levels of protection

In paragraph (3), the phrase “recognise that it is inappropriate to encourage” has been replaced by the wording “shall not encourage” trade or investment by weakening the levels of protection. The latter language, which has a stronger signalling effect also features in the EPA with Japan.

##### Article [New Article/placement to be decided] Sustainable Development – Multilateral environmental agreements and labour conventions

At the end of this Article, language has been added to reflect the importance of working towards the ratification the ILO fundamental conventions as reflected in the ILO’s Centenary Declaration of 2019.

##### Article [New Article/placement to be decided] Sustainable Development – Climate change and clean energy transition

The text has been further improved, taking account proposals by different Member States.

##### Article 24 -Exceptions

First, several Member States raised questions concerning the drafting of paragraph (1) and (2) of Article 24. These paragraphs of Article 24 have therefore been redrafted to improve the readability of the exceptions and to bring it in line with the EU practice on exceptions. As regards the general exception, paragraph (1) was deleted and paragraph (2) rephrased in order to exclude Article 10(1), 10(12), 12, 13, 14, 15 and 29 from the exceptions. As Article 10(12) had originally been omitted in the first text proposal, this Article was also added to the enumeration.

Secondly, as regards the security exception in paragraph (3) – in the new numbering paragraph (2) – the scope was changed as well, in line with standing practice, cf. CETA and other bilateral agreements, as the security exception should apply to the entire agreement and therefore the reference to Article 12 and 13 ECT in paragraph (3) has been deleted. Note that the reference to the exclusion of Article 29 (interim provisions on trade related matters) was kept as it is this seems to be relevant for Contracting Parties which are not WTO members.

### **Part V [ECT] Dispute settlement**

A number of changes were introduced to Part V, in particular to:

- (i) reflect comments from Member States on various aspects of the investor-to-State dispute settlement mechanism, including making explicit the possible application of a future Multilateral Investment Court to the ECT;
- (ii) incorporate a State-to-State enforcement mechanism for trade and sustainable development provisions;
- (iii) extend to the State-to-State dispute settlement mechanism certain provisions of the reformed investment dispute settlement rules (e.g. on transparency).

More specifically, the changes are the following:

- Reaffirming the EU's commitment to structural ISDS reform

The text now contains a general note clarifying that the EU proposal does not affect the overall EU and Member States' objective to set up permanent Investment Court Systems (ICS) and to create a Multilateral Investment Court, and reaffirming their readiness to engage with other partners in discussions to incorporate such mechanisms in the context of the ECT.

- Article 26

Article 26 contains new text elements (paragraphs (3)(a) and 4(d), including footnote 3) making explicit that a future Multilateral Investment Court can be used to settle disputes between Contracting Parties and investors from other Contracting Parties that have signed up to the Court. Footnote 3 also provides for the optional jurisdiction of the Court in case an investor from a State that is not a Party to the Court requests the submission of a dispute to the Court in a dispute against a State that is a Party thereto.

New footnotes (1) and (2) were added to paragraph (4), in particular to declare inadmissible claims relating to investments that have been made through fraudulent or abusive practices, and to clarify that the references to the applicable arbitration rules (ICSID, ICSID Additional Facility, UNCITRAL, SCC) under paragraph (4) are meant to be dynamic.

Paragraph (6) was modified to reflect the applicable law provisions of other EU's ICS texts. In particular a new footnote was added making explicit that domestic law is not part of the applicable law to a dispute and that it can only be considered by a tribunal as a matter of fact.

Paragraph (9) was added to incorporate into Article 26 a link to the annex on Public Debt. In line with Annexes 8B of CETA and Annex 4 of the EU-Singapore IPA, the Annex of Public

Debt limits the application of the investor-to-State mechanism with regard to certain claims on debt restructuring (see further below).

Paragraph (10) provides that the Charter Conference may adopt, by a three-fourths majority, supplemental rules to the dispute settlement provisions of Part V. This would ensure the possibility to incorporate additional rules in line with outcomes achieved in other multilateral fora (e.g. a Code of Conduct as currently in preparation in the context of the UNCITRAL and ICSID discussions).

- [New Article] Multilateral Dispute Settlement Mechanism

Even though the possibility to make the ECT subject to the jurisdiction of a future Multilateral Investment Court has always been the intention of the Commission, following requests by several Member States, the text now includes a new provision explicitly referring to the future application of a Multilateral Investment Court to the ECT. The article also establishes a commitment by the ECT Contracting Parties to engage into systemic multilateral ISDS reform.

- [New Article] Frivolous claims

A new paragraph (3) was added to this article to reflect the anti-circumvention provision found in other EU ICS texts. The provisions will ensure that a tribunal declines jurisdiction in cases where the investors acquired the investment for the main purpose of submitting a claim under the ECT.

In addition the previous text under paragraph (3) concerning the loser-pays principle has been moved to a new article (see below).

- [New Article] Costs

The text of this new Article corresponds to former paragraph 3 of the article on Frivolous Claims. The substance of the text, which incorporates the loser-pays principle, has not been changed.

- [New Article] - Transparency

Apart from a few editorial changes, the novelty in this article lies in paragraph (2) which extends the application of the UNCITRAL Transparency Rules *mutatis mutandis* to State-to-State disputes under Article 27 and to disputes on trade and sustainable development provisions under Article 28A.

- [New Article] - The Non-disputing Party to the Treaty and other Contracting Parties

This article establishes a differentiation between the home State of the investor (i.e. the “non-disputing Party”) and the other Contracting Parties to the ECT. The non-disputing Party has a right to receive documents relating to the dispute from the respondent (paragraph (1)), has a right to attend a hearing (paragraph (2)) and can make oral or written interventions on matters within the scope of the dispute (paragraph (3)). The other Contracting Parties have a right to

attend hearings and can make submissions limited to issues of Treaty interpretation. The provisions are meant to also apply to State-to-State disputes under Article 27 and to disputes on trade and sustainable development provisions under Article 28A.

- [New Article] - Security for Costs

This Article was changed in order to specify that the tribunal may order the investor to post security for the costs of the proceedings, not only when there is a risk that the investor would not be able to pay, but also when there is a risk that the investor would not be willing to pay. This approach reflects the latest state of play of the discussions on security for costs in the context of the ICSID reform process.

- New Article- Valuation of damages

As requested by several Member States, a new provision on valuation of damages was added. In addition, the text reserves the right of the EU to put forward additional text proposals in line with outcomes of ongoing discussions in other multilateral fora.

- Article 27: Settlement of Disputes between Contracting Parties

Paragraph 3(e) has been modified to ensure that in disputes concerning trade and sustainable development provisions under Article 28A, the members of the panel would have the necessary qualifications and expertise in labour and environmental law (the new mechanism for dispute resolution on trade and sustainable development provisions of Article 28A incorporates Article 27 paragraph 3(e) by reference (*see below*)).

- [New Article 28A] Settlement of Disputes on trade and sustainable development provisions between Contracting Parties

Article 28A establishes a specific State-to-State dispute settlement mechanism in relation to disputes that concern the trade and sustainable development provisions covered by (the revised) Part IV of the ECT. This mechanism builds on the provisions of Article 27, albeit with certain variations. It is designed to broadly reflect the EU's approach in relation to the enforcement mechanism for trade and sustainable development chapters of bilateral EU trade and investment agreements.

In particular, Article 28A incorporates paragraphs (1), (2), (3)a to (3)(g) and (3)(j) of Article 27. This may entail the application of the UNCITRAL Arbitration Rules to a dispute under Article 28A unless the parties agree otherwise. The footnote to paragraph (1) however clarifies that in case the UNCITRAL Arbitration Rules apply to a dispute under Article 28A, such rule apply to the exception of their Section IV.

Paragraphs (2) and (3) contain variations with respect to Article 27, to ensure that the mechanism under Article 28A is aligned with the enforcement mechanisms applicable to trade and sustainable development chapters in bilateral EU trade and investment agreements. In particular, after the panel issues the report to the Parties, these will discuss appropriate actions and measures to implement the panel's recommendations. The Secretariat would be in charge

of monitoring the implementation of the panel's recommendations and report to the Charter Conference.

- Annex on Public Debt

In the light of the current COVID-19 crisis and a likely increase of the public debt, it was considered more prudent to include a public debt annex also in the ECT - although it is understood that the Public Debt annex may not be directly relevant for energy companies to-date.

**NB Changes compared to the draft proposal sent to the TPC S&I/EWG on 2 March (and discussed on 3 and 4 March 2020) are highlighted in yellow.**

**Annex**

## **Draft EU text proposals for the modernisation of the Energy Charter Treaty (ECT)<sup>1</sup>**

### **THE ENERGY CHARTER TREATY**

(Annex 1 to the Final Act of the European Energy Charter Conference)

PREAMBLE

The Contracting Parties to this Treaty,

[...]

REAFFIRMING their commitment to the Charter of the United Nations, done at San Francisco on 26 June 1945, and having regard to the principles articulated in The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948,

**HAVE AGREED AS FOLLOWS:**

#### **Part I [ECT] Definitions and Purpose**

##### **Article 1: Definitions**

As used in this Treaty:

(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.

[Paragraphs 2-3]

(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*].

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<sup>1</sup> The text proposals are based on the current text of the ECT, with additions in “underlined” and deletions in “strikethrough”.

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

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

- (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<sup>2</sup>;
- (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 simple loan or 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.

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<sup>2</sup> "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.

“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.

(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"].

**[New paragraph]**

“UNCITRAL Transparency Rules” means the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

**[New paragraph]**

“Non-disputing Party” means the Contracting Party whose investor is party to a dispute with another Contracting Party pursuant to Article 26.

**[New paragraph]**

“Third Party funding” means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a party to a dispute under Article 26 in order to finance, directly or indirectly, part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.

[...]

**[New paragraph]**

“Tribunal” means an arbitral tribunal established pursuant the applicable arbitration rules or the multilateral investment court referred to in Article 26(4)(d).

## Part II [ECT] Commerce

### Article 7: Transit

[...]

(5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to:

- (a) permit the construction or modification of Energy Transport Facilities; or
- (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.

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

[New paragraph **7a-9a**]

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

[Paragraph 10]

### **Article 9: Access to Capital:**

[Paragraphs 1-3]

(4) Nothing in this ~~Article~~ Treaty shall prevent:

- (a) financial institutions from applying their own lending or underwriting practices based on market principles and prudential considerations; or
- (b) a Contracting Party from taking measures:
  - (i) for prudential reasons, including the protection of Investors, consumers, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or
  - (ii) to ensure the integrity and stability of its financial system and capital markets.

## **Part III [ECT] Investment promotion and protection**

### **[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.]

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

~~(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 of 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.

[Paragraphs 2-6]

(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.

[Paragraph 11]

(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. **[Not to be deleted, but moved to Miscellaneous Provisions]**—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.

### **Article 13: Expropriation**

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

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

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.

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

(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) 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.

[...]

### **Article 17: Non-Application of Part III in Certain Circumstances**

(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.

### **Part IV [ECT] Miscellaneous Provisions [...]**

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

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.

**[New article/placement to be decided]**  
**Sustainable development - Context and objectives**

- (1) The Contracting Parties recall the Rio Declaration and Agenda 21 on Environment and Development of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the UN 2030 Agenda for Sustainable Development of 2015 with its Sustainable Development Goals (SDGs).
- (2) The Contracting Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. The Contracting Parties affirm their commitment to promote the development of international trade and investment in energy-related sectors in such a way as to contribute to the objective of sustainable development.

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

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

**[New article/placement to be decided]**

## **Sustainable development - Multilateral environmental agreements and labour conventions**

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

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

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

### **[New article/placement to be decided]**

#### **Sustainable development - Climate change and clean energy transition**

Recognising the urgent need of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) and the purpose and goals of the Paris Agreement in order to effectively combat climate change and its impacts, and committed to enhancing the contribution of trade and investment to climate change mitigation and adaptation, each Contracting Party shall:

- a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contribution;
- b. promote and enhance the mutual supportiveness of investment and climate policies and measures, thereby accelerating to the transition towards a low greenhouse gas emission, clean energy and resource efficient economy, as well as to climate-resilient development;
- c. promote and facilitate trade and investment of relevance for climate change mitigation and adaptation, including, inter alia, by removing obstacles to trade and investment concerning climate-friendly energy technologies and services such as renewable energy production capacity, low-carbon technologies as well as other relevant energy efficient products and services, and by the adoption of policy frameworks conducive to the deployment of climate-friendly technologies;

- d. cooperate, as appropriate, with the other Contracting Parties on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

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

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

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

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

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

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

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

(a) population and human health;

(b) biodiversity;

(c) land, soil, water, air and climate; and

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

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

(4) Each Contracting Party shall take into account the findings of the environmental impact assessment and make the results of the process referred to in paragraph 3 available to the public prior to granting authorisation for the project. The Contracting Parties shall make

available the outcome findings of the environmental impact assessment and of the authorisation granted to the public in an appropriate manner.

### Article 24: Exceptions

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

~~(21) The provisions of this Treaty other than~~

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

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

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

- (i) necessary to protect public security, public order or public morals;
- (ii) ~~(i)~~ necessary to protect human, animal or plant life or health;
- (iii) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (A) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;
  - (B) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
  - (C) safety;
- (iv) ~~(ii)~~ essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
  - (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
  - (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or
- (v) ~~(iii)~~ designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure
  - (A) has no significant impact on that Contracting Party's economy; and
  - (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, ~~provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties.~~ Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end;

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

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

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

- (a) for the protection of its essential security interests including those
- (i) relating to the supply of Energy Materials and Products to a military establishment; or
  - (ii) taken in time of war, armed conflict or other emergency in international relations;
- (b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; ~~or~~
- ~~(c) for the maintenance of public order.~~

Such measure shall not constitute a disguised restriction on Transit.

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

- (a) resulting from its membership of a free-trade area or customs union; or
- (b) which is accorded by a bilateral or multilateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.

## Part V [ECT] Dispute Settlement

*[Note: The provisions put forward hereafter are without prejudice to the overall policy of the European Union and its Member States regarding the systemic reform of investor-to-State dispute settlement through bilateral Investment Court Systems (ICS) and, in the medium term, a permanent Multilateral Investment Court. Pending the establishment of such a permanent structure at a multilateral level, the European Union and its Member States stand ready, in accordance with their overall policy, to consider the possibility to set up within the context of the ECT modernisation a mechanism based on this approach.]*

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

[...]

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation or the multilateral investment court referred to in paragraph (4)(d). in accordance with the provisions of this Article.

[...]

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), [FN1] the Investor shall further provide its consent in writing for the dispute to be submitted to [FN2]:

*[FN1] For greater certainty, a claim submitted under subparagraph (2)(c) is inadmissible if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.*

*[FN2] For greater certainty, the applicable dispute settlement rules pursuant to this paragraph shall be those as in effect on the date of the submission of the claim.*

[...]

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); ~~or~~

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce; or,

(d) the rules of a multilateral investment court to which the Contracting Party which is party to the dispute is a Party. [FN3]

*[FN3] For greater certainty, if the Contracting Party which is party to the dispute and the Contracting Party of the Investor have both consented to the jurisdiction of the multilateral investment court, the dispute under subparagraph 2(c) shall be submitted for resolution to such a multilateral court to the exclusion of the other mechanisms of dispute resolution referred to in paragraphs (4)(a) to (c). An Investor of a Contracting Party that is not a Party to the multilateral investment court referred to in subparagraph 4(d) may nevertheless request that the dispute under subparagraph 2(c) be submitted to the multilateral investment*

court. In such case, the relevant rules of the multilateral investment court shall apply to the dispute.

[...]

(6) A tribunal established under referred to in paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law. It shall interpret this Treaty in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

[FN: For greater certainty, the domestic law of a Contracting Party shall not be part of the applicable law. Where a tribunal is required to ascertain the meaning of a provision of the domestic law of a Contracting Party as a matter of fact, it shall follow the prevailing interpretation of that provision given by the courts or authorities of that Contracting Party and any meaning given to the relevant domestic law of a Contracting Party by the tribunal shall not be binding upon the courts or authorities of that Contracting Party. A tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of the obligations under Part III of this Treaty, under the domestic law of a Contracting Party.]

[...]

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

(10) The Charter Conference, pursuant to Article 36(4), may adopt rules supplementing the applicable dispute settlement rules referred to in Part V of this Treaty.

#### **New Article: Multilateral Dispute Settlement Mechanism [placement to be decided]**

1. The Contracting Parties shall pursue with each other and other interested partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes.

2. Upon the entry into force between the Contracting Parties of an international agreement providing for such a multilateral mechanism applicable to disputes under this Treaty, the relevant provisions of Part V of this Treaty shall cease to apply. The Contracting Parties may adopt a decision specifying any transitional arrangements.

#### **New Article: Frivolous claims [placement to be decided]**

1. A Contracting Party which is a party to the dispute may, no later than 30 days after the establishment of the tribunal or of the division of the court hearing the case, or 30 days after it became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The tribunal, after giving the parties to the dispute an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection, stating the grounds therefor. In the event that the objection is received after the first session of the tribunal, the tribunal shall issue such

decision as soon as possible, and no later than 120 days after the objection was filed. In doing so, the tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute. The decision of the tribunal shall be without prejudice to the right of a party to object, pursuant to paragraph [xx] or in the course of the proceeding, to the legal merits of a claim and without prejudice to the tribunal's authority to address other objections as a preliminary question.

2. Without prejudice to the tribunal's authority to address other objections as a preliminary question or to the right of a Contracting Party to raise any such objections at any appropriate time, the tribunal shall address and decide as a preliminary question any objection by the Contracting Party that, as a matter of law, a claim, or any part thereof, is not a claim for which an award in favour of the Investor may be made, even if the facts alleged were assumed to be true. The tribunal may also consider any relevant facts not in dispute. Such an objection shall be submitted to the tribunal as early as possible, and in any event not later than the expiration of the time limit fixed for the filing of the counter-memorial or statement of defence, unless the facts on which the objection is based are unknown to the party at that time. On receipt of an objection under paragraph [xx], and unless it considers the objection manifestly unfounded, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision on the objection, stating the grounds therefor.

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

#### **New Article: Costs [placement to be decided]**

4. The tribunal shall order that the costs of the proceedings be borne by the unsuccessful party to the dispute. In exceptional circumstances, the tribunal may apportion such costs between the parties to the dispute if it determines that apportionment is appropriate in the circumstances of the case. Other reasonable costs, including the reasonable costs of legal representation and assistance, shall be borne by the unsuccessful party to the dispute, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the case. Where only some parts of the claims have been successful, the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

#### **New article: Transparency**

1. The UNCITRAL Transparency Rules shall apply to disputes under Article 26, with the following ~~additional obligations~~:

a. The following documents shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules: the request for amicable settlement pursuant to Article 26(1); the request for arbitration where applicable; the

notice of challenge and the decision on challenge of any member of the tribunal ; a request for consolidation of claims in accordance with the applicable arbitration rules.

b. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.

c. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the parties to a dispute shall make publicly available in a timely manner prior to the constitution of the tribunal or of the division of the court hearing the case, relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules.

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

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

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

1. A Contracting Party which is a party to a dispute shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information<sup>3</sup> has been resolved, deliver to the non-disputing Party to the Treaty:

- a. a the request for amicable settlement pursuant to Article 26(1), the notice or request for arbitration or claim pursuant to Article 26(4) and any other documents that are appended to such documents;
- b. on request:
  - i. pleadings, memorials, briefs, requests and other submissions made to the tribunal by a party to the dispute;
  - ii. written submissions made to the tribunal by a third person;
  - iii. minutes or transcripts of hearings of the tribunal, where available; and
  - iv. orders, awards and decisions of the tribunal.
- c. on request and at the cost of the non-disputing Party to the Treaty, all or part of the evidence that has been submitted to the tribunal.

2. The non-disputing A Contracting Party has the right to attend a hearing held in relation to a dispute under Article 26, 27 or 28A.

3. The tribunal shall accept or, after consultation with the parties to the dispute, may invite written or oral submissions from the non-disputing Party to the Treaty in accordance

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<sup>3</sup> For greater certainty, the term confidential or protected information shall be understood as defined in and determined pursuant to Article 7 of the UNCITRAL Transparency Rules.

with Article 5 of the UNCITRAL Transparency Rules, as well as submissions on issues of treaty-interpretation from other Contracting Parties.

### **New article: Intervention by Third Parties**

1. The tribunal shall permit any natural or legal person who can demonstrate a direct and present interest in the result of the dispute (the intervener) to intervene as a third party. The intervention shall be limited to supporting, in whole or in part, the award sought by one of the disputing parties.

2. An application to intervene must be lodged within 90 days after the publication of submission of the claim pursuant to Article [xx]. The tribunal shall decide on the application within 90 days, after giving the disputing parties an opportunity to submit their observations.

3. If the application to intervene is granted, the intervener shall receive a copy of every procedural document submitted to the disputing parties, subject to the redaction of confidential or protected information. The intervener may submit an intervention within a time period set by the tribunal. The disputing parties shall have an opportunity to reply to the intervention. The intervener shall be permitted to attend the hearings held in relation to a dispute pursuant to Article 26 and to make an oral statement.

4. The right of intervention pursuant to this Article is without prejudice to the possibility for the tribunal to accept amicus curiae briefs from third parties in accordance with the UNCITRAL Transparency Rules.

5. For greater certainty, the fact that a natural or legal person is a creditor of the Investor party to the dispute shall not be considered sufficient in itself to demonstrate that the person has a direct and present interest in result of the dispute.

### **New article: Security for eCosts**

1. ~~Upon~~ For greater certainty, on request, and after hearing the disputing parties, the tribunal may order the Investor to post security for all or a part of the costs of the proceedings if there are reasonable grounds to believe that the Investor risks not being able or willing to honour a possible decision on costs issued against it.

2. If the security for costs is not posted in full within 30 days after the issuance of an tribunal's order pursuant to paragraph 1 or within any other time period set by the tribunal, the tribunal shall so inform the parties to the dispute. The tribunal may order the suspension or termination of the proceedings.

### **New article: Third Party Funding**

1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the tribunal, the name and address of the third party funder and of its beneficial owner.

2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.

#### **New article: Valuation of damages**

1. Monetary damages shall not be greater than the loss suffered by the Investor as a result of the breach of the provisions referred to in Part III, reduced by any prior damages or compensation already provided by the Contracting Party concerned.

2. The tribunal shall not award punitive damages.

3. Valuation criteria shall be based on internationally recognised principles and norms.  
[Note: The EU reserves the right to propose more detailed rules on valuation at a later stage pending the outcome of discussions in other international fora.]

#### **Article 27: Settlement of Disputes between Contracting Parties**

(3)(e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty including, where appropriate, labour or environmental law, of the members to be appointed.

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

(1) In the event of a disagreement between the Contracting Parties on any matter regarding the interpretation or application of regarding Articles [Sustainable development – Context and Objectives, Right to regulate and levels of protection, multilateral environmental agreements and labour conventions, Climate change and clean energy transition, Responsible Business Practices, Transparency and Impact Assessment], the procedures established under this Article and Article 27 paragraphs (1), (2), (3)a to (3)(g) and (3)j shall apply.[FN]

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

(2) The Tribunal shall issue a report to the Parties, unless the Parties agree otherwise, no later than 180 days after the date of its establishment. The report shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. The report shall be made publicly available.

(3) The Parties shall discuss appropriate actions or measures to be implemented taking into account the report of the Tribunal and the recommendations therein. The Secretariat shall monitor the implementation of any such measures and shall keep the matter under review and report to the Charter Conference.

## ANNEX X

### PUBLIC DEBT

1. No claim that a restructuring of debt of a Contracting Party breaches an obligation under Part III (Investment Protection) may be submitted to, or if already submitted, be pursued under Article 26(4) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 10(7) (National Treatment and Most Favoured Nation Treatment).

2. Notwithstanding Article 26(2), and subject to paragraph 1 of this Annex, an investor may not submit a claim under Article 26(4) that a restructuring of debt of a Contracting Party breaches an obligation under Part III (Investment Protection) other than Article 10.7 (National Treatment and Most Favoured Nation Treatment) [FN1], unless 270 days have elapsed from the date of submission by the Investor of the written request for amicable settlement pursuant to Article 26(1).

*FN1: For greater certainty, a breach of Article 10.7 (National Treatment and Most Favoured Nation Treatment) does not occur merely by virtue of a different treatment provided by a Contracting Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spillover effects, or on grounds of eligibility for debt restructuring.*

3. For the purposes of this Annex:

(a) “negotiated restructuring” means the restructuring or rescheduling of debt of a Contracting Party that has been effected through (i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt subject to restructuring, excluding debt held by that Contracting Party or by entities owned or controlled by it, have consented to such debt exchange or other process.

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

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