SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In the Matter of the Arbitration Between CEF ENERGIA, B.V. Petitioner, v. THE ITALIAN REPUBLIC Respondent.	**Index No.** _____ **Notice of Petition**

PLEASE TAKE NOTICE that, on August 16, 2019, Petitioner CEF Energia filed a Petition to Confirm Arbitral Award with the Supreme Court of The State of New York, New York County, against Respondent, the Italian Republic. A copy of the Petition, together with the Affirmation of Charlene C. Sun, dated August 16, 2019, and all exhibits thereto is attached to this Notice of Petition. An application will be made to the Court, to be held at a courthouse thereof, located at 60 Centre Street, City of New York, County of New York, State of New York, at the Submissions Part, Room 130, on the November 15, 2019, at 9:30 a.m. that day, or as soon thereafter as counsel can be heard, for an order pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38) and Chapter 2 of the Federal Arbitration Act (9 U.S.C. § 201, *et seq.*), confirming the Award and directing that judgment be entered thereon, and for such other and further relief as may be just, proper, and equitable, together with the costs and disbursements of this proceeding.

PLEASE TAKE FURTHER NOTICE that an answer and supporting affidavits, if any, shall be served at least seven days before the aforesaid date of hearing.

Dated: New York, New York
August 16, 2019

Respectfully submitted,

/s/ James E. Berger

James E. Berger
Charlene C. Sun

KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036-4003
Tel: (212) 556-2200
Fax: (212) 556 -2222
jberger@kslaw.com
csun@kslaw.com

Attorneys for Petitioner
CEF Energia B.V.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In the Matter of the Arbitration Between CEF ENERGIA, B.V. Petitioner, v. THE ITALIAN REPUBLIC Respondent.	**Index No.** _____ **Affirmation of Charlene C. Sun**

AFFIRMATION OF CHARLENE C. SUN

I, Charlene C. Sun, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am of counsel at King & Spalding LLP, counsel to Petitioner herein. I am a member in good standing of the Bar of the State of New York. I have personal knowledge of the facts set forth herein, and could and would testify to them if called upon to do so.

2. This affirmation is provided in support of Petitioner's Petition to Confirm Arbitral Award. The award (the "Award") is captioned SCC Arbitration V (2015/158) and was rendered on January 16, 2019 in an arbitration between Petitioner and Respondent, the Italian Republic ("Italy") under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, pursuant to the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention") and Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 *et seq*.

3. Attached hereto as Exhibit A is a duly-certified copy of the Award.

4. Attached hereto as Exhibit B is a true and correct copy of the Energy Charter Treaty ("ECT"), Article 26 of which provides that any disputes arising under the ECT may be submitted to arbitration "under the Arbitration Institute of the Stockholm Chamber of Commerce." Italy signed the ECT on December 17, 1994 and ratified it on December 5, 1997. The ECT entered into force in the Italian Republic on April 16, 1998. In accordance with Article 1(2) of the ECT, Italy was a Contracting Party to the ECT at the time the arbitration underlying the Award was commenced. Italy gave notice of its withdrawal from the ECT on December 31, 2014 and its withdrawal became effective on January 1, 2016. Pursuant to Article 47(3) of the ECT, the post-withdrawal period during which the ECT continues to apply to pre-existing qualifying investments like Petitioner's is twenty years. In other words, all investments existing at the time of Italy's renunciation of the ECT remain protected, and investors in Italy are allowed to use the Dispute Settlement Provisions of the ECT against Italy until 2036.

5. Attached hereto as Exhibit C is a true and correct copy of the Petitioner's Request for Arbitration ("RFA"), dated November 20, 2015. Collectively, the ECT and the RFA constitute the agreement by the parties to arbitrate.

Dated: New York, New York
August 16, 2019

Charlene C. Sun

EXHIBIT A

In the matter of the Energy Charter Treaty
And in the matter of an arbitration seated in Stockholm, Sweden

SCC Arbitration V (2015/158)

CEF Energia B.V.

v.

The Italian Republic

Award

Tribunal

Prof. Dr. Klaus Sachs
CMS Hasche Sigle
Nymphenberger Str. 12
D-80335 Munich
Germany

Mr. Klaus Reichert, S.C.
Brick Court Chambers
7-8 Essex Street
London WC2R 3LD
United Kingdom

Prof. Giorgio Sacerdoti
Via Monte Napoleone 20
20121 Milan
Italy

Table of Contents

Definitions

1. This award uses the following definitions (and further definitions are noted as necessary in the body of the Award):

AAEG: Authority for Electrical Energy and Gas *(Autorità per l'Energia Elettrica e il Gas)*

Claimant: CEF Energia B.V., Hoogoorddreef 15, 1101 BA, Amsterdam, The Netherlands

Respondent: Repubblica Italiana, Avvocatura Generale dello Stato, Via dei Portoghesi n. 12, 00186 Roma, Italy

Parties: Collectively Claimant and Respondent

SCC Rules: The Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce in force as from 2010

SCC: The Arbitration Institute of the Stockholm Chamber of Commerce

Tribunal: Prof. Dr. Klaus Sachs, appointed by Claimant (he submitted his confirmation of appointment to the SCC on 11 November 2015), Prof. Giorgio Sacerdoti, appointed by Respondent (he submitted his confirmation of appointment to the SCC on 12 February 2016), and Mr. Klaus Reichert, S.C., appointed by Messrs. Sachs and Sacerdoti as Presiding Arbitrator (he submitted his confirmation of appointment to the SCC on 1 April 2016)

ECT: the Energy Charter Treaty

CJEU: Court of Justice of the European Union

Achmea: Judgment, dated 6 March 2018, of the CJEU in Case C 284/16, Slowakische Republik (Slovak Republic) v Achmea BV

Commission: the European Commission

Commission's Communication: the Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment (COM(2018) 547/2) of 19 July 2018

Blusun: *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016

GSE: Gestore dei Servizi Energetici GSE S.p.A.

ENEA: Italian National Agency for New Technologies, Energy and Sustainable Economic Development

PV: Photovoltaic (electricity producers)

Introduction

2. Incentive schemes put in place by Respondent to encourage investment in renewable energy supply lie at the heart of this arbitration. Claimant owns, in whole or in majority part, three Italian companies which operate photovoltaic plants in Italy, and alleges that certain changes Respondent made (directly and indirectly) to such incentive schemes engaged international responsibility as a matter of the ECT. Claimant further alleges that such international responsibility gives rise to the right on its part to compensation with the object of putting it into the position its investments would have been in had the changes to the incentive schemes not taken place. Apart from jurisdictional objections, Respondent also argues that the measures it took do not engage international responsibility on its part, and, further, Claimant's investments remained profitable notwithstanding the changes which were made to the incentive schemes. The Tribunal, if it has the jurisdiction to do so, resolves these disputes by this award.

Procedural History

3. The following paragraphs set out the main steps which have occurred in this arbitration. This is not intended to be a comprehensive account of every occurrence in this arbitration.

4. On 20 November 2015, Claimant filed its Request for Arbitration ("RfA") stating, at paragraph 2 thereof, that it was doing so pursuant to Article 26(4)(c) of the ECT and Article 2 of the SCC Rules.

5. On 18 January 2016, Respondent filed its Answer ("Answer").

6. On 26 January 2016, Claimant wrote a letter in reply to Respondent's Answer.

7. On 6 April 2016, the SCC referred this case to the Tribunal.

8. Following consultation with the Parties the Tribunal issued Procedural Order No. 1 on 14 June 2016 which, amongst other matters, established a timetable for the case.

9. On 14 October 2016, Claimant filed its Statement of Claim ("SoC") together with accompanying exhibits, a witness statement of Scott Lawrence, expert reports from Antonio D'Atena, Richard Edwards, and a joint expert report from Drs. Boaz Moselle and Dora Grunwald.

10. On 9 January 2017, the Commission applied for leave to intervene as a non-disputing party. Following invitations to comment on this application, Claimant filed its response on 24 January 2017 and Respondent filed its position on 1 February 2017.

11. On 24 March 2017, Respondent filed its Statement of Defence ("SoD") with accompanying exhibits, witness statements from Luca Miraglia and Daniele Bacchiocchi, an expert opinion of Giacomo Rojas Elgueta, an economic report of GRIF, and a financial report of GRIF.

12. On 31 March 2017, Claimant filed its objections to Respondent's requests for bifurcation and suspension.

13. On 7 April 2017, the Tribunal issued Procedural Order No. 2. which made the following rulings:

Bifurcation and Suspension

14. *Taking into account its present appreciation of the case, noting that this is a question of procedure, the Tribunal rules on bifurcation and suspension in the following paragraph.*

15. *Having considered the parties' respective submissions, the Tribunal refuses the Respondent's requests for bifurcation and/or suspension. The Tribunal will consider all matters raised in this arbitration at the one time in accordance with the procedural calendar as established in Procedural Order No. 1.*

16. *The parties are to note that the Tribunal's decision is one of procedure, taking into account the present circumstances of the case, and is not to be viewed or construed in any way by either side as indicating any position on any determinative matter or issue.*

EU Commission Application

17. *Taking into account its present appreciation of the case, noting that this is a question of procedure, the Tribunal rules on the EU Commission Application in the following paragraph.*

18. *Having considered the parties' respective submissions, the Tribunal permits the participation of the EU Commission on the following basis:*

    (i) The participation of the EU Commission in this arbitration is limited to one written submission (attaching only legal authorities, and no evidentiary materials) with no oral presentation or attendance at the hearing;

    (ii) The EU Commission's written submission is to be submitted to the Tribunal, for subsequent circulation

to the parties, by no later than 1 June 2017;

(iii) The parties may make such written observations on the EU Commission's filing as they see fit thereafter in their respective substantive submissions due, respectively, on 26 July 2017 and 15 November 2017;

(iv) The EU Commission will have no access to the evidentiary record in this case; and

(v) The Tribunal will inform the EU Commission of its decision immediately after this Procedural Order is issued to the parties, but only to the extent of what has been decided.

19. The Commission filed its written submission on 1 June 2017 ("Commission Submissions"). Claimant made written observations on 3 August 2017.

20. On 3 August 2017, Claimant filed its Reply ("Reply") together with accompanying exhibits, a second witness statement of Scott Lawrence, a second expert reports from Richard Edwards, and a second joint expert report from Drs. Boaz Moselle and Dora Grunwald.

21. On 20 November 2017, Respondent filed its Rejoinder ("Rejoinder") with accompanying exhibits, second witness statements from Luca Miraglia and Daniele Bacchiocchi, a second expert opinion of Giacomo Rojas Elgueta, and a second report of GRIF.

22. On 15 December 2017, Claimant indicated that it intended to cross-examine Mr. Daniele Bacchiocchi, Mr. Luca Miraglia, Professor Giacomo Rojas Elgueta, Professors Cesare Pozzi, Giuseppe Melis, Umberto Monarca, Ernesto Cassetta, and Davide Quaglione of GRIF

23. On 18 December 2017, Respondent indicated that it intended to cross-examine Mr. Scott Lawrence, Mr. Richard Edwards, Dr. Boaz Moselle and Dr. Dora Grunwald of FTI, and Prof. Antonio D'Atena.

24. On 9 February 2018, the Parties indicated to the Tribunal that they had agreed to add fourteen documents to the record of the case.

25. Following correspondence with, and assistance of the Tribunal, and having agreed to dispense with the necessity of a pre-hearing conference call, on 13 February 2018 the Parties agreed their hearing schedule.

26. On 19, 20, 21, and 22 February 2018, the hearing took place in Paris in accordance with the agreed hearing schedule. The Parties submitted both opening and closing PowerPoint presentations. Each day the Parties confirmed, by email, the list of their participants. Finally, on 21 February 2018, the Tribunal gave the Parties a list of questions for the purposes of the following day's oral closing submissions.

27. At the conclusion of the hearing the following exchange took place[1]:

> *7 THE PRESIDENT: Now, here's a question that I personally*
> *8 like to ask. We established -- and you very kindly*
> *9 established between yourselves -- the timetable for this*
> *10 case in Procedural Order No. 1. I just want to have it*
> *11 confirmed that the parties followed that timetable, with*
> *12 the various adjustments along the way; but the timetable*
> *13 of proceedings that you established, that you followed*
> *14 it, and we've got here today in accordance with that*
> *15 timetable.*
> *16 MR SMITH: So confirmed from the Claimant.*
> *17 MR AIELLO: The same for us*

28. On 25 February 2018, the Tribunal wrote to the Parties as follows:

> *The Tribunal again thanks Counsel and the Parties for their kind co-operation, efficiency, and courtesy during our hearing.*

[1] Transcript, Day 4, p. 239

Having considered the matter, the Tribunal invites the following written observations:

(a) on the consequences, if any, of the outcome of the forthcoming ECJ judgment [Achmea] – *we suggest that this be done and exchanged within 14 days of the judgment.*

(b) At the same time as the Claimant makes its observations on the forthcoming ECJ judgment, it should also set out its position on the passages of the Clifford Chance Due Diligence Report which were relied upon during the closing submissions of the Respondent.

Upon receipt of these written observations, the Tribunal may issue further invitations (depending on their contents).

29. On 21 March 2018, the Parties submitted their post-hearing briefs.

30. On 23 March 2018, the Tribunal wrote to the Parties as follows:

The Tribunal has reviewed the recent submissions and, first, refers to paragraph 10 of the brief of the Respondent, in particular:

> *The consequence of that incompatibility with EU law is that the offer for arbitration becomes inapplicable.*

We invite the Respondent to elaborate on this submission, including on how and when this happened.

Secondly, upon receipt of this further elaboration from the Respondent, we would then invite the parties to reply generally to the submission of the other.

31. On 6 April 2014, the Parties indicated to the Tribunal that they had agreed a timetable for the subsequence submissions as follows:

- Respondent shall articulate on its sentence "the consequences of that incompatibility with EU law is that...", as requested, by Friday 13 April.

- Both Parties shall then reply generally to the submission of the other by Friday 4 May.

32. On 13 April 2018, the Respondent filed its further Note on the consequences of *Achmea*.

33. On 4 May 2018, the Parties filed their respective further submissions.

34. On 1 June 2018, the Claimant applied to have admitted to the record of this arbitration the award rendered on 16 May 2018 in *Masdar Solar & Wind Cooperatief U.A. v. Spain* ("*Masdar*") along with a proposal that each side be permitted to make a submission on that award. The claim in *Masdar* was brought against Spain pursuant to the ECT.

35. On 15 June 2018, the Parties confirmed that they had agreed to simultaneous submissions on *Masdar* to be filed on 6 July 2018. The Parties also confirmed that they would file costs submissions on 6 July 2018 with a subsequent opportunity for comment on 13 July 2018.

36. On 26 June 2018, the SCC extended the deadline for rendering this award to 28 September 2018.

37. On 6 July 2018, the Claimant filed its costs submissions. On the same day, the Parties each filed submissions on *Masdar* with the SCC for subsequent exchange.

38. On 11 July 2018, the Tribunal indicated to the Parties that the cut-off date for any further observations on or provision of new awards (if arising) for the record of this arbitration was 20 July 2018.

39. On 20 July 2018, the Parties each submitted comments on the awards *Antin Infrastructures et alt. v. Kingdom of Spain* (15 June 2018)("*Antin*") and *Antaris GmbH & Michael Goede v The Czech Republic* (2 May 2018)("*Antaris*").

40. On 24 July 2018, the Respondent applied to introduce to the record of this arbitration the Commission's Communication on the protection of intra-EU investments of 19 July 2018. This was followed on 26 July 2018, by Claimant's objection to the Respondent's application.

41. On 29 July 2018, the Tribunal wrote to the Parties as follows:

The EU communication is admitted to the record.

The Tribunal understands the record of this arbitration to be now closed and complete.

42. On 3 August 2018, the Respondent wrote to the Tribunal to request permission to submit press articles concerning a putative sale by the Claimant of certain of its investments.

43. On 7 August 2018, the Tribunal wrote to the Parties as follows:

The Respondent's letter suggests that there may be matters which might be required to be brought to our attention concerning the quantum of the claims.

We have considered the matter and we do not wish to have such press reports on the evidential record of the case. Our preference is that we ask the parties to now liaise on this putative issue, without copying us, and if, in that process it emerges that there are matters which we do need to see then we ask that these be brought to our attention as soon as possible. Please note that the Tribunal has deliberated, the award is in preparation, and, therefore, what we are now proposing is not a reopening of the case but confined only to the possibility of something of importance for the purposes of the quantum of the claims being brought to our attention.

44. On 10 September 2018, the Respondent applied to reopen the proceedings pursuant to Article 34 of the SCC Rules.

45. On 19 September 2018, the Claimant submitted its opposition to the Respondent's application to reopen the proceedings.

46. On 21 September 2018, the SCC extended the deadline for rendering this award to 28 December 2018.

47. On 10 October 2018, the Respondent submitted its reply to the Claimant's opposition to the application to reopen the proceedings.

48. By Procedural Order No. 3 of 15 October 2018, the Tribunal refused the Respondent's application to reopen the proceedings.

49. On 17 December 2018, the SCC extended the deadline for rendering this award to 21 January 2019.

Prayers for Relief advanced by the Parties – Sequence of Issues

50. The Tribunal now records the Prayers for Relief, in their latest iteration, advanced by the Parties in this case.

51. At paragraph 446 of the Reply the following relief is sought:

> *• a declaration that the Tribunal has jurisdiction over this dispute;*
>
> *• a declaration that Italy has violated the Energy Charter Treaty and international law with respect to Claimant's investments;*
>
> *• compensation to Claimant for all damages it has suffered, as set forth in Claimant's submissions and as may be further developed and quantified in the course of this proceeding;*
>
> *• all costs of this proceeding, including (but not limited to) Claimant's attorneys' fees and expenses, the fees and expenses of Claimant's experts, and the fees and expenses of the Tribunal and the SCC;*
>
> *• pre-award and post-award compound interest at the highest lawful rate from the Date of Assessment until Italy's full and final satisfaction of the Award; and*
>
> *• any other relief the Tribunal deems just and proper.*

52. At paragraphs 480-483 of the Rejoinder the following relief is sought:

> *480. In the light of the above, the Respondent reiterates its requests to the Tribunal to:*
>
> *- Decline jurisdiction to decide, as the ECT does not cover intra-EU disputes.*
>
> *- Alternatively, decline jurisdiction over the totality of claims, since:*
>
> > *- Some of the attacked measures are exempted under Article 21 ECT,*
> >
> > *- No amicable solution has been attempted for some further measures; and*
> >
> > *- the exclusivity forum choice contained in the GSE Conventions bans this Tribunal from judging under the umbrella clause.*

- In a further alternative, decline admissibility of protection of the Claimant's alleged interests since these are barred from seeking relief, as they did not seek amicable solution for a number of claims.

481. Should the Tribunal consider to have jurisdiction over the case and that claims are either totally or partially admissible, declare on the merits that

- the Respondent did not violate Article 10(1) ECT, first and second sentence, since it did not fail to grant fair and equitable treatment to the Claimant's investment.

- the Respondent did not violate Article 10(1) ECT, fourth sentence, either, since it always adopted reasonable and non-discriminatory measures to affect Claimant's investment.

- Article 10(1) ECT, last sentence (the so-called "umbrella clause") does not apply in the case at stake, or, alternatively, that the Respondent did not violate it neither through statutory or regulatory measures, nor the GSE Conventions.

- Consequently, declare that no compensation is due.

482. In the unfortunate event that the Tribunal were to recognize legitimacy to one of the Claimant's griefs:

- Declare that damages were not adequately proved.

- In addition, declare that both the methods for calculation and calculation itself of damages proposed by the Claimant are inappropriate and erroneous.

- Order the Claimant to pay the expenses incurred by the Italian Republic in connection with these proceedings, including professional fees and disbursements, and to pay the fees and expenses of the Members of the Tribunal and the charges for the use of the facilities of the SSC, in accordance with Articles 43 and 44 of SCC 2010 Arbitration Rules.

483. The Respondent reserves the right to amend and modify its evaluations on relief and to refine its position in the course of the arbitration.

53. It is immediately apparent from the respective Prayers for Relief advanced by the Parties that a threshold issue of jurisdiction arises in this case, namely, whether or not the ECT can give rise to an "intra-

EU" arbitration. By the phrase "intra-EU" arbitration the Tribunal means the issue as to whether the Tribunal lacks jurisdiction because either Article 26 ECT is inapplicable to disputes between an investor from a EU member State and another EU member State, or because EU law subsequent to the ECT has deprived tribunals established under Article 26 ECT from their jurisdiction to hear such disputes. If the answer to that threshold issue is that the Tribunal lacks jurisdiction then there is no need for further analysis and the case ends. Thus, the Tribunal will analyze that issue first. It is uncontroversial to say that this issue does not require an examination of the underlying facts of this case, but rather it is a matter of legal analysis as to whether or not on 20 November 2015 (the date of the RfA) there was a valid offer on the part of Respondent to arbitrate disputes arising from the ECT.

54. If, on the other hand, the "intra EU" issue is resolved against Respondent, then there would also remain for analysis the other jurisdictional and admissibility objections advanced by it. These are articulated, in outline, in Respondent's alternative jurisdictional prayers for relief recorded above. In the Tribunal's view, given their nature they fall for consideration not isolated from the facts but as part of the overall analysis of the merits of the case.

55. Thus, if the Tribunal goes beyond the threshold issue of "intra-EU" jurisdiction, it will engage in an analysis of the facts, the merits on liability (at which time Respondent's other jurisdictional and admissibility objections will be analyzed), and, ultimately, if necessary, the merits on quantum.

56. The Tribunal considers, in its procedural appreciation of the file of this case, to be the most efficient way to arrange this award.

Jurisdiction – Intra EU

Introduction – the relevant provision in the ECT

57. The Tribunal, first, notes the following provision in the ECT (in relevant extract):

> *Article 26 Settlement of Disputes between an Investor and a Contracting Party:*
>
> *(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
>
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
>
> *(a) to the courts or administrative tribunals of the Contracting Party to the dispute;*
>
> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
>
> *(c) in accordance with the following paragraphs of this Article.*
>
> *(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 in accordance with the provisions of this Article.*
>
> *(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).*
>
> *(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).*
>
> *(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*

> *(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce. ...*
>
> .....
>
> *(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*

58. The overarching question concerning jurisdiction is whether or not, on the date of the RfA (20 November 2015), Article 26 of the ECT was in force as regards Respondent. Claimant says yes, and Respondent says no (as indeed does the Commission). If it was in force as regards Respondent, the RfA consummated an international agreement to arbitrate by which the Tribunal was established to decide the issues in dispute. If it was not in force on that date, the case comes to an end as the Tribunal would have no jurisdiction. The Tribunal now proceeds to resolve that issue.

59. By way of introductory observation to the intra-EU jurisdictional analysis, the Tribunal will arrange this issue broadly into two parts. First, there is the position advocated by Respondent (and also advocated by the Commission) from the outset to the effect, in general, that as a matter of treaty interpretation the ECT was not intended to cover intra-EU disputes (namely, a dispute between an investor from a member state and another member state); or, treaties between member states subsequent to the ECT have had the effect of superseding it. This is the main thrust of Respondent's (and the Commission's) position on jurisdiction. Secondly, a narrower question, but one to which great importance was attached by Respondent, took centre-stage after the hearing, namely the consequences, if any, of *Achmea*.

Jurisdiction challenge pre-Achmea

60. Prior to *Achmea* Respondent's jurisdictional objection was articulated thus in summary (para. 10, SoD):

> *....the ECT does not cover intra-European Union ("EU", or the "Union") disputes: this was not the intention of the signing parties, nor such interpretation would be compatible with a combined reading of the ECT and the EU Treaties as currently in force. Lack of jurisdiction under this ground would require dismissal of the dispute in its entirety.*

61. The views, in broadly similar terms, but to an identical outcome, contained in the Commission Submissions were summarised as follows (para. 8):

> *This brief is organised into four sections. After the present introduction (Section 1.), the Commission will show, first, that the interpretation of Article 26 ECT leads to the conclusion that the offer for entering into arbitration made by Italy is limited to investors from contracting parties other than EU Member States and did not create any international obligations between EU Member States inter se (Section 2.). It will, then, second, set out that if Article 26 ECT were to be interpreted in the opposite manner, i.e. as entailing an offer also to EU investors, that that would constitute a violation of the Treaty on Functioning of European Union ("TFEU") and that there would be conflict between two international treaties which both are part of the law applicable by your Tribunal, namely the ECT and the TFEU. Said conflict would have to be resolved, in any case, in favour of the TFEU, either via interpretation on the basis of context ("harmonious interpretation" or "systemic integration") or via the applicable rules of conflict of laws (Section 3.) On the basis of these assessments, the Commission will, finally, suggest a course of action to your Tribunal that involves three options for proceeding with the present dispute: First, declare that your Tribunal lacks the competence to hear the case. Second, suspend the proceeding pending the preliminary ruling of the ECJ in Achmea v Slovakia, which is expected to decide on the compatibility of intra-EU Investor-State Dispute Settlement ("ISDS") with Union law Third and finally, should your Tribunal consider that it is competent to hear the case, which would make it necessary to analyse the compliance of Italy's measures with State aid rules, in particular for assessing whether the claimants had legitimate expectations, find a solution that respects the*

exclusive competence of the Commission in that regard. (Section 4.).

62. In passing the Tribunal notes that the second of the proposals suggested by the Commission has been overtaken by events, namely that the CJEU has rendered its decision in *Achmea*. However, as discussed below the CJEU did not decide, as a matter of EU Law, on *the compatibility of intra-EU Investor-State Dispute Settlement ("ISDS") with Union law,* rather the outcome of that case was narrowly articulated by that court, and specific to its circumstances. Awaiting the outcome of *Achmea* would not have been of any assistance.

63. In the Rejoinder, and during the course of the hearing, Respondent placed particular emphasis on the award in *Blusun* as regards the merits of the case. However, Claimant also invoked *Blusun* in the Reply in support of its case as regards jurisdiction. While many other tribunals have opined on the intra-EU "issue", considering that Respondent has particularly approbated *Blusun* in this case, the Tribunal, therefore, sets out the pertinent part of the reasoning in relation to intra-EU jurisdiction and the ECT as articulated by that tribunal:

B. EU Law and the inter se issue

(a) Admissibility of the inter se argument

277. .....

(b) The applicable law

278. The Parties in effect agree that the applicable law in determining this issue is international law, and specifically the relevant provisions of the VCLT. The Tribunal agrees, but would observe that this does not exclude any relevant rule of EU law, which would fall to be applied either as part of international law or as part of the law of Italy. The Tribunal evidently cannot exercise the special jurisdictional

powers vested in the European courts, but it can and where relevant should apply European law as such.

(c) The original scope of the ECT

279. As a matter of international law, the first question is whether the ECT applied to relations inter se of EU Member States as at the date of its conclusion (December 1994) in accordance with Articles 31-33 of the VCLT.

280. On its face there is nothing in the text of the ECT that carves out or excludes issues arising between EU Member States. (1) The preamble to the ECT records that it intends to place the commitments contained in [the European Energy Charter] on a secure and binding international legal basis. This implies that the scope of the (non-binding) European Energy Charter of 17 December 1991 was replicated in binding form in the ECT. There is no indication of any inter se exclusion in the Charter, which refers to a 'new desire for a European-wide and global co-operation based on mutual respect and confidence', and further refers to the 'support from the European Community, particularly through completion of its internal energy market' (Preamble, paras. 6, 14). The EC and Euratom were signatories to the Charter. This was of course before the Treaty of Maastricht, let alone the Lisbon Treaty. (2) Article 1(2) of the ECT defines 'Contracting Party' as 'a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force. EU Member States and the EU are all Contracting Parties. Prima facie at least, a treaty applies equally between its parties. It would take an express provision or very clear understanding between the negotiating parties to achieve any other result. Thus when Great Britain was asserting 'the diplomatic unity of the British Empire', it was argued from time to time that multilateral treaties to which the Dominions were separately parties had no inter se application. The inter se doctrine was not however accepted, being unsupported by express provision or clear understanding to the contrary. (3) There is no express provision (or 'disconnection clause', to adopt recent parlance) in the ECT. (4) While the Respondent and the EC relied on the travaux preparatoires to justify reading in a disconnection clause, this is not permissible in a context in which the terms of the treaty are clear. In any case, the travaux preparatoires seem to point against implying a disconnection clause: one was proposed during the course

of the Energy Charter Treaty negotiations, but was rejected.

281. Neither is there anything in the text to support the EC's argument that the ECT did not give rise to inter se obligations because the EU Member States were not competent to enter into such obligations. The mere fact that the EU is party to the ECT does not mean that the EU Member States did not have competence to enter into inter se obligations in the Treaty. Instead, the ECT seems to contemplate that there would be overlapping competences. The term 'regional economic integration organizations (or REIO) is defined in Article 1(3) of the ECT to mean an 'organization constituted by states to which they have transferred competence over certain matters a number of which are governed by the ECT, including the authority to take decisions binding on them in respect of those matters. The Area of the REIO is also defined by Article 1(10) with reference to EU law. But nothing in Article 1, nor any other provision in the ECT, suggests that the EU Member States had then transferred exclusive competence for all matters of investment and dispute resolution to the EU.

282. The EC argues that the 'Member States .. . are ... presumed to be aware of the rules governing the distribution of competences in a supranational organisation they have themselves created.' But if the Member States thought they did not have competence over the inter se obligations in the ECT, this would have been made explicit by including a declaration of competence to set out the internal division of competence between the EC and its Member States, as has been done in many other treaties with mixed membership. Nothing in the text of the ECT supports the implication of such a declaration of competence.

283. Pursuant to Article 6 of the VCLT, every State possesses capacity to conclude treaties and is bound by those obligations pursuant to the principle of pacta sunt servanda. No limitation on the competence of the EU Member States was communicated at the time that the ECT was signed. Article 46 of the VCLT provides that a State may not invoke provisions of its internal law regarding competence to conclude treaties to invalidate a treaty unless it was a manifest violation of a rule of fundamental importance. While EU law operates on both an internal and international plane, a similar principle must apply. Even if, as a matter of EC law, the EC has exclusive competence over matters of internal investment, the fact is that Member

States to the EU signed the ECT without qualification or reservation. The inter se obligations in the ECT are not somehow invalid or inapplicable because of an allocation of competence that the EC says can be inferred from a set of EU laws and regulations dealing with investment. The more likely explanation, consistent with the text of the ECT, is that, at the time the ECT was signed, the competence was a shared one.

284. The EC relied on its competence argument to argue that there was also no diversity of territory among the investors and the host State as required by Article 26, since both are part of the same 'Contracting Party' for its purposes. It is not necessary for the Tribunal to deal with this argument, since it has held that the European Member States remain 'Contracting Parties' and that the ECT does create inter se obligations for European Member States.

(d) Subsequent modification of the ECT as to inter se matters

285. The Respondent and the EC also argue that, even if the ECT had originally concerned inter se matters, this was modified by the fact that the Member States of the EU subsequently entered into other agreements that covered both the investment and dispute resolution aspects of the ECT. The EC states that subsequent EU treaties, such as the Treaty of Amsterdam, the Treaty of Nice, and the Treaty of Lisbon, implicitly repealed the earlier ECT under the lex posterior rule in Article 30 of the VCLT, whereby 'successive treaties relating to the same subject-matter' will prevail over the earlier to the extent that the treaties are not compatible.

286. Turning first to the substantive investment obligations, it is not clear how these are incompatible with the investment rights protected under European law. The EC points to the rules establishing the European internal market, with free movement of goods, persons, services and capital. It states that discriminatory measures or expropriation are not permitted under European law. But these obligations are arguably broader than those in the ECT, and are complementary to them. There is no discrimination unless the same benefits are not accorded to other EU States, but there is nothing in the ECT that requires such a result. Were a national of a European State not party to the ECT to bring international arbitration proceedings against a European host State that was a party to the ECT and had breached investment obligations

protected under it, that host State would have to determine whether it could, consistent with its EU obligations, decline to consent to such jurisdiction. Nothing in the ECT would prevent the host State from extending its protections beyond those States that are party to it, if this were required to meet these obligations. As the tribunal found in Electrabel v. Hungary, EU law can be presumed not to conflict or otherwise be inconsistent with the ECT.

287. The only example the EC pointed to where an inconsistency might arise between EU and investment law was the award in Micula v. Romania. In Micula, however, the tribunal concluded that EU law was not applicable to the dispute, as Romania had not yet acceded to the EU at the time the impugned measures were taken (although the EC appears to have taken the view that EU rules on state aid did apply during the accession negotiations). Any conflict thus arose not out of incompatibility of the relevant BIT with EU law, but out of a disagreement on whether EU rules applied prior to accession. After the Micula award was issued, the EC notified Romania that it would be in breach of the EU rules on state aid if it complied with its obligation under the award to pay damages to the investors for a breach of the fair and equitable treatment standard. In that context, any conflict related to the implications of enforcement, not to direct contradictions between the substantive rules themselves. This was also the conclusion of both the Micula tribunal and the Micula ad hoc committee.

288. The Respondent and the EC also argue that the dispute resolution clause, Article 26 of the ECT, is itself incompatible with Article 344 of the TFEU, which provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

289. In the view of the Tribunal, there is no such incompatibility. The dispute before this Tribunal is not an inter-State dispute. It is a dispute, in the words of Article 26, 'between a Contracting Party and an Investor of another Contracting Party'. It is not necessary for this Tribunal to decide whether Article 27, which concerns inter-State disputes, would be incompatible with Article 344 of the TFEU. Even if there were such an inconsistency, this would not also void Article 26, since the later Treaty will supersede the earlier one only to the extent of any incompatibility. To find otherwise would disadvantage

> *investors, who have no ability under European law to protect their investment by suing the host State directly for breaches of the ECT. Neither does anything in European law expressly preclude investor-State arbitration under the ECT and the ICSID Convention.*
>
> *290. As noted (paragraph 260(e) above), the Claimants also relied on the combined effect of the lex specialis and lex posterior presumptions, the ECT being both more specific than the EU legal order and subsequent to it. Having concluded that there is no incompatibility between the TFEU and the ECT, the Tribunal does not need to address this argument.*
>
> *291. For these reasons, the Tribunal holds that the inter se obligations in the ECT have not subsequently been modified or superseded by later European law.*
>
> *(e) The state of the authorities*
>
> *292. The intra-EU issue has been canvassed in greater or lesser depth by previous investment tribunals, which have reached practically common conclusions.*
>
> .....
>
> *302. Despite the fact that the EC has intervened in many other intra-EU arbitrations, as far as has been publicly reported, no tribunal yet has upheld this objection to jurisdiction.*
>
> *303. Overall the effect of these decisions is a unanimous rejection of the intra-EU objection to jurisdiction. The tribunal in each case has found that the relevant BIT or the ECT was intended to bring about binding obligations between EU Member States. The tribunals found no contradiction between the substantive provisions of EU law and the substantive or dispute resolution provisions of the BITs. No such system for investor- State arbitration exists in EU law, and it would be incorrect to characterise such disputes as inter-State disputes such that Article 267 of the TFEU could be said to preclude jurisdiction. These conclusions support those adopted by the Tribunal in this case.*

64. Having considered the matter, the Tribunal adopts the reasoning in *Blusun* in full. The reasoning is comprehensive and unimpeachable.

The Tribunal does not consider it necessary to add or subtract in any way from the *Blusun* reasoning.

65. The Tribunal extrapolates the following points from *Blusun* for the purposes of its present jurisdictional analysis.

66. First, the interpretation argument advanced by Respondent (and by the Commission) which is referenced as the 'disconnection clause', in shorthand parlance, does not stand up to scrutiny when the ECT is interpreted (as the *Blusun* tribunal did) in an entirely regular and ordinary manner according to the provisions of the VCLT.

67. Secondly, nothing in EU law subsequent to the ECT has the effect of superseding (insofar as Respondent is concerned) the latter.

68. By way of completeness the Tribunal also now addresses two further points on jurisdiction raised by Respondent.

69. Respondent submits that the rules on state aid, a concept forming part of EU law, lead to the conclusion that compliance with any award might transgress such rules at an enforcement stage. Therefore, such potential transgression (which might arise as a matter of EU law) denudes the Tribunal now of ECT jurisdiction.

70. This state aid point was considered, and then dismissed by the tribunal in *Blusun*. The Tribunal agrees.

71. Effectively Respondent's position is that because there might be some enforcement issue in the future, deriving from an aspect of EU law (state aid, it must be recalled, itself was the product of the sovereign choices of member states, and, in particular for this issue, something which Respondent itself created through its membership of the EU), then this must denude the Tribunal of its jurisdiction as a matter of an entirely separate treaty (the ECT).

72. The Tribunal does not see how such a proposition can have the far-reaching effect on jurisdiction which Respondent suggests. If the Tribunal were to accede to such a proposition then it would give support to a sovereign state being able to avoid an international promise to arbitrate disputes with a two-fold argument which relies on rules which such sovereign itself created and simply foreshadows putative future issues with enforcement. The Tribunal cannot give succour to this position, and it is dismissed.

73. Next, Respondent drew upon Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, generally referred to as the *MOX Plant Case*. The Tribunal understands this position on the part of Respondent to be supportive of the main thrust of its case on *Achmea*, rather than providing a separate jurisdictional argument. As discussed below, *Achmea*, when analysed in detail, does not provide the Respondent (or the Commission) with legal support for the outcome sought, thus, the *MOX Plant Case* does not fill that gap. The Tribunal does understand that the *MOX Plant Case* is, in of itself, utilised as the legal proposition for bringing intra-EU treaty arbitration to an end.

Achmea

74. As the jurisdictional arguments in this arbitration evolved, particularly in the aftermath of the hearing, *Achmea* has moved centre-stage in terms of the importance and significance attached to it by Respondent (and the Commission).

75. The Commission's Communication is now quoted, in pertinent part, to illustrate the foregoing point, with emphasis added.

> *In the recent preliminary ruling concerning the Achmea case, **the Court of Justice confirmed that investor-State arbitration clauses in intra-EU BITs are unlawful.*** (p. 2)
>
> .....
>
> *The Achmea judgment and its consequences*

> *In the Achmea judgment the Court of Justice ruled that the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States. Recourse to such clauses undermines the preliminary ruling procedure provided for in Article 267 TFEU, and is not compatible with the principle of sincere cooperation.* ***This implies that all investor-State arbitration clauses in intra-EU BITS are inapplicable*** *and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it. Member States that are parties to pending cases, in whatever capacity, must also draw all necessary consequences from the Achmea judgment. Moreover, pursuant to the principle of legal certainty, they are bound to formally terminate their intra-EU BITs.*
>
> ***The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable.*** *Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States.* (pp. 3-4)

76. Approximately one month before the Commission's Communication, the tribunal in *Masdar* arrived at a quite different conclusion as that sought by the Respondent (and the Commission). The Tribunal notes the following passages from that award:

678. Upon consideration of the Parties' respective submissions and upon analysis, the Tribunal has concluded that the Achmea Judgment has no bearing upon the present case.

679. The Achmea Judgment is of limited application – first, and specifically, to the Agreement on encouragement and reciprocal protection of investment between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic and, second, in a more general perspective, to any "provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic." The ECT is not such a treaty. Thus, the Achmea Judgment does not take into consideration, and thus it cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party.

*680. The conclusion of the Tribunal is in line with the Opinion of Advocate General Wathelet delivered on 19 September 2017 in Achmea. The Advocate General stated that Achmea was: "the first opportunity [for the CJEU] to express its views on the thorny question of the compatibility of **BITs concluded between member States** and in particular of the investor-State dispute settlement ('ISDS') mechanisms established by those BITs." (Emphasis added). Thus, it is clear that Achmea pertains only to BITs concluded between EU Member States – as the wording of question No. (1) referred by the Bundesgerichtshof to the CJEU likewise confirms: "Does Article 344 TFEU preclude the application of a provision in a **bilateral investment protection agreement between Member States of the European Union** (a so called intra-EU BIT) [...]." (Emphasis added).*

681. With specific reference to the ECT, the Advocate General made the following statement:

> *"That multilateral treaty on investment in the field of energy [the ECT] operates even between Member States, since it was concluded not as an agreement between the Union and its Member States, of the one part, and third countries, of the other part, but as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing. In that sense, **the material provisions for the protection of investments provided for in that Treaty and the ISDS mechanism also operate between Member States. I note that if no EU***

> ***institution and no Member State sought an opinion from the Court on the compatibility of that treaty with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible."*** *(Emphasis added).*
>
> *682. Had the CJEU seen it necessary to address the distinction drawn by the Advocate General between the ISDS provisions of the ECT and the investment protection mechanisms to be found in bilateral investment treaties made between Member States within the ambit of its ruling, it had the opportunity to do so. In fact, the Tribunal notes that the CJEU did not address this part of the Advocate General's Opinion, much less depart from, or reject, it. The Achmea Judgment is simply silent on the subject of the ECT. The Tribunal respectfully adopts the Advocate General's reasoning on this matter, and it relies in particular upon the observation in the final sentence cited above from his Opinion.*
>
> *683. For these reasons, the Tribunal concludes that the Achmea Judgment has no bearing upon its determination of the matters in issue in this arbitration and it denies Respondent's Application.*

77. Unsurprisingly, Claimant adopts the reasoning in *Masdar* in support of its position on jurisdiction. On the other hand, Respondent severely criticizes the tribunal in *Masdar* for the cursory manner (in its view) by which *Achmea* was analysed, and the conclusion reached in that regard. Respondent's heading in its submissions on *Masdar* leaves no room for doubt in that regard, with emphasis added:

> *The Masdar award failed to engage with the Achmea judgment and* ***used an easy cop out strategy***

78. In light of the diametrically-opposed views of the Parties the Tribunal considers it appropriate to examine what it is *Achmea* decides, and, importantly, what it does not decide.

79. First, briefly as to the context of *Achmea*; a dispute arose between Achmea B.V., a Dutch company, and the Slovak Republic due to certain governmental changes in the market for private health insurance. An UNCITRAL tribunal was constituted pursuant to

Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic ("the Achmea BIT"). Frankfurt am Main, Germany, was chosen as the legal seat of that UNCITRAL tribunal and the arbitral proceedings. The Slovak Republic raised an objection of lack of jurisdiction, namely, that, as a result of its accession to the European Union, recourse to an arbitral tribunal provided for in Article 8(2) of the Achmea BIT was incompatible with EU law. Achmea B.V. was awarded damages in the principal amount of EUR 22.1 million by that UNCITRAL Tribunal. The Slovak Republic brought an action to set aside that arbitral award before the German courts, ultimately arriving on appeal at the Bundesgerichtshof.

80. The Bundesgerichtshof decided to stay the appeal before it and ask the following questions of the CJEU for a preliminary ruling:

> *(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?*
>
> *If Question 1 is to be answered in the negative:*
>
> *(2) Does Article 267 TFEU preclude the application of such a provision?*
>
> *If Questions 1 and 2 are to be answered in the negative:*
>
> *(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

81. The Tribunal notes that the first question, in particular, was posed in wide terms by the Bundesgerichtshof and is not confined to the Achmea BIT.

82. Rather than answering the widely-drawn question 1 posed by the Bundesgerichtshof, the CJEU combined questions 1 and 2, but also added a qualifying phrase (emphasis added):

> *31. By its first and second questions, which should be taken together, the referring court essentially asks whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, **such as Article 8 of the BIT**, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

83. The CJEU then set out a number of general considerations found in EU law which are now quoted in full:

> *32. In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited).*
>
> *33 Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States,*

and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).

34 EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).

35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174).

36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (see, to that effect, Opinion 1/09 (Agreement creating a unified patent litigation system) of 8 March 2011, EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 175; and judgment of 27 February 2018, Associação

Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 33).

37 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 176 and the case-law cited).

38 The first and second questions referred for a preliminary ruling must be answered in the light of those considerations.

84. The Tribunal notes that, having set out a number of general considerations (which are of general application in EU law), the CJEU then discusses the precise circumstances of the Achmea BIT. This analysis of the Achmea BIT is particularly important as it informs the exact rationale for the answers given by the CJEU to the Bundesgreichtshof.

85. The CJEU, first, sought to ascertain whether the disputes which a tribunal established according to Article 8 of the Achmea BIT might be called on to resolve are liable to relate to the interpretation or application of EU law (emphasis added, and this is language particularly relied upon by Respondent). In that regard it refers to Article 8(6) of the Achmea BIT (emphasis added):

6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
– the law in force of the Contracting Party concerned;
– the provisions of this Agreement, and other relevant agreements between the Contracting Parties;

> – *the provisions of special agreements relating to the investment;*
> – *the general principles of international law.*

86. This precise language led the CJEU to the conclusion that a tribunal established pursuant to Article 8 of the Achmea BIT may, in two respects, be called on to interpret or, indeed, to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

87. The Tribunal notes that the use of the word "shall" in the introductory paragraph of Article 8(6) of the Achmea BIT compels the conclusion that any such tribunal was inevitably going to decide a dispute according to EU law, amongst others. The two emphasised sub-paragraphs recorded just above are not options, but part of the matters to which such a tribunal would mandatorily be taking into account.

88. The CJEU, secondly, analysed whether a tribunal established pursuant to Article 8 of the Achmea BIT was a court or tribunal within the meaning of Article 267 of the TFEU. The answer was readily found, namely, that it was not such a court or tribunal.

89. Thirdly, the CJEU analysed the extent of judicial review available at the seat, namely, Frankfurt am Main. It noted that paragraph 1059(2) of the Code of Civil Procedure (part of Germany's *lex arbitri*) provides only for limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award. Specifically, in relation to commercial arbitration, the CJEU has held that the requirements of efficient arbitration proceedings justify the limited review of arbitral awards by courts of EU Member States, "**provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a**

preliminary ruling" (the Tribunal's emphasis, and arising from the landmark 1999 decision of the CJEU in what is routinely referred to as *Eco Swiss*).

90. However, the CJEU found (for reasons which do not readily emerge from its reasoning) that the circumstances of Article 8 of the Achmea BIT do not permit a similar review of awards which attach to commercial arbitrations (in the manner mandated by *Eco Swiss*). The Tribunal infers from this, in the specific instance of dispute between Achmea B.V. and the Slovak Republic, that even if the German courts could examine the arbitral award of 7 December 2012 in light of fundamental provisions of EU law (which they can do due to *Eco Swiss*), that was not a satisfactory (for the CJEU) answer to the reformulated questions.

91. The CJEU then articulated its conclusion, which is now recorded in full:

> *56. Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.*

92. The Tribunal makes two observations which arise from this conclusion of the CJEU. The reasoning stems entirely from the specific circumstances of the Achmea BIT, and is not based on any other BIT or a wider ISDS enquiry (particularly, not the ECT); and, secondly, the recourse which might be had against the arbitral award of 7 December 2012 before the German courts, which includes (as a matter of *Eco Swiss*) an examination in light of fundamental principles of EU law, is, in the view of the CJEU, insufficient to

ensure the full effectiveness of EU law, and, further, could prevent such full effectiveness. It is unclear from the reasoning of the CJEU as to why this is the case, but, given that *Achmea* does not address the ECT, the Tribunal does not dwell any further on this point.

93. The further conclusion which the CJEU then draws is as follows:

> *Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.... In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.*

94. Having reached these conclusions, the CJEU answers the question which it reformulated (as recorded above) from the questions posed by the Bundesgerichtshof in the following manner:

> *Consequently, the answer to Questions 1 and 2 is that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

95. The Tribunal notes that the predicate word for the answer given by the CJEU to the question it posed itself is "consequently" which, thus, plainly draws on the preceding analysis of Article 8 of the Achmea BIT, and not (as question 1 posed by the Bundesgerichtshof sought) a wider discussion of ISDS clauses in BITs.

96. Considering *Achmea*, thus, in full, the Tribunal draws a number of conclusions as follows:

(a) the answer given by the CJEU is confined, on a full, rather than selective analysis of the whole judgment, to the specific context of Article 8 of the Achmea BIT only;

(b) the question, of wider application to ISDS clauses, posed by the Bundesgerichtshof was not answered so, therefore, no view can be inferred as to the compatibility of such clauses with EU law insofar as the opinion of the CJEU is concerned. Had the CJEU wished to answer the widely-drawn questions posed by the Bundesgerichtshof, then presumably it would have done so;

(c) the mandatory requirement in Article 8(6) of the Achmea BIT for a tribunal constituted under that treaty to decide a dispute according, amongst others, to (i) "the law in force of the Contracting Party concerned" and (ii) "the provisions of this Agreement, and other relevant agreements between the Contracting Parties" was the treaty language which transgressed EU law;

(d) the CJEU does not go so far as to say that the Slovak Republic or the Kingdom of the Netherlands are barred from offering to enter into arbitration agreements. Rather, the Tribunal understands the position to be more correctly that the objection by Respondent (and the Commission) forming of what it says is the gravamen of *Achmea* is to the extent of the authority given to such a tribunal to decide a dispute, amongst others, according to the two EU law aspects already noted above. Put another way, it appears that EU member states may bring such arbitral tribunals into being, but, according to the position adopted by Respondent and the Commission, they are not allowed by EU law to authorise such arbitral tribunals to interpret or apply such law; and

(e) the CJEU does not make any comment on, nor does it gainsay the authority of that UNCITRAL tribunal to rule according to the general

principles of international law. Its sole concern revolves around the two parts of Article 8(6) of the Achmea BIT which it says engage the application or interpretation of EU law.

97. Drawing upon the foregoing conclusions from *Achmea* for the purposes of this case, the Tribunal agrees with the tribunal in *Masdar* that the judgment is, in of itself, of limited application (only, insofar as EU law is concerned, to the Achmea BIT) and, further, of no application as such to the ECT. Respondent's criticism of the approach taken by the tribunal in *Masdar* appears to the Tribunal as unwarranted in view of the CJEU's answers to its own reformulated questions.

98. In light of the above reasoning and conclusions concerning the lack of direct impact of *Achmea* as undermining the jurisdiction of the Tribunal, the Tribunal is not convinced that its conclusions should be modified because of the position taken by the Commission in its Communication (quoted above at para. 75). The Tribunal considers that a proper reading of the *Achmea* does not lead to the conclusion that "[T]he Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the ECT as regards intra-EU relations". Nor is the Tribunal convinced for the reasons stated above that "[T]his provision, interpreted correctly does not provide for an investor-State arbitration clause applicable between investors from a Member State of the EU and another Member State of the EU"

99. The Tribunal restates that it is called, in this dispute, to resolve the alleged breach by Respondent of Art. 10(1) ECT on the basis of principles of public international law relevant to the interpretation and application in the present case of the ECT, a multilateral treaty in force and applicable also between The Netherlands and Respondent. The Tribunal is therefore unable to read *Achmea* as supporting the

Commission's view (with all due respect to the Commission's role within the EU, the Communication is not an authoritative statement of EU law) that [G]*iven the primacy of Union law, that clause* [Article 26, ECT], *if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable."*

100. In conclusion, therefore, the Respondent's objections to jurisdiction based on *Achmea* are dismissed.

Intra-EU jurisdiction conclusion

101. Thus, the Tribunal dismisses the jurisdictional objections raised by the Respondent as regards what might be termed the intra-EU issue.

102. There are other jurisdictional and/or admissibility issues raised by Respondent but these are dealt with below in connection with the merits.

(A) Facts – (B) Merits & Liability (incl. concomitant Jurisdiction & Admissibility)

Section A - Facts

Introduction

103. This part of the award is arranged as follows. First, the Tribunal will set out its understanding of the historical context of promotion of renewable energy production in Italy. Next, there will be a description of each of the five *Conto Energia* Decrees which were implemented by Respondent. This will be followed by an outline of the three Italian companies which Claimant purchased (in whole or in majority part) which operate photovoltaic plants and the agreements concerning the incentives for their respective output. Thereafter, the Tribunal records the facts surrounding the measures taken by Respondent of which Claimant makes complaint. These are all matters which the Tribunal considers, in light of the submissions received from the Parties, to be

factually uncontroversial. The Tribunal has been assisted, considerably, by the Parties in this regard in the manner that they have not engaged in needless factual disputes, but rather have dwelt upon the more important issues as to whether or not the measures taken by Respondent engage international responsibility as a matter of the ECT.

104. For the avoidance of doubt, the summary of facts (*i.e.* the historical context, the five *Conto Energia* Decrees, and the outline of the three Italian companies purchased by Claimant) which follows should not be taken as setting out material anterior findings. The summary of facts has the purpose of putting into broad context for the reader the background to this case. Analysis of material issues which might, or might not, be a trigger for the disposition of claims follow in a later part of this Award.

Historical Context

105. From the early 1980s onwards Respondent has promoted and encouraged the development and use of renewable energy sources. Given that Italy is a country blessed with abundant sunshine for much of the year, photovoltaic generation of electricity was clearly of considerable importance.

106. In particular, Respondent's Law No. 9 of January 9, 1991, simplified the authorization procedure for the production of energy from renewable sources. Regional governments were required to develop plans prioritizing the production of energy from renewable sources.

107. In 1992, Respondent established the first fixed feed-in tariff for renewable energy production through its CIP6/92 regulation. That regulation allowed renewable energy producers to produce electricity from renewable sources without any capacity limit and established a remuneration procedure based on kilowatt-hours of electricity

produced. The CIP6/92 regulation also provided some certainty to investors because it obligated ENEL S.p.A., Respondent's electricity company, to buy all electricity produced from renewable energy sources. By 1997, 16% of Italy's electricity was being produced from renewable energy sources.

108. Respondent continued to encourage investments in its developing renewable energy sector by enacting Legislative Decree No. 79 on March 16, 1999. Known as the *Bersani Decree*, that act encouraged electricity production from renewable energy sources by prioritizing their access to the grid. The *Bersani Decree* also obligated generators and importers of electricity from non-renewable sources beyond a certain threshold to inject a portion of electricity from renewable sources into the grid. To satisfy that obligation, the non-renewable generators or importers could purchase a corresponding amount of renewable energy from other producers, or from the GSE, or they could purchase "green certificates" from third parties.

Developments leading to the "Conto Energia" Decrees

109. On 27 September 2001, the European Parliament and the Council enacted Directive 2001/77/EC, promoting electricity produced from renewable energy sources in the internal electricity market. That directive set national targets for each member state for renewable energy production in light of the EU's stated objective of having 22.1% of total Community electricity consumption generated from renewable energy sources by 2010. Respondent was expected to produce 25% of its total electricity consumption from renewable energy sources by 2010. That directive was subsequently replaced by Directive 2009/28/EC, which aimed to achieve a 20% share of energy from renewable sources in the Community's gross final consumption of energy by 2020. It required that EU member states report on planned or existing measures put in place to meet those targets. It also

required EU member states to adopt indicative targets for the following 10 years. For Respondent, the target was for 17% of overall energy consumption to come from renewable energy sources by 2020.

110. In light of the fact that the cost of producing electricity from renewable sources was substantially higher than the cost of producing electricity from fossil fuels, in order to meet its target, Respondent considered it fit to implement measures and above-market incentives that would further develop and encourage investments in its renewable energy sector. Thus, on 29 December 2003, Respondent enacted Legislative Decree No. 387, the goal of which was to "promote a greater contribution from renewable energy sources to the production of electricity in the Italian and European markets." Article 7 thereof, which addressed solar power, stated that Respondent would implement incentive tariffs to encourage investments in photovoltaic facilities. Accordingly, from 2005 to 2012, Respondent enacted incentive schemes for photovoltaic plants known as *Conto Energia* Decrees. The Tribunal now records Article 7 of Legislative Decree No. 387:

> *Article 7 - Specific provisions for photovoltaic energy*
>
> *1. Within six months from the date of entry into force of this decree, the Minister of Productive Activities, in consultation with the Minister of Environment and Protection of Natural Resources, in consultation with the Joint Conference, shall adopt one or more decrees which define the criteria to encourage the production of electricity from solar sources.*
>
> *2. The criteria referred to in paragraph 1, which shall impose no new cost to the state budget and shall be in compliance with Community legislation currently in force, shall:*
>
> *a) establish the requirements of the subjects that may benefit from incentives;*
>
> *b) establish the minimum technical requirements of the*

eligible components and systems;

c) establish the conditions for the accumulation of the new incentives with other incentives;

d) establish the modalities for determining the scope of incentives. For electricity produced by photovoltaic conversion of solar energy, provide a specific incentive rate, decreasing amount and duration as to ensure fair remuneration of each investment and operating costs;

e) establish a target for the nominal power to be installed;

f) agree also with the upper limit of the cumulative electric power of all plants that can receive the incentive;

g) may include the use of green certificates allocated to the Manager of the grid in Article 11 paragraph 3, second sentence of the legislative decree 16 March 1999 n. 79.

111. Since Legislative Decree No. 387 did not allow the costs of incentives to be borne by the State (as provided for in Art.7(2), quoted just above) – a constant feature also of all later enactments in respect of PV incentivized tariffs, those costs were passed on to electricity consumers through electricity bills, as Claimant has explained and acknowledged. The Authority for Electrical Energy and Gas ("AEEG") collects those fees from electricity consumers to cover the incentive tariff costs. The GSE is the state-owned company responsible for paying the incentive tariffs to electricity producers under the *Conto Energia* decrees.

The Conto Energia Decrees

Conto I

112. Respondent implemented its first incentive tariff programme for electricity generated by photovoltaic sources on 28 July 2005. The programme was designed for relatively small facilities, under 1 MW in capacity, and it highlighted the possibility of individuals and families, as well as businesses and traditional energy companies, to become producers in Italy's electricity system.

113. *Conto I* provided that qualifying photovoltaic plants had the right ("*diritto*") to receive a specific incentive tariff for a twenty-year period. The tariff rate was paid to the producer per kilowatt-hour of electricity it produced, on top of whatever sale price the producer also obtained for its electricity. *Conto I* established tariff rates for eligible plants authorized in 2005 and 2006 on the basis of the facility's nominal capacity: 0.445€/kWh for plants between 1 kW and 20 kW; 0.460€/kWh for plants between 20 kW and 50 kW; and 0.490€/kWh for plants between 50 kW and 1 MW. The rates offered to eligible facilities after 2006 were slightly lower.

114. *Conto I* required anyone who wished to develop a solar facility and benefit from the incentives to submit a request for the incentive tariff, along with a commitment to obtain the necessary authorizations for the construction and operation of the plant. Once provisionally authorized to benefit from the programme, the investor then had six to twelve months (depending on the plant's capacity) to commence construction of the facility and twelve to twenty-four months to complete construction and connect the facility to the grid. Failure to meet those deadlines would result in loss of the right to the incentive tariffs.

115. Confirmation of the right to the incentive tariffs under *Conto I* was established by a formal letter from the GSE, which communicated the specific tariff rate that it agreed to pay for a twenty-year period to the company or person that held the project rights to a photovoltaic plant (*i.e.*, the "*soggetto responsabile*"). This is reflected in Art. 7.7 of *Conto I*:

> *Within 90 days following the deadlines provided for transmission of the applications under paragraph 1, the implementing body (soggetto attuatore) shall communicate the outcome under paragraphs 4 and 5 to the plant operators (soggetti responsabili) who sent the application under paragraph 1. The implementing body shall also*

notify entitled operators, on the basis of the provisions under paragraph 5, article 5 and article 6 (2), of the amount of the incentive tariff actually awarded for a period of twenty years commencing from the date of operation of the plant.

116. The letter served as the basis for a contract that the producer and the GSE would subsequently execute. In outline, such a contract indicated that it was effective as of the date on which the producer connected the plant to the grid and that it would terminate twenty years later. Amendments to the contract could only be made in writing by mutual agreement between the producer and the GSE.

117. Some of the pertinent provisions of a sample *Conto I* contract are now recorded by the Tribunal:

Article 1
Purpose of the agreement

This agreement concerns the recognition by GSE to the Producer of the contribution due to electricity generated by solar power through photovoltaic conversion and incentivized pursuant to Legislative Decree 387/03, art. 7 of MAP decrees dated 28/07/2005 and 06/02/2006, A.E.E.G. resolution no. 188/05 as subsequent amended and modified by resolution 40/06 and A.E.E.G. resolution no. 28/06.

Article 2
Effective date and value of the incentive

For a period of twenty years as of 08/04/2009, the incentive tariff to be recognized to the photovoltaic plant concerned under this agreement is equal to 0.46 €/kWh.

Article 3
Incentives payment methods

The payment of the incentive tariffs shall be made by GSE according to the measures defined in art. 3-bis of A.E.E.G. resolution no. 40/06 and in conformity with the payment

methods regulated by such resolution. With respect to art. 3 bis of A.E.E.G. resolution no. 40/06, GIOVA SOLAR SRL is the party responsible for the survey, registration and communication to GSE of the measurements on the incentivized photovoltaic energy. GSE provides for the payment of the incentive tariffs with value date as of the last day of the month following the one in which the "Payment Date" measurements are received. In the event the "Payment Date" falls on a holiday, the payment is arranged with value date as of the following business day.

GSE shall arrange for the payment of the incentive tariffs by crediting the amounts to the bank account specified by the Producer in the "data registration form for the purpose of incentive tariffs payment", mentioned in the introductory section of this agreement.

Article 8
Effective date and duration of the agreement

This agreement is effective from 08/04/2009 and shall expire on 07/04/2029. This contract is deemed as legally terminated and having ceased to produce effects for the Parties should the Producer be faulty on the prohibitions and forfeitures defined in art. 10 of Law 575/1965 as subsequent amended and modified.

Article 9
Jurisdiction

For any dispute arising out of or in any way connected to the interpretation of this Agreement and the documents referred to therein, the Parties agree on the exclusive jurisdiction of the Court of Rome.

Article 10
Formalization of the agreement

This Agreement is signed in two original copies; the Producer and GSE shall separately send their duly signed originals. Any modification to the agreement must occur in writing.

Conto II

118. On 19 February 2007, the Ministry of Economic Development of Respondent enacted a second *Conto Energia* ("*Conto II*") with a stated goal of implementing a simplified, stable, and durable system to access the photovoltaic incentives. One of the recitals to *Conto II* makes this intention explicit:

> *It being held that it is necessary to introduce corrections to the mechanism introducing a simplified system for accessing incentives, which is both stable and lasting*

119. *Conto II* changed *Conto I* in two principal respects.

120. First, it eliminated the preliminary authorization phase that previously existed and instead required electricity producers to request the benefit of the incentive tariff upon the facility's entry into operation. This simplified the enrolment process and avoided the problem of investors being granted capacity that was never realized. It also meant that investors bore the development and construction risks of their investments, because the tariff rates decreased progressively over time and the rate granted to a given facility was established only when the facility entered into operation.

121. Secondly, *Conto II* increased the capacity thresholds for receiving incentive tariffs to include plants over 1 MW and to an aggregate installed capacity of 1,200 MW. It also established a variety of tariff rates that were based on sophisticated technical criteria of a given plant, including a facility's nominal capacity and other characteristics such as the plant's size and whether it was partially or totally integrated. As with *Conto I*, the *Conto II* rates were paid to producers per kilowatt hour of electricity produced, regardless of the sale price of the electricity that the producers also received. The *Conto II* tariffs

were slightly lower than those offered in *Conto I*. *Conto II* expressly stated, at Art. 6(1), that "*[T]he tariff identified ..... is awarded for a period of twenty years commencing from the date of entry into operation of the plant and shall remain constant in current currency for the entire twenty year period.*"

122. The tariff rates established in *Conto II* were available to eligible plants entering into operation in 2007 and 2008, with slightly reduced tariffs available to facilities entering into operation after 2008. The *Conto II* tariffs were available until the aggregate installed capacity of photovoltaic plants in Italy reached 1,200 MW, although facilities that connected to the grid within fourteen months of the date on which Italy reached the 1,200 MW threshold would also receive the tariffs.

123. In line with Respondent's goal of making photovoltaic investments more competitive until the technology matured and their costs decreased, *Conto II* stated that the Ministry of Economic Development would issue a subsequent decree revising the incentive tariffs for photovoltaic plants connected to the grid after 2010, taking into account energy products and component price trends as well as technological monitoring from the ENEA. In practice, through the *Salva Alcoa* decree (Law Decree 8 July 2010, n. 105), Respondent later extended the *Conto II* incentive tariffs to plants entering into operation after 2010.

124. The implementation of *Conto II* was furthered through the "*Implementation of the Decree of the Minister of Economic Development, in consultation with the Minister for the Environment, Land and Sea February 19, 2007, for the purpose of promoting the production of electricity using photovoltaic plants*" by the AEEG, quoted in relevant part:

Article 8.1

The incentive rate is recognized to the parties responsible allowed under Article 5 for twenty years from:

a)The date of entry into the facility, for photovoltaic systems that became operational after the date of entry into force of this measure;

b) The first day of the month following that in which they completed the actions needed for eligibility to tariffs, and in any case not before the first day of the month following the date of entry into force of this regulation, for photovoltaic systems came into operation in the period between 1 October 2005 and the date of entry into force of this provision and which comply with the provisions Article 4, paragraph 7 of the Ministerial Decree of 19 February 2007.

Article 5.2 thereof states that tariff amount is specified by GSE in the communication on the admission to the support regime; therefore, if we combine Article 5.2 with Article 8 the result is that the tariff amount as accorded by GSE is fixed for 20 years.

125. A *Conto II* contract was, in broad terms (save for the amount of the incentive and the relevant dates) the same as that set out above for *Conto I*.

Conto III

126. Respondent's Ministry of Economic Development enacted reduced tariffs (in comparison with *Conto II*) in a third *Conto Energia* ("*Conto III*") on 6 August 2010. As with the previous two *Conto Energias*, *Conto III* granted qualifying photovoltaic plants the right (*diritto*) to receive a specific incentive tariff that would remain constant for a 20-year period starting from the date of the plant's connection to the grid. *Conto III* established a range of tariffs for various facilities entering into operation from 2011 through 2013 and provided that the Ministry of Economic Development would issue a subsequent decree establishing the rates for incentive tariffs offered to plants connected to the grid after 2013. The *Conto III* tariffs were available until the aggregate installed capacity of photovoltaic plants admitted to the

programme reached 3,000 MW. Plants that were connected to the grid within 14 months of the date on which Italy reached the 3,000 MW threshold would also receive the *Conto III* tariffs.

127. The implementation of *Conto III* was furthered through the "Deliberation implementing Ministerial Decree of 6 August 2010 (Third Energy Bill)", by AEEG, quoted in relevant part:

> *Article 11*
>
> *The incentive rate and the increase if any are approved (...)*
>
> *a) for twenty years from the date of entry into the facility, for photovoltaic systems for which the Responsible Party's submission to the GSE request on schedule in Article 4, paragraph 1, of the ministerial decree of August 6, 2010;*
>
> *b) for twenty years, minus the period between the date of entry into operation of the plant and the date of sending communication to the GSE, for photovoltaic plants for which the Responsible Party has submitted to GSE a request later than expected from Article 4, paragraph 1, of the ministerial decree of August 6, 2010.*

128. A *Conto III* contract was, in broad terms (save for the amount of the incentive and the relevant dates) the same as that set out above for *Contos I & II*. By way of example, Art. 2 of a *Conto III* contract stated:

> *The incentive tariff, constant in current currency, to be recognised to the photovoltaic plant concerned under this Agreement, is equal to 0.3030 Euro/kWh, a value recognised by GSE and notified to the Soggetto Responsabile with the communication on the admission to*

The Romani Decree

129. In order to implement Directive 2009/28/EC Respondent passed Law 96/2010 (*"Principles and guiding criteria for the implementation of Directive 2009/28* [and other Directives]"), which provided for the

issuance of implementing Legislative Decrees, such as the "*Romani Decree*" No. 28/2011 of 3 March 2011. Among its guiding principles, Article 17 of Law 96/2010 ("Measures for conforming the national legal system to the Community's legislation on energy and recovery of garbage") stated at para.1(h) that "in preparing the implementing legislative decrees…the Government shall follow…also the following guiding guidelines:…(h) adjusting and strengthening the incentive system of renewable energy sources and of energy saving, without new or additional burdens for the public finance…"

130. The *Romani Decree* sought thus to balance several competing factors relevant to the photovoltaic market. On one hand, Respondent wanted to maintain (i) equitable remuneration for investors, given that photovoltaic facilities still needed above-market incentives to compete with traditional electricity producers, and (ii) the confidence of investors by ensuring a constant rate of incentives throughout a fixed time period equal to the average useful life of a facility, reinforced through a contract with the GSE. On the other hand, Respondent wanted to adjust the tariffs to account for cost reductions in photovoltaic technology and to reduce costs of electricity for consumers. The *Romani Decree* contemplated gradual regulatory monitoring and controls, while "safeguarding investments already made."

131. The Tribunal notes, in particular, that Article 24(d), which is recorded below, of the *Romani Decree* provides for private law agreements for the assignment of applicable incentives. As noted already, each of *Contos I, II,* and *III* required formal contracts as the consummation of the arrangements for incentives.

132. The Romani Decree altered the mechanics of *Conto III* by limiting the availability of the *Conto III* tariffs to photovoltaic plants that were connected to the grid by 31 May 2011 (instead of by 31 December

2013, as originally contemplated). Plants connected after that date would receive different incentive tariffs, to be established in a future decree. Furthermore, the *Romani Decree* introduced limitations on the eligibility of plants receiving incentive tariffs, based on their size, organization, and zoning of land.

133. The Tribunal now records aspects of the *Romani Decree* (with emphasis added):

> *Art. 23 – General principles*
>
> *1. This Section provides for the new regulation of support regime dedicated to RES based energy and energy efficiency through the reorganization and improvement of current support mechanisms. The new rules provide for a general framework aimed at promoting renewable sources energy generation and energy efficiency to the extent adequate to reach the targets set forth in art. 3 hereof, by setting criteria and tools that promote effectiveness, efficiency, streamlining and overtime stability of the support regimes as well as pursue the harmonization with other tools designed for alike purposes together* ***with the reduction of support costs charged to end-users.***
>
> *2.* ***Gradual intervention to safeguard investments made and proportionality to the targets*** *are further general principles of the reorganization and improvement of support regime reform, as well as flexibility of support regimes' structure, in order to take into account market dynamics and technology evolution of renewables and energy efficiency.*
>
> .....
>
> *Art. 24 Incentive mechanisms*
>
> *1. The production of electricity from plants using renewable sources that enter into operation after December 31, 2012, will be promoted through the instruments and according to the general criteria set out in paragraph 2 and the specific criteria set out in paragraphs 3 and 4. The safeguard of non-incentivized plants is ensured through the mechanisms under art. 8 hereof.*

> *2. The production of electricity by the plants referred to in paragraph 1 is supported on the basis of the following general criteria:*
>
> *a) the incentive has the purpose of ensuring a fair remuneration of the investment and operating costs;*
>
> *b) the period one is entitled to receive the incentive all through is equal to the average conventional lifecycle of specific kind of plant, and starts from the date of entry into operation thereof;*
>
> ***c) the incentive remains constant throughout the support period to which one is entitled under the law and may take into consideration the economic value of energy produced;***
>
> ***d) the incentives are assigned by way of private law agreements between the GSE and the plant owner (soggetto responsabile), based on a sample agreement approved by the Authority of Electricity and Gas within 3 months as of the entry into force of the first of the decrees as per para 5 herein.***

Conto IV

134. On 5 May 2011, Respondent's Ministry of Economic Development enacted *Conto IV* as a matter of the *Romani Decree* requirement that it issue revised incentive tariffs for facilities connected to the grid after 31 May 2011. The rates established in *Conto IV* were based, amongst others, the goal of progressively decreasing tariffs to achieve a gradual alignment with the actual cost of the technology, while maintaining stability and certainty in the market.

135. In particular, *Conto IV* noted that, in light of the evolution of photovoltaic technology, "grid parity" would be achieved within a few years. "Grid parity" occurs when photovoltaic plants can generate power at an equal or lower cost than the price of purchasing power from the electricity grid. In Respondent's view, once producers achieved grid parity, it would no longer be necessary to incentivize the development of new facilities. At the same time, *Conto IV*

confirmed the importance of additional incentive tariffs to ensure an increase of installed capacity in the immediate future.

136. As with the previous *Conto Energia* decrees, *Conto IV* provided that those producers that connected qualifying photovoltaic plants to the grid between 31 May 2011, and 31 December 2016, had the right (*diritto*) to receive a specific incentive tariff, which would remain constant, for a twenty-year period starting from the date of the plant's connection to the grid. Respondent established different values for *Conto IV* incentive tariffs for each month of 2011, each semester of 2012, and the first semester of 2013 on the basis of a plant's nominal capacity and other technical characteristics. It also established a registry for applicants so that Respondent could monitor enrolment during each month or semester. *Conto IV* stated that a reduced tariff, to be determined at a later date, would apply to new plants connected to the grid beginning in the second semester of 2013.

137. Nevertheless, once Respondent granted a tariff value to a facility, according to the text of *Conto IV,* the incentive granted would remain constant for twenty years, as was the case with the previous *Conto* arrangements.

138. *Conto* IV also included new measures to moderate the growth of the total cost of the incentive tariff system for photovoltaic facilities, noting that the total cost would likely reach €3.5 billion euros *per annum* by 2011. Those measures included limits on the amount of incentive tariffs granted to new facilities per semester, beyond which the incentive tariffs would no longer be available for new facilities during that semester. Respondent also proposed an overall cap on the total photovoltaic capacity that could benefit from incentive tariffs and a corresponding cost threshold: *Conto IV* established a national objective for cumulative nominal installed photovoltaic capacity of 23 GW, which would correspond to a total annual cost of €6-7 billion for

all of the *Conto Energia* incentive tariffs. Respondent's Ministry of Economic Development was entitled, though not obligated, to revise the incentive tariffs for future plants when Italy reached the €6 billion threshold, "favouring in any event the further development of the sector."

139. As with the three previous *Conto Energia* decrees, under *Conto IV*, the GSE entered into contracts with producers whose plants benefited from the incentive tariffs, which confirmed the tariff rate granted to the facilities. The contracts were to remain in force for the same twenty-year period stated in the *Conto* itself.

140. The Tribunal now records the part of *Conto IV* setting out access to the incentive tariffs:

> *Article 10*
>
> *Transmission of documentation on operational date of the plant and access to incentive tariffs*
>
> *1. Within fifteen calendar days of the operational date of the plant the plant operator (soggetto responsabile) is under an obligation to send GSE a request for the pertinent incentive tariff, complete with all documentation provided under annex 3-C. Failure to comply with the deadlines under this paragraph involves inadmissibility of the incentive tariffs for the period between the operational date and the date of communication to GSE, without prejudice to entitlement to the applicable tariff at the operational date.*
>
> *2. For the purposes of paragraph 1, the grid managers are under an obligation to connect the plants to the electricity grid within the terms established by the Authority for electricity and gas resolution no. ARG/elt 99/08 as subsequently amended.*
>
> *3. Following verification of compliance with the provisions of this decree, GSE will establish and guarantee payment of the tariff owed to the plant operator (soggetto responsabile) within one hundred and twenty days of the date of receipt of the application, excluding times imputable to the plant operator.*

> *4. Transfer of a photovoltaic plant, or of the building or property unit on which the plant is located together with the plant itself, must be notified to GSE within 30 days of the date of registration of the transfer.*
>
> *5. The period of entitlement to the incentive tariffs under this decree is considered net of any suspensions due to problems connected to grid safety or following catastrophic events recognised as such by the competent authorities.*

Conto V

141. By early 2012, Respondent approached the €6 billion threshold for its incentive tariffs program anticipated in *Conto IV*. Respondent also determined that as of year-end 2011, renewable electricity production capacity was 94 TWh per year, only 6 TWh short of its 2020 target of 100 TWh. Therefore, Respondent considered that it was well on its way to meeting its EU targets. Thus, in accordance with the *Conto IV* provision that it could issue new tariffs once Respondent met the €6 billion cost threshold, on 5 July 2012, its Ministry of Economic Development enacted the fifth and final *Conto Energia*. *Conto V* stated that it would enter into force 45 days after the AEEG issued a resolution announcing that the total cost of the incentive tariffs had reached €6 billion. The AEEG issued that resolution on 12 July 2012, and *Conto V* entered into force on 27 August 2012.

142. In *Conto V*, Respondent noted that technological progress and economics of scale had contributed to a rapid decrease in the cost of photovoltaic plants, and that this decrease had caused a similarly rapid increase in the number of plants being built and connected to the grid. Respondent concluded that it would need an additional €700 million per year of incentive tariffs to make photovoltaic technology competitive, but that, thereafter, new producers would no longer require incentive tariffs.

143. *Conto V* provided two different incentive regimes based on the photovoltaic plants' capacity: (i) it awarded plants up to 1 MW an "all-inclusive tariff" (that is, including both the price of the electricity and the value of the incentive with a further specific tariff for any self-consumed quantity of energy), and (ii) it awarded plants exceeding 1 MW an amount equal to the difference (if positive) between the all-inclusive tariff mentioned above and the market price ("*prezzo zonale orario*") of electricity plus the revenues deriving from the sale of the energy to the market ("*l'energia prodotta resta nella disponibilità del produttore*"). Therefore, the value of the incentive component varied depending on the market price (*i.e.* if the price of electricity rose, the incentive value decreased and *vice versa*).

144. Additionally, regardless of a plant's capacity, *Conto V* provided a bonus tariff on the electricity the operator produced and consumed, which would constitute revenue in addition to the savings that the producer had from generating its own electricity. *Conto V* also simplified access to the incentive tariffs for plants that Respondent deemed to be under-developed (*e.g.*, concentrated photovoltaic systems and plants with innovative characteristics) or whose development needed to be further incentivized given their cost (*e.g.*, very small rooftop plants). Plants falling outside these categories could access the *Conto V* incentives by applying to a registry that was capped in phases corresponding to the total cost of the incentive program. Specifically, the cap for the first registry was €140 million euros, the cap for the second registry was €120 million, and so on, until requests for *Conto V* tariffs reached €700 million.

145. *Conto V* ceased to apply on 6 July 2013. Thus, after 6 July 2013, no incentive tariffs were available to any new photovoltaic plant installed and connected to the Italian electricity grid.

146. One other aspect of *Conto V* is recorded later in this Award

concerning imposition of administrative fees.

147. The Tribunal now sets out a number of provisions in Conto V:

> *Article 5*
> *(Incentive Tariffs)*
>
> *4. The tariff is awarded for a period of twenty years commencing from the entry into operation of the plant and shall remain constant in current currency for the entire support period. This entitlement period is considered net of any suspensions due to problems connected to grid safety or following catastrophic events recognised as such by the competent authorities.*
>
> *Article 6*
> *(Application for and disbursement of incentive tariffs)*
>
> *1. Within fifteen calendar days as of the entry into operatoin date of the plant, uploaded by the grid manager onto GAUDI, the plant operator (soggetto responsabile) is under an obligation to send GSE a request for the relevant incentive tariff, by submitting a declaration in lieu of affidavit pursuant to article 47 of DPR 445, 2000, including information under annex 3-B. Failure to comply with the deadlines under this paragraph involves loss of the incentive tariffs for the period between the operational date and the date of communication to GSE, without prejudice to entitlement to the applicable tariff at the operational date.*
>
> *2. For the purposes of paragraph 1, the grid managers are under an obligation to connect the plants to the electricity grid within the terms established by the Authority for electricity and gas resolution no. ARG/elt 99/08 as subsequently amended and to register the date of the connection with GAUDI within the deadlines established therein.*
>
> *3. Following verification of compliance with the provisions of this decree, GSE will guarantee payment of the tariff owed to the plant operator (soggetto responsabile) within ninety days of receipt of the application under paragraph 1, excluding times imputable to the plant operator or to other parties consulted by GSE in application of law no. 183, 12 November 2011, or operators involved in the process for uploading and validating data in GAUDI. Prior to the date on which GAUDI is fully operational and interoperational with the portal for the management of incentives, established by the Authority for electricity and gas, GSE*

will adopt transitional solutions for the acquisition of data already present in GAUDI directly from the parties applying for incentives, providing prior information to the Authority for electricity and gas and the Ministry for economic development.

148. The Tribunal notes that the sample (submitted as an exhibit by Claimant) of a *Conto V* contract with the GSE has the following provision, with emphasis added:

> *Article 17*
> *Modifying agreements and referral*
>
> *17.1 Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*
>
> *17.2 For anything not expressly defined in the present Agreement, the Parties expressly defer to the provisions in the Ministerial Decree on 5 July 2012, to the decisions referenced in the present Agreement and their subsequent modifications and supplements, to the rules on the subject of connections of plants to the grid and measurement of electricity, to the other legislation of the sector and, where applicable, to the provisions of the Civil Code.*
>
> ***17.3 GSE retains the right to unilaterally modify the clauses of the present Agreement which, as a result of any legislative and regulatory amendments, are in contrast with the existing framework.** These modifications shall be communicated by GSE to the Soggetto Responsabile through the electronic portal, notwithstanding the possibility for the Soggetto Responsabile to withdraw from the present contractual relationship in conformity with the provisions of Article 13 above.*
>
> *17.4 The Parties are aware that any statement rendered in the context of the present Agreement and/or in the context of the activities/obligations connected to its application are made pursuant to Presidential Decree of the Republic 445/00.*
>
> *17.5 The introduction forms a substantial and essential part of the agreement.*

149. In contrast, the corresponding provision of a sample *Conto IV* contract

with the GSE states as follows:

> *Article 15*
> *Modifying agreements and referral*
>
> *Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*
>
> *The Parties are aware that any declaration deriving from the present Agreement and/or in the context of the activities/obligations connected to its application is made pursuant to Presidential Decree of the Republic 445/00.*
>
> *The introduction forms an integral and essential part of the Agreement.*

150. It readily emerges from this comparison that with the *Conto V* arrangements, Respondent changed the term of the GSE contracts to allow for unilateral changes brought about by legislation. Mutual agreement to changes was no longer essential in order for certain changes to become applicable.

Claimant's Investments

Megasol

151. In January 2010, Claimant acquired Sunholding S.r.l. ("Sunholding"). Sunholding owned Megasol S.r.l., a company that held all project rights to a photovoltaic plant of approximately 13 MW located in Montalto di Castro in the Lazio region ("Megasol"). The Megasol photovoltaic plant was connected to the grid in May 2011 and received an incentive tariff of 0.346€/kWh under *Conto II*, as confirmed by a GSE Agreement dated 2 November 2011. Claimant's acquisition of Sunholding, therefore, pre-dated the relevant GSE Agreement.

152. The tariff recognition letter dated 12 October 2011 provided as follows.

> *RE: Communication on the incentive tariff for the section N = 244595,01 having a capacity of 13240 kW pursuant to interministerial decree 19 February 2007.*
>
> *With reference to the photovoltaic plant named MEGASOL FV, we hereby communicate the admission to the incentive tariff under Ministerial Decree 19 February 2007, equal to 0.3460 euro/kWh.*
>
> *The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 03/05/2011; the tariff is constant, in current currency for all the twenty-year period.*
>
> *The plant operator [soggetto responsabile] data are the following:*
>
> *kind of subject: legal entity*
> *name: MEGASOL S.R.L*
> *fiscal code/VAT code: 06324730966*
> *address: VIA GUIDO D'AREZZO, 15 20145 Comune di MILANO (MI)*
>
> *The value of the incentive tariff has been determined based on the documentation sent together with the tariffs application form as of 15/06/2011, as well as on plant's features listed below:*
>
> *Plant ID number: 244595,01*
> *Capacity of the photovoltaic plant: 13240 kW*
> *Kind of intervention: NEW BUILDING*
> *Plant location: LOC.QUARTUCCIO, SN 01014 Comune di MONTALTO DI CASTRO (VT)*
> *The energy generated by the plant matches the amount of energy injected into the grid: YES*
> *Building integrated plant pursuant to art. 2, para 1, let. b1), b2), b3) of MD 19 February 2007: [Non-integrated – category b1]*
>
> *For the payment of the incentive tariff, the plant operator [soggetto responsabile] is required to:*
>
> *1. access the section "Agreements" of the web portal dedicated to incentive tariff request*

https://applicazioni.gse.it) (through the username and password already received;

2. select the plant interested by the relevant agreement through the search function (it will be possible to fill in the data on the legal representative, or bank details of the plant operator if such info have not been provided when filing the incentive tariff request application);

3. after clicking on the button "Details" it will be possible to look at the draft of the agreement governing the contractual relationship on the incentive payment for the plant previously selected;

4. in case of discrepancies or should the applicant be willing to submit comments as per art. 10 of Law 7 August 1990, 241 please select the "NO" option and click on "Validate": a form for notifications will appear. Only after GSE notice on data amendments having been made or on the outcome of the reassessment, it will be possible to proceed with the acceptance declaration (point 5 below).

5. To accept the text of the agreement please select the "YES" button and click on the "Confirm" button. Please print and sing the Acceptance declaration and attach a copy of the ID of the plant operator (lacking thereof will prevent GSE from executing the agreement). The relevant documentation shall be sent to:

Gestore dei Servizi Energetici - GSE S.p.A.

Viale M. Pilsudski 92
00197 - Roma

Please specify on the envelop "PV plants incentivation – Incentive tariff agreement Acceptance declaration – plant reference n. 244595,01".

6. The GSE, after executing the agreement, will make available on the web portal, section "Agreements" the electronic version of the agreement digitally signed by the legal representative of GSE.

... ...

With Kind Regards.
Photovoltaic Department Representative

153. Certain of the terms of the *Megasol* GSE Agreement dated 2 November 2011 are set out in the following paragraphs.

154. The heading of the *Megasol* GSE Agreement is as follows:

> *AGREEMENT ON PHOTOVOLTAIC TARIFFS*
>
> *AGREEMENT NO. 108F25553007 ON THE RECOGNITION OF INCENTIVE TARIFFS FOR THE PRODUCTION OF ELECTRICITY FROM PHOTOVOLTAIC PLANTS PURSUANT TO MINISTERIAL DECREE DATED 19/02/2007* [which is *Conto II*] *AND RESOLUTION NO. 90/07 OF THE AUTHORITY FOR ELECTRICITY AND GAS* [which is quoted, in part, at para. ..... above]

155. The pertinent (in the Tribunal's appreciation) clauses of the *Megasol* GSE Agreement are as follows:

> *Article 1*
> *Purpose of the Agreement*
>
> *This agreement concerns the recognition by GSE to the Producer of the contribution owed to electricity produced by solar power through photovoltaic conversion and incentivised pursuant to Legislative Decree 387/03 of the Ministerial Decree dated 19/02/2007 and [AEEG] resolution no. 90/07.*
>
> *Article 2*
> *Effective date and value of the incentive*
>
> *For a period of twenty years starting from 03/05/2011, the incentive tariff to be granted to the photovoltaic plant under this Agreement is equal to 0.3460 €/kWh and is constant in current currency.*
>
> .....
>
> *Article 8*
> *Effectiveness and duration of the Agreement*
>
> *This Agreement is effective as of 22/12/2010 and expires on 21/12/2030. This Agreement is deemed as legally terminated and ceases to produce effects for the Parties*

should the Producer incur in one of the cases of [incentive tariff] forfeiture defined in art. 10 of Law 575/1965 and subsequent modifications and integrations, as well as upon the occurrence of the situation provided for in art. 10, paragraph 3 of AEEG resolution no. 90/07.

Article 9
Jurisdiction

For any dispute arising out of or in any way connected to the interpretation and execution of this Agreement and the documents referred to therein, the Parties agree on the exclusive jurisdiction of the Forum of Rome.

Article 10
Formalisation of the agreement

For the purposes of formalising this Agreement, the Producer is required to print through the electronic portal the related Declaration of Acceptance and send it to GSE duly signed, attaching a photocopy of a valid identification document. This Agreement is executed at the time that GSE proceeds with the acceptance of the aforementioned Declaration, making available on its electronic portal the copy for the Producer, signed by its legal representative. Subsequent to the activation of this Agreement, any agreements modifying or integrating the content of this Agreement must be agreed upon in writing otherwise being null and void. The Parties acknowledge that any declaration made under this Agreement is rendered pursuant to the Decree of the President of the Republic (D.P.R.) 445/00.

Phenix

156. In December 2010, Claimant acquired a 70% controlling stake in Phenix S.r.l. ("Phenix"), a company that held all project rights to a photovoltaic plant of approximately 24 MW located in Canino in the Lazio region ("Sugarella"). The Sugarella photovoltaic plant was connected to the grid in April 2011 and was entitled to an incentive tariff of 0.297€/kWh under *Conto III*, as confirmed by a GSE Agreement dated 23 November 2011. Claimant's acquisition of that 70% controlling stake in Phenix, therefore, pre-dated the relevant

GSE Agreement.

157. The tariff recognition letter dated 17 November 2011 provided as follows.

> *RE: Communication on the incentive tariff pursuant to ministerial decree 6 August 2010, concerning the photovoltaic plant named SUGARELLA, capacity 24170.76 kW, located in STRADA VICINALE DI SAN PIEROTTO, SNC 01011 Municipality of CANINO (VT) site LA SUGARELLA, ID number N = 506827.*
>
> *With reference to the photovoltaic plant hereunder, we hereby communicate the admission to the incentive tariff under Ministerial Decree 6 August 2010 equal to 0.2970 euro/kWh.*
>
> *The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period. Such period is calculated net of plant stop due to grid stability issues or natural disasters qualified as such by the competent authorities. These events shall be notified through the web portal section "Post agreement execution notices – Out of order".*
>
> *The data of the plant operator (soggetto responsabile) (hereinafter SR) are the following:*
>
> *name: PHENIX RENEWABLES S.R.L.*
> *fiscal code/VAT code: 06367010961*
> *address: VIA DELLA ROTONDA , 36 00186 Comune di ROMA (RM)*
>
> *The value of the incentive tariff has been determined according to the documentation filed together with the request for tariffs concession on 19/07/2011, as well as on the basis of the following specific information:*
>
> *type of plant: Photovoltaic*
> *Power: 24170.76 kW*
> *Plant operator (Soggetto Responsabile): legal entity*
> *Kind of intervention: NEW CONSTRUCTION*
> *Plant site category: OTHER*
> *Category of plant: OTHER PV PLANT*
> *Energy sale regime: OFF-TAKE*

In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:

1. login on the web portal https://applicazioni.gse.it) (dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Terzo Conto Energia";

2. select the plant concerned through the search function;

3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;

4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, tit will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);

5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";

6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.

The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if, according to art. 23 and 43 of Legislative decree 28/2011, the occurrence of circumstances preventing tariffs payment is ascertained, even if such conditions emerged during the examination of a plant different from the one at issue.

.....

With Kind Regards.

Conto Energia Unit Representative

158. Certain of the terms of the *Phenix* GSE Agreement dated 23 November 2011 are set out in the following paragraphs.

159. The heading of the *Phenix* GSE Agreement is as follows:

> *AGREEMENT NO. I08F25553007 ON THE RECOGNITION OF INCENTIVE TARIFFS FOR THE PRODUCTION OF ELECTRICITY FROM PHOTOVOLTAIC PLANTS PURSUANT TO MINISTERIAL DECREE DATED 19/02/2007* [which is *Conto II*] *AND RESOLUTION NO. 90/07 OF THE AUTHORITY FOR ELECTRICITY AND GAS* [which is quoted, in part, at para. ..... above]

160. The pertinent (in the Tribunal's appreciation) clauses of the *Phenix* GSE Agreement are as follows:

> *Article 1*
> *Purpose of the Agreement*
>
> *This Agreement concerns the recognition to the Soggetto Responsabile by GSE, of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 6 August 2010 and AEEG resolution ARG/elt 181.10*
>
> *Article 2*
> *Effective date and value of the incentive*
> *The incentive tariff to be granted to the photovoltaic plant under this Agreement, which is constant in current currency, is equal to 0.2970 Euro/kWh, a value recognised by GSE and disclosed to the Soggetto Responsabile with the communication of admission to the incentive tariffs.*
>
> .....
>
> *Article 10*
> *Effective date and duration of the Agreement*
>
> *This Agreement is effective from 28/04/2011 and expires on 27/04/2031.*

.....

Article 13
Jurisdiction

For any dispute arising out of or in any way connected to the interpretation and execution of this Agreement and the documents referred to therein, the Parties agree on the exclusive jurisdiction of the Forum of Rome.

Article 14
Formalisation of the Agreement

For the purposes of formalising the Agreement, the Soggetto Responsabile is required to print the relevant Declaration of Acceptance and send it to GSE through the online portal duly signed, together with a copy of a valid identification document. This Agreement is formalised at the time that GSE proceeds with the acceptance of the aforementioned Declaration, providing a copy of the agreement on its electronic portal, signed by its legal representative.

Article 15
Amendments and other

Any agreements modifying or integrating the content of this Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed upon in writing, otherwise being null and void. The Parties acknowledge that any declaration under this Agreement in connection with the activities/obligations related to the performance thereof is made pursuant to the Decree of the President of the Republic (D.P.R.) 445/00. The introduction forms an integral and essential part of this Agreement.

Enersol

161. On 30 March 2012[2], Claimant acquired Enersol S.r.l., a company that held all project rights to a multi-section photovoltaic plant of

[2] Para. 160 of the SoC contains a chart with the dates of acquisitions by Claimant. The date of acquisition of *Enersol* is stated to be 30 March 2012. This is accepted by Respondent on slide 62 of its Opening Presentation at the hearing. Thus, as it is common case between the Parties, the Tribunal finds that the date of acquisition of *Enersol* by Claimant is 30 March 2012.

approximately 48 MW located in Canaro in the Veneto region ("Enersol"). The Enersol photovoltaic plant was partitioned in seven sections. Section 1 of the plant was connected to the grid in April 2011, and was entitled to an incentive tariff of 0.297€/kWh under *Conto III*, as confirmed by a GSE Agreement dated 2 November 2011. Sections 2 and 3 of the plant were connected to the grid in July 2011, and were entitled to an incentive tariff of 0.251€/kWh under *Conto IV*, as confirmed by two separate GSE Agreements (one per Section) dated 2 March 2012. Sections 4 to 7 of the plant were connected to the grid in August 2011, and were entitled to an incentive tariff of 0.238€/kWh under *Conto IV*, as confirmed by four separate GSE Agreements (one per Section) dated 11 January 2012 (for Sections 5 and 7), 6 February 2012 (for Section 4), and 2 March 2012 (for Section 6). Thus, Claimant's acquisition of *Enersol*, therefore, post-dated the relevant GSE Agreements.

162. The tariff recognition letters, with the subsequent GSE Agreements, in connection with *Enersol* are each recorded in turn.

Letter – Enersol Section 1 – 11 October 2011

RE: Communication on the incentive tariff pursuant to ministerial decree 6 August 2010, concerning the photovoltaic plant named FOTOVOLTAICO ENERSOL, capacity 11964.44 kW, located in VIA VITTORIO EMANUELE , s.n. 45034 Municipality of CANARO (RO) site SALINE, ID number N = 512446.01.

With reference to the photovoltaic plant hereunder, we hereby communicate the admission to the incentive tariff under Ministerial Decree 6 August 2010 equal to 0.2970 euro/kWh.

The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period. Such period is calculated net of plant stop due to grid stability issues or natural disasters qualified as such by the competent authorities. These events shall be notified through the web portal section "Post agreement execution notices – Out of order".

The data of the plant operator (soggetto responsabile) (hereinafter SR) are the following:
name: ENERSOL S.R.L.
fiscal code/VAT code: 01381190295
address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)

The value of the incentive tariff has been determined according to the documentation filed together with the request for tariffs concession on 17/06/2011, as well as on the basis of the following specific information:
type of plant: Photovoltaic
Power: 11964.44 kW
Plant operator (Soggetto Responsabile): legal entity
Kind of intervention: NEW CONSTRUCTION
Plant site category: OTHER
Category of plant: OTHER PV PLANT
Energy sale regime: OFF-TAKE
Eligible for incentive tariff increase: NO

In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:
1. login on the web portal https://applicazioni.gse.it) (dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Terzo Conto Energia";
2. select the plant concerned through the search function;
3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;
4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, tit will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);
5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";
6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the

GSE.

GSE Agreement for Enersol Section 1 (T03N25531907) 31
October 2011
(relevant extract)

Purpose of the Agreement

This Agreement concerns the recognition to the Soggetto Responsabile by GSE, of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 6 August 2010 and AEEG resolution ARG/elt 181.10

Article 2
Effective date and value of the incentive
The incentive tariff to be granted to the photovoltaic plant under this Agreement, which is constant in current currency, is equal to 0.2970 Euro/kWh, a value recognised by GSE and disclosed to the Soggetto Responsabile with the communication of admission to the incentive tariffs.

Article 10
Effective date and duration of the Agreement
This Agreement is effective from 28/04/2011 and expires on 27/04/2031.

Article 15
Amendments and other
Any agreements modifying or integrating the content of this Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed upon in writing, otherwise being null and void.

Letters – Enersol Sections 2 & 3 – 20 February 2012

RE: Communication on the incentive tariff pursuant to MD 5 May 2011 concerning the photovoltaic plant named FOTOVOLTAICO ENERSOL, with a capacity of 6649.44 kW, located in VIA VITTORIO EMANUELE, s.n. 45034 Municipality of CANARO (RO) site of SALINE, plant ID number N = 512446.02. [512446.03 in the context of Enersol Section 3]

With reference to the photovoltaic plant mentioned above, we hereby communicate the admission to the incentive tariff under Ministerial Decree 5 May 2011, equal to 0.251 euro/kWh.

The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/07/2011; the tariff is constant in current currency for all the twenty year period. This timeframe is calculated net of any plant stops due to problems concerning grid safeguard or following natural disaster considered as such by the competent authorities. These events shall be communicated through the relevant web portal section.

The identification data of the plant owner (Soggetto Responsabile) are the following:
name: ENERSOL S.R.L.
fiscal code/VAT code: 01381190295
address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)

The value of the incentive tariff has been determined according to the documentation sent together with the application for the incentive tariffs dated 05/08/2011, and on the basis of the following features:
Kind of plant: Big Photovoltaic Plant
Nominal capacity: 6649.44 kW
Soggetto Responsabile: legal entity
Kind of intervention: NEW CONSTRUCTION
Site nature: agricultural area
Kind of facility installed: OTHER PV PLANT
Energy sale regime: Off-take
Additional tariff increase: -

In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:
1. login on the web portal (https://applicazioni.gse.it) dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Quarto Conto Energia";
2. select the plant concerned through the search function;
3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;
4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, tit will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);
5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sign the Acceptance

declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";
6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.

The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if the lack of the elements necessary for granting incentives is ascertained.

The GSE also verifies the occurring of any circumstances preventing incentives payments and adopt all consequent measures of revocation or exclusions in accordance with arts. 23 and 43 of legislative decree 28/2011.

GSE Agreements for Enersol Sections 2 & 3 (T03N236118107 & T03N236188307 respectively) 2 March 2012
(relevant extract)

Article 1
Purpose of the Agreement
This Agreement regards the recognition to the Soggetto Responsabile by GSE of the incentive tariff related to the electricity produced through photovoltaic conversion from solar sources from the plant mentioned in the introduction, incentivised pursuant to art. 7 of Legislative Decree 387/03 of the Ministerial Decree dated 5 May 2011.

Article 2
Value of the incentive
The incentive tariff, constant in regular instalments in current currency, to be recognised to the photovoltaic plant under this Agreement, is equal to 0.2510 Euro/kWh, a value recognised by GSE and notified to the Soggetto Responsabile with the communication on admission to the incentive tariff.

Article 10
Effective date and duration of the Agreement
The present Agreement is effective from 31/07/2011 and expires on 30/07/2031.

Article 15

Modifying agreements and referral

Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.

Letters – Enersol Sections 4 (15 December 2012), 5, 6, & 7 (each on 16 December 2012)

RE: Communication on the incentive tariff pursuant to MD 5 May 2011 concerning the photovoltaic plant named FOTOVOLTAICO ENERSOL, with a capacity of 5448.96 kW, located in VIA VITTORIO EMANUELE, s.n. 45034 Municipality of CANARO (RO) site of SALINE, plant ID number N = 512446.04. [512446.05 in the context of Enersol Section 5; 512446.06 in the context of Enersol Section 6; and 512446.07 in the context of Enersol Section 7]

With reference to the photovoltaic plant mentioned above, we hereby communicate the admission to the incentive tariff under Ministerial Decree 5 May 2011, equal to 0.238 euro/kWh.

The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/08/2011; the tariff is constant in current currency for all the twenty year period. This timeframe is calculated net of any plant stops due to problems concerning grid safeguard or following natural disaster considered as such by the competent authorities. These events shall be communicated through the relevant web portal section.

The identification data of the plant owner (Soggetto Responsabile) are the following:
name: ENERSOL S.R.L.
fiscal code/VAT code: 01381190295
address: VIA VITTORIO VENETO, 137 45100 Comune di ROVIGO (RO)

The value of the incentive tariff has been determined according to the documentation sent together with the application for the incentive tariffs dated 13/09/2011, and on the basis of the following features:
Kind of plant: Big Photovoltaic Plant
Nominal capacity: 5448.96 kW
Soggetto Responsabile: legal entity
Kind of intervention: NEW CONSTRUCTION
Site nature: agricultural area
Kind of facility installed: OTHER PV PLANT

Energy sale regime: Off-take
Additional tariff increase: NO

In order to activate the payment of tariffs, the plant owner [Soggetto Responsabile] is invited to:
1. login on the web portal (https://applicazioni.gse.it) dedicated to incentives through the ID and password previously assigned and access section "Agreements" by clicking on "Quarto Conto Energia";
2. select the plant concerned through the search function;
3. click on the button "Details" and look at the draft of the agreement regulating the contractual relationship on tariffs payment relating to the selected plant;
4. should any (records) discrepancies be detected, select the button "before signing the agreement some data on the plant owner [Soggetto Responsabile] must be corrected by GSE" and click on the "Proceed" button. By this way, a notice on discrepancies or errors will be activated; only after GSE notice to SR on the corrections having been made, tit will be possible to go on with sending the acceptance declaration of the agreement (point 5 below);
5. to accept the agreement click on "I declare I have read and accept in full all provisions regulating this agreement" and click on the "Proceed" button. Print and sing the Acceptance declaration and attach thereto a copy of SR ID in force (lacking thereof will prevent GSE from executing the agreement), upload the document. Once the uploading is completed just click on the button "Send agreement";
6. the GSE, after executing the agreement, will make available, in the section "Agreements" on the web portal, the document in electronic format digitally signed by the legal representative of the GSE.

The above is without prejudice to the right of GSE to carry out subsequent controls through documents and/or on-site inspections, as well as adopt annulment or revocation measures concerning the incentive tariffs admission letter, thereby asking back for the amounts already paid, if the lack of the elements necessary for granting incentives is ascertained.

The GSE also verifies the occurring of any circumstrances preventing incentives payments and adopt all consequent measures of revocation or exclusions in accordance with arts. 23

GSE Agreements for Enersol Sections 4, 5, 6, & 7
(respectively: T03N2229769107 of 16 February 2012; T03N229798007 of 11 January 2012; T03N229798207 of 2 March 2012; T03N229798307 of 11 January 2012)

(relevant extract)

Article 1
Object of the Agreement
This Agreement concerns the recognition to the Producer [Enersol S.r.l.] by the GSE of the incentive tariff related to the electricity produced through photovoltaic conversion from solar power by the plant mentioned in the introduction, incentivized pursuant to art. 7 of Legislative Decree No. 387/03, Ministerial Decree 5 May 2011.

Article 2
Value of the Incentives
The incentive tariff, constant in regular instalments in the applicable currency to be recognized to the photovoltaic plant under this Agreement, is equal to 0.2380 €/kWh, a value recognized by GSE and disclosed to the Producer [Enersol S.r.l.] with the communication on the admission to the incentive tariff.

Article 10
Date and Duration of the Agreement
The present Agreement is effective from 31 August 2011 and expires on 30 August 2031.

Measures taken by Respondent

163. The Tribunal starts its analysis first with the *Spalmaincentivi* measure taken by Respondent, which Claimant alleges to have transgressed – in breach of Article 10(1) ECT - its legitimate expectations as to the stability of the legal and economic regime of the PV electricity production in Italy into which it invested. The Tribunal will then describe the other measures. This order of analysis is justified by the fact that the *Spalmaincentivi* was the preponderant cause of the reduction to Claimant's revenues from its investments. Temporally, however, the *Spalmaincentivi* was not the first measure by which Respondent sought to "scale back", as Claimant describes Respondent's policy in this respect, the incentives it had given to PV electricity production in the furtherance of its policy objectives.

Spalmaincentivi

164. *Spalmaincentivi* (or "incentive spreading") is the journalistic, colloquial name of the provisions of Article 26 of Law Decree

91/2014 of 24 June 2014, which was subsequently converted with substantial relevant changes into Law 116/2014 of 11 August 2014. As all such decrees addressing urgent issues, which under the Italian Constitution, Governments may enact with force of a law, Law Decree 91/2014 had to be converted by Parliament within 60 days into a law, possibly with amendments, as happened for Law Decree 91/2014, in case it would lose any effect. The shortened name of the Decree is "Decreto Competitività" ("Competitiveness Decree"). It included a range of measures to bolster Italy's competitiveness, including among others, as mentioned in its full title, measures for the "limitation of the costs burden on electricity tariffs", which are found in Article 26. This purpose was considered so important that, as the Parties have recalled, Article 26 measures have been also labelled with the term "taglia-bollette" (tariff bill-cut).

165. The original text of Article 26 provided only, among other measures included in the Law Decree, to reduce the burden for electricity consumers due to advantages granted to various electricity users and producers (among the latter, notably PV producers) that the benefits of the incentive tariffs would be spread over 24 years instead of the 20 years provided in the various *Conto Energia*. According to Claimant this entailed a reduction of 17%-25% depending on the residual period of operation of a given PV plant.

166. As a result of the parliamentary debate, in which parliamentarians of parties favourable to the industry were active in proposing modifications that would diminish the negative impact of the original *Spalmaincentivi* on PV producers, the conversion Law 116/2014 (effective 1st January 2015) offered producers the choice between three options: (A) a 17–25% tariff cut (as originally provided in the Law Decree), paid over 24 years instead of originally promised 20 years; (B) a tariff reduction from 2015–2019, with a promise of

increased tariffs in remaining years; and (C) (which applied in default of a choice by a producer) straight 6–8% cut over 20 years, depending on the installed capacity of the plant concerned. Further, another aspect of *Spalmaincentivi* was that payment of 100% of the incentive within 60 days was changed to 90% with the 10% balance paid the subsequent year.

Administrative fees and imbalance costs

167. First, as regards administrative fees, article 10.4 of *Conto V* provided that, as of 1 January 2013, all photovoltaic producers benefiting from incentive tariffs under any *Conto* were required to pay an annual administrative fee corresponding to € 0.0005 per kWh of incentivized energy, to cover the GSE's management, verification, and control expenses.

168. Secondly, as regards imbalance costs, on 5 July 2012, the AEEG passed Resolution 281/2012/R/EFR ("Resolution 281"), which required renewable energy producers to pay imbalance costs as of 1 January 2013. The GSE, with approval of the AEEG, implemented the method by which those costs would apply to renewable energy producers at the end of 2012 with Resolution 493/2012/R/EFR ("Resolution 493").

169. Resolution 281 and Resolution 493 were challenged before the Italian administrative courts. On 9 June 2014, the *Consiglio di Stato* found in favour of the producers and held that the AEEG's resolutions were unlawful. In particular, the *Consiglio di Stato* indicated that the resolutions were discriminatory because they regulated programmable and non-programmable sources of energy in the same manner, and therefore failed to differentiate amongst different types of renewable energy sources. As a result of that judgment, in many cases, the GSE reimbursed the sums that renewable energy producers had already paid under Resolution 281 and Resolution 493.

170. On 23 October 2014, the AEEG issued Resolution No. 522/2014/R/EEL ("Resolution 522") that, once again, imposed imbalance costs on renewable energy producers. Although certain producers challenged Resolution before the Italian courts on grounds that it should be null and void as in contrast with the principles of the previous court ruling, renewable energy producers have been paying these imbalance costs since 1 January 2015.

Robin Hood tax

171. In 2008, Respondent enacted a windfall profits tax on the profits of oil, gas, and other traditional energy companies, colloquially known in an amalgam of English popular legend and modern economic factors as the "Robin Hood" tax.

172. Under the heading of "Oil and gas sectors" in Law-Decree No. 112/2008 of June 25, 2008, Respondent provided that, as a result of the country's economic situation and the social impact of the increase in energy prices, it would increase the corporate income tax rate of companies with an annual gross income of over € 25 million by 5.5 percentage points, from 27.5% to 33%.

173. In July 2009, Respondent increased the corporate income tax rate of companies subject to the Robin Hood tax to 34%. Respondent explicitly excluded producers of renewable energy from the Robin Hood tax because they had not benefited from the then price spikes in traditional energy sources.

174. In August 2011, Respondent broadened the scope of the Robin Hood tax by extending it to all energy producers, including renewable energy producers, with a gross annual income of over €10 million and taxable income of over €1 million. In the law decree's preamble it was noted the urgency of adopting financial stabilization measures

was to guarantee the stability of Italy in the midst of an international economic crisis and unstable markets. Respondent also increased the corporate income tax rate of companies subject to the Robin Hood tax from 34% to 38%, which applied to fiscal years 2011 through 2013.

175. In June 2013, Respondent extended the scope of the Robin Hood tax by reducing the applicable income thresholds to gross annual income over €3 million and taxable income over € 300,000. This resulted in the application of the Robin Hood tax to Claimant's photovoltaic plants.

176. A constitutional challenge to the application of the Robin Hood tax to the renewable energy sector was brought and on 11 February 2015, the Italian Constitutional Court ruled the extension of the Robin Hood tax to renewable energy producers to be unconstitutional. The Court also ruled that its decision would not have retroactive effect.

177. On 28 April 2015, Respondent confirmed that renewable energy producers were required to pay the Robin Hood tax for the 2014 fiscal year.

IMU/TASI charges

178. In December 2013, Respondent classified photovoltaic plants as immovable property, thereby subjecting them to increased IMU and TASI charges. Respondent changed this in the 2016 Budget Law, reducing IMU and TASI charges by about 90%. Respondent has not refunded IMU and TASI charges paid in 2014 and 2015.

Section B - Merits – Liability (incl. concomittant Jurisdiction & Admissibility)

Introduction

179. Claimant says that the matters discussed in the foregoing section of this award (*Spalmaincentivi*, Administrative fees and imbalance costs, the *Robin Hood* tax, and the IMU/TASI charges) give rise to ECT claims in respect of each of its three investments, namely, *Megasol*, *Phenix*, and *Enersol*. Claimant summarised each head of claim, in its Opening Presentation at the hearing, as follows:

- *Italy failed to fulfill the obligations it entered into with respect to CEF's investments, which were crystallized in Tariff Confirmation Letters and Contracts.*
- *Italy violated CEF's legitimate expectations of receiving precisely the tariffs granted to its PV plants through the Conto Energia Decrees, Tariff Recognition Letters, and Contracts when Italy amended those tariffs through the enactment of various measures, including the Spalmaincentivi*
- *If Italy's case is to be believed, then it failed to provide a transparent legal framework, since under Italy's case, the Conto Energia Decrees, Tariff Recognition Letters, and Contracts did not mean what they plainly said.*
- *Italy's measures reducing the Conto Energia tariffs unreasonably impaired CEF's investments.*

180. In summary, these are: (a) Umbrella Clause claims; (b) FET claims; (c) Failure to provide transparent legal framework claims; and (d) Unreasonable impairment claims.

181. Respondent denies all liability, and, additionally, raises the exception found in Article 21 of the ECT in respect of a number of the measures (this summary is taken from its Opening Presentation at the hearing): (a) Robin Hood Tax; (b) Qualification of assets for fiscal and cadastral purposes; (c) Imbalance charges; and (d) Administrative fees.

182. The Tribunal, in its procedural appreciation of the materials before it, arranges its analysis as follows: 1. FET claims; 2. Umbrella Clause claims; 3. Failure to provide transparent legal framework claims; and 4. Unreasonable impairment claims.

FET claims

183. The Tribunal, first, records the basic contours of what constitutes fair and equitable treatment. Article 10(1) of the ECT provides as follows, in part:

> *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.*

184. The Parties are in agreement with one another that protection of legitimate expectation comes within the ambit of Article 10(1) of the ECT, though as to what precisely such protection exactly means (from the plethora of prior awards cited to the Tribunal) is an area of contention. The briefings which the Tribunal received from the Parties on 20 July 2018 (commenting, *inter alia*, on *Antaris*) encapsulated such contention; but most particularly these briefings showed that each advocated a view that, regardless of how one articulates the protection of legitimate expectation, the outcome was going to be their favour.

185. In this respect the Tribunal finds it useful to recall and quote the summary made by the tribunal in *Antaris* of the protection that the FET standard grants to covered foreign investors by clauses such as Art. 10(1) ECT. The Tribunal considers that the summary of the *Antaris* award quoted hereunder is by and large a correct description of the import of the FET standard as found in Article 10 (1) ECT in

the light of the abundant case law that has developed on the issue. In referring to such summary the Tribunal is, in any case, mindful that principles have to be adapted to the specificity of each case and that in this field previous awards and decisions may properly be looked at as useful (re-)statements of the law but do not represent binding precedents. The relevant recapitulation in *Antaris* is as follows (footnotes omitted):

> *360. As is usual in these cases, the Parties have adduced many published awards (in this case more than 50) on the interpretation or application of the FET ("fair and equitable treatment") standard, and the FPS ("full protection and security") and non-impairment standards. Most of them are well-known, and, although formulations of the principles differ in detail, it is only necessary to summarize the present state of international law and practice in these general propositions (several of which overlap with each other):*
>
> *(1) There will be a breach of the FET standard where legal and business stability or the legal framework has been altered in such a way as to frustrate legitimate and reasonable expectations or guarantees of stability.*
>
> *(2) A claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision.*
>
> *(3) A claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state.*
>
> *(4) An expectation may arise from what are construed as specific guarantees in legislation.*
>
> *(5) A specific representation may make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectation, but is not indispensable to establish a claim based on legitimate expectation which is advanced under the FET standard.*
>
> *(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the*

State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.

(7) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.

(8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.

(9) The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.

(10) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.

(11) Protection from arbitrary or unreasonable behaviour is subsumed under the FET standard.

(12) It will also fall within the obligation not to impair investments by "unreasonable ... measures" (Article 10(1), ECT) or "arbitrary ... measures (Article 2(2), Czech Republic/Germany BIT).

(13) The investor is entitled to expect that the State will not act in a way which is manifestly inconsistent or unreasonable (i.e. unrelated to some rational policy).

186. Respondent also, at para. 473 of SoD, makes the point that *the protection under the FET standard may only concern those expectations of the investors that existed at the time when they made*

the investment. It is with this important temporal point that the Tribunal will begin its analysis of the FET claims.

187. As already noted above (paras. 152 and 153), both the tariff recognition letter and the GSE Agreement in respect of *Megasol* post-dated Claimant's investment. Also, as already noted above (paras. 157 and 158), both the tariff recognition letter and the GSE Agreement in respect of *Phenix* post-dated Claimant's investment. Further, neither plant had been, at the time of the investments, connected to the grid. Thus, at the time Claimant invested in both *Megasol* and *Phenix*, at the very best it can be said that its intention was to complete plants which would, at a point in the future, be connected to the grid, and be compliant with the necessary requirements under the applicable *Conto*. Thereafter, appropriate applications would need to be made (and the requirements of the applicable *Conto* to be satisfied), a reply in the positive received, and then a GSE Agreement consummated.

188. Claimant, in reality, at the time of the making of both the *Megasol* and *Phenix* investments still had a number of steps to take before it knew for certain that the hoped-for incentives were actually awarded to it. It enjoyed no guarantee of success at the time of investment, and nothing in any of Respondent's *Contos* could infer that a party in Claimant's position as of such dates was inevitably going to be awarded the incentives. The fact that Claimant did indeed, at a later time, succeed in all respects for both *Megasol* and *Phenix* does not assist it as of the dates upon which it made those investments. What is decisive is that as of those dates the protection of Claimant's investment rights had not yet crystallised.

189. As a consequence, the Tribunal finds that Claimant cannot assert an FET claim by way of protection of legitimate expectation for both *Megasol* and *Phenix* insofar as it might allege that the changes to the

later-awarded incentives engage international responsibility on the part of Respondent.

190. Conversely, no such difficulty arises in respect of *Enersol*. As noted above in footnote 2, it is common case that the date of Claimant's investment was 30 March 2012, which clearly post-dates the connections to the grid, the tariff recognition letters, and the GSE Agreements. Thus, as of 30 March 2012, Claimant's investment in *Enersol* enjoyed crystallised rights to incentives as described above.

191. Thus, the Tribunal will now analyse whether Respondent's actions transgressed the protection of legitimate expectation by the ECT insofar as *Enersol* is concerned. This is a two-stage process as a matter of international law: first, what is the origin and scope, precisely, of the legitimate expectation; secondly, how exactly has such legitimate expectation (if first established as a matter of international law) have been transgressed, if at all, in a manner prohibited by international law.

192. Before embarking into the analysis of whether or not there was a breach of any legitimate expectation attached to Claimant's investment in *Enersol*, the Tribunal must address threshold points raised by Respondent.

193. As noted in para. 181 above, Respondent raises Article 21 of the ECT in four respects. Article 21 of the ECT provides as follows:

ARTICLE 21
TAXATION

> *(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.*

(2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:

(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).

(3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

(4) Article 29(2) to (8) shall apply to Taxation Measures other than those on income or on capital.

(5) (a) Article 13 shall apply to taxes.
(b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other

> *international agreement or arrangement by which the Contracting Party is bound.*
>
> *(b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.*
>
> *(c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.*
>
> *(d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.*

194. Respondent says that certain of the actions it took of which Claimant makes complaint, are captured by Article 21 of the ECT. In such circumstances, if Respondent is correct, the Tribunal has no jurisdiction to decide whether or not those actions engaged international responsibility as a matter of the ECT. These arguments are now examined in turn.

195. As regards administrative fees, these arose as follows. Article 10.4 of *Conto V* provided that, as of 1 January 2013, all photovoltaic producers benefiting from incentive tariffs under any *Conto* were required to pay an annual administrative fee corresponding to € 0.0005 per kWh of incentivized energy, to cover the GSE's management, verification, and control expenses. Are these administrative fees a Taxation Measure, or are they not?

196. As Respondent points out at para. 147 of the SoD, the definition in Article 21(7) of the ECT is very wide, and includes *any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein.* Respondent

then develops its argument as to what is tax provision in the domestic law of Italy at paras. 149-151 of the SoD:

> *149. In Italy, fiscal measures (tributi) can be broadly divided into three categories: imposta (tax), tassa (fee) and contributo (contribution), although it is not the name of the measure to actually make it a fiscal measure (as further explained). In general terms, a (administrative, judicial or industrial) fee is paid as consideration for a given service rendered by a public body. In this case, the service provided is in principle requested by the citizen. A tax corresponds to the wealth that is drawn from the citizens in relation to the production of income for the provision of general services provided by the State; therefore, this is not related to any specific service but based on the contributive capacity ("capacità contributiva") of the person. Finally, a contribution (or "onere sociale": social burden) is the compulsory levy from certain individuals, to the fact that they derive a benefit, directly or indirectly, by certain public services, even without having requested these.*
>
> *150. In the absence of legislative measures to help defining when a specific measure is to be considered a fiscal measure (tributo), we need to be guided by case law, in particular by the Italian Constitutional Court. The Constitutional Court has stated repeatedly that, irrespective of the name given to the measure, the features that qualify a disbursement as of fiscal nature are: 1) dutifulness of the withdrawal, 2) absence of exact reciprocity between the parties, and 3) connection of the withdrawal to the public spending by linking this to an economically significant prerequisite.*
>
> *151. In addition, the Italian Constitution imposes that tributes be established by law. All taxes, fees and contributions under Italian law thus satisfy the above conditions under Article 21(7) and consequently are "Taxation Measures" under the ECT.*

197. Claimant's Reply (para. 109) counters by referencing the official Italian language version of the ECT which only includes "imposte" in Article 21(7), rather than the wider definition advocated by Respondent encompassing "tassa" and "contributo". Claimant also invokes a number of awards stated to be in its favour (*Murphy Exploration & Production Company – International v the Republic of Ecuador*, Partial Final Award, 6 May 2016; *Occidental Petroleum Corporation, Occidental Exploration and Production Company v The*

Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012; and *Yukos Universal Ltd. v Russian Federation*, Award, 18 July 2014).

198. The Tribunal finds Claimant's argument as to the Italian language version of the ECT to be unavailing. If it were upheld, then the different official language versions of Article 21(7) (as demonstrated in para. 120 of the Rejoinder) would give rise to radically differing results. The definition contained in Article 21(7), whether in Italian, or any other official language, is widely drawn. The Tribunal does not, therefore, have any reason to consider that definition, insofar as it applies to Italy, as being anything other than that articulated by the Italian Constitutional Court: *1) dutifulness of the withdrawal, 2) absence of exact reciprocity between the parties, and 3) connection of the withdrawal to the public spending by linking this to an economically significant prerequisite.*

199. Thus, the Tribunal considers the administrative fees to be a Taxation measure. They clearly fall within the definition articulated by the Italian Constitutional Court. The Tribunal accepts the submission of Respondent at para. 149 of the SoD that the widely-drawn meaning of a taxation measure in Italy (*tributi*) encompasses fees such as the administrative fees imposed on all photovoltaic operators by means of *Conto V*. These were *consideration for a given service rendered by a public body* and while such administrative fees might only be directed towards photovoltaic operators and not the public at large, this does not detract from their essential nature: they are imposed by Respondent (or an emanation thereof) in order to fund a service rendered in support of such photovoltaic operators. The Tribunal finds further support for its conclusion from the example given by Respondent concerning municipal garbage taxes. Although they are in principle fees for service rendered, Italian jurisprudence considers them to be taxes because they are charged on all home owners or

tenants to whom the service is provided irrespective of a precise correspondence between such service and its utilization by an individual owner or tenant.

200. In such circumstances, Claimant's claims concerning administrative fees are captured by Article 21 of the ECT.

201. Secondly, as regards imbalance costs, Respondent says, at para. 132(b) of the Rejoinder:

> *Imbalance charges in turn relate to the dispatching of energy and are an instrument to cope with shocks of the dispatching system. Transmission and dispatching of energy is reserved to the State and granted in concession to Terna. Relevant legislation defines "dispatching" as the activity aimed at providing instructions for the use and the coordinated operation of production plants, the transmission grid and auxiliary services. Terna has a monopoly over such activities. In the case of transmission and dispatching activities, Terna has the duty to grant non-discriminatory access to all operators and be neutral and unbiased in offering the service. However, this does not interfere with the possibility that a specific charge be paid by way of fee. The fiscal nature of such measures is recognize by the Claimant in the first place: "[p]olicymakers have the choice either of charging imbalance costs to renewable producers or passing them on to consumers" (§173 of Statement of Claim). It states further "Italy had socialized the imbalance costs, meaning that the entire energy forecast was conducted at the national system level and the costs were passed on to endconsumers via the electricity bill." (§ 175 of Statement of Claim). Passing these costs on to consumers means to impose a general fee to final users for the implementation of the mechanism of energy reserves by Terna, indeed to "socialize" the costs of the public service. Charging them to the generality of energy producers means to equally impose a fee, to "socialize" the costs by putting a burden on producers instead of final user. What changes is the general category of persons charged with the fee, not its nature.*

202. The Tribunal considers the imbalance costs to be a Taxation measure. They clearly fall within the definition articulated by the Italian Constitutional Court and the analysis conducted above in connection with administrative fees applies *mutatis mutandis*. Whether or not the current imbalance fees are illegal as a matter of Italian law is a

municipal matter.

203. In such circumstances, Claimant's claims concerning imbalance costs are captured by Article 21 of the ECT.

204. The *Robin Hood* tax clearly falls within the definition articulated by the Italian Constitutional Court, and is, therefore, a Taxation measure. While it might well be the subject of bewilderment to Claimant that taxes which have been held by the municipal courts to be unconstitutional have not been reimbursed, that is still in the domain of a Taxation measure.

205. In such circumstances, Claimant's claims concerning the *Robin Hood* tax are captured by Article 21 of the ECT.

206. Finally, in this regard, the Tribunal also readily appreciates the IMU and TASI charges to be Taxation measures. Classifying photovoltaic plants as immovable property, thereby subjecting them to increased IMU and TASI charges, falls directly within the definition articulated by the Italian Constitutional Court. As with the *Robin Hood* tax, the non-refund of such charges paid in 2014 and 2015 may well be considered by Claimant to be irreconcilable with the 2016 Budget Law, but that is a matter of municipal law inextricably bound up with domestic fiscal measures.

207. In such circumstances, Claimant's claims concerning the IMU and TASI charges are captured by Article 21 of the ECT.

208. In conclusion, and taking into account all of the foregoing, Claimant's FET claim reposes on what was its legitimate expectation as on 30 March 2012 in respect of the *Enersol* investment, and, whether, *Spalmaincentivi* transgressed the protection of such, if any, legitimate expectation. The Tribunal will now proceed to assess that FET claim according to the following approach: first, what is the origin and

scope, precisely, of the legitimate expectation; secondly, how exactly has such legitimate expectation (if first established as a matter of international law) been transgressed in a manner prohibited by international law.

The origin and scope of Claimant's legitimate expectation as regards Enersol

209. As on 30 March 2012, when Claimant bought *Enersol*, what can be objectively identified as unquestionably in place and explicitly known to it?

210. First, seven sections of the photovoltaic plant had already been connected to the national electricity grid.

211. Secondly, seven tariff recognition letters had been issued by an emanation of Respondent. These letters stated (as already recorded above):

> *The incentive tariff will be recognized for a period of twenty years as of the date of entry into operation of the plant: 28/04/2011; the tariff is constant, in current currency, all through the 20-year period.* [Section 1]
>
> *The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/07/2011; the tariff is constant in current currency for all the twenty year period.* [Sections 2 & 3]
>
> *The tariff will be recognized for a twenty-year period as of the date of entry into operation of the plant: 31/08/2011; the tariff is constant in current currency for all the twenty year period.* [Sections 4, 5, 6, & 7]

212. These letters did not simply state that the tariffs were recognised, but expressly say that in order to obtain such tariffs, the relevant GSE agreements needed to be printed and signed. This was an express and unmistakeable invitation on the part of an emanation of Respondent to

sign the relevant GSE agreements as an essential prerequisite to the obtaining of the incentives.

213. Thirdly, seven GSE Agreements had been concluded between investments of Claimant and an emanation of Respondent. By way of example, as already recorded above, these GSE Agreements had the following language (example is taken from Sections 2 and 3):

> *The incentive tariff, constant in regular instalments in current currency, to be recognised to the photovoltaic plant under this Agreement, is equal to 0.2510 Euro/kWh, a value recognised by GSE and notified to the Soggetto Responsabile with the communication on admission to the incentive tariff.*
>
> *The present Agreement is effective from 31/07/2011 and expires on 30/07/2031.*
>
> *Any modifying or supplementary agreements on the content of the present Agreement subsequent to the date on which the agreement signed by GSE is made available must be agreed in writing, under the penalty of nullity.*

214. The language found in the sample GSE contract pursuant to *Conto V*, which expressly puts on notice any photovoltaic producer of the potential for unilateral changes brought about by legislation, is not present in any of the seven GSE Agreements applicable to *Enersol*. All of the GSE Agreements to which *Enersol* was a party had the express language that the only way change could be brought about to contractual terms was by way of mutual agreement in writing.

215. Fourthly, four *Contos* and the *Romani Decree* had been passed into law by Respondent. These, in varying respects, were the domestic legal background to the incentive schemes.

216. For the moment, the Tribunal does not take account of the plethora of advertising material (whether apparently issued by emanations of Respondent, or through promotional material issued by, amongst

others, law firms) which Claimant relies upon in its submissions as indicating reliance on the putative constancy of the incentive schemes. Much of this material might well be described as puffery, and the Tribunal prefers, at this stage, to analyse the four matters discussed just above for the purposes of Claimant's legitimate expectation as on 30 March 2012.

217. Looking at the four matters described above (in no particular order: (a) the four *Contos* and *Romani Decree*; (b) the tariff recognition letters; (c) the connections to the national grid; and (d) the GSE Agreements), a party in the shoes of Claimant would be left in no doubt but that it was to receive incentives, in constant currency, for a twenty year period, and all pursuant to private law contracts (as this was understood to be the state of Italian law at the time of the making by Claimant of its *Enersol* investments – indeed the *Romani Decree* could not have been clearer in that respect to any reasonable reader) which could not be amended save by mutual agreement. This was clearly based on the consistent legal policy of Respondent as manifested in the four *Contos* and the *Romani Decree*. No reading, no matter how indulgent, could lead anyone to consider anything other than a clear promise of twenty years of constant currency incentives pursuant to a private law contract. This is not a black letter reading, or the Tribunal holding Respondent hostage to blinkered pedantry (which would be unbecoming the dignity of a sovereign state), rather, it is the product of a careful, good faith reading of all of Respondent's unambiguous acts as set out above.

218. The critical question readily emerges from all of the foregoing is whether Claimant enjoyed a legitimate expectation protected by Article 10(1) of the ECT in respect of its *Enersol* investment as of 30 March 2012?

219. Drawing upon the principles articulated by the tribunal in *Antaris*, the Tribunal now ascertains whether a key predicate for a claim based on legitimate expectation is present in this case. As that tribunal described, *[A] claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision*, it is readily apparent to the Tribunal that both the origin and scope of the expectation of Claimant in respect of *Enersol* as on 30 March 2012 is precisely identifiable: *Enersol* was to receive incentives, in constant currency for a twenty-year period.

220. It is also important to differentiate the situation of Claimant as on 30 March 2012 in respect of *Enersol* with that of the claimant in *Blusun*. That claimant was, unlike Claimant and its investment in *Enersol*, still at a preliminary stage of its attempts to invest in the Italian photovoltaic market. That led to it falling at the first legal hurdle for causation as a matter of Article 10(1) of the ECT before that tribunal which found (para. 386) that:

> *[T]o conclude, in the Tribunal's view, the Project ran a significant risk of incurring legal or administrative difficulties, even if these could be (and in the event largely were) overcome. Its success was by no means certain.*

221. This finding of the *Blusun* tribunal echoes part of the summary, already quoted above, of the tribunal in *Antaris*, but now quoted again in specific illustration of these points:

> *(6) Provisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law; and given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.*

> *(7) An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.*
>
> *(8) The requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.*
>
> *(9) The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders.*
>
> *(10) Except where specific promises or representations are made by the State to the investor, the latter may not rely on an investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.*

222. The foregoing five points made by the tribunal in *Antaris* do not present Respondent with an answer to the position of Claimant in respect of *Enersol* as of 30 March 2012. Claimant's expectation as of that date was not simply (as was, essentially, the case with the *Blusun* claimant) relying on a general, *erga omnes*, promise found in law to putative photovoltaic producers. Quite the contrary, by 30 March 2012, Claimant's expectation was both specific as to what it was to receive by way of incentives and their exact duration, and precise in its origin (namely, from explicit acts of Respondent).

223. The next question is, according to the tribunal in *Antaris*, is whether *such representations were reasonably relied upon by the Claimants.* This is a matter which, at the very end of the hearing, included a new point being raised by Respondent in connection with a due diligence report prepared for Claimant's financiers by Clifford Chance.

224. Claimant, prior to consummating its investment in *Enersol* on 30 March 2012 undertook due diligence via the law firm of Ashurst. A Legal Due Diligence Report authored by that firm of 18 March 2012 is relied upon in Claimant's SoC. That Legal Due Diligence Report explicitly references the GSE Agreements (section 5 thereof). Further, the Tribunal has been shown by Claimant a set of slides prepared by Glennmont Partners (which is understood to be the controller of Claimant) entitled *Serenissima* which describes (p. 5) explicitly the volume and price arrangements for the *Enersol* investment.

225. The Tribunal readily, therefore, sees that Claimant relied on the circumstances of *Enersol* (described above) when deciding whether or not to invest. All of the matters set out in both the Legal Due Diligence Report and the *Serenissima* presentation carefully record the circumstances of *Enersol* and, therefore, reliance can well be understood to have been reasonable.

226. However, at the end of the hearing there was a ripple in the lagoon by reason of reliance, first raised in oral closing argument by Respondent, on a passage in an exhibit of Claimant, the due diligence report issued by Clifford Chance.

227. Respondent's point, which arose in oral closing argument at the hearing (and cannot be found anywhere in Respondent's memorials), was as follows. In a due diligence report prepared for Claimant's financiers by Clifford Chance, the following is stated:

> *7.4 Changes in applicable legislation*
>
> *In Italy, alternative energy incentive programmes are highly regulated and constantly evolving at the local, national and EU level. If amendments were made to the current legislation setting out the eligibility requirements for admission to, and the incentives available under, Conto Energia, any photovoltaic plant that is not*

yet admitted to Conto Energia at the time such legislative amendments become effective may have to comply with the then-applicable requirements and be eligible only for the then-available incentives.

You should be aware that Italian law does not prohibit the enactment of laws with retro-active effect; although no laws with retroactive effect have been issued in the field of energy law in Italy in the past.

Once the grant of the incentives is secured by the execution of the agreement with the GSE, the risk of a retroactive change in incentives can be reasonably deemed low.

228. The Clifford Chance due diligence report was included as an exhibit to Claimant's SoC, and, therefore, was entirely known to Respondent from that moment onwards. Nonetheless, it was only at the oral closing stage at the hearing that considerable emphasis was laid upon this section by Respondent as support for the proposition that Claimant was on notice that there was a risk of retrospective changes to granted incentives. As described in the procedural history section of this Award, the Tribunal thereafter received post-hearing submissions in that regard. These will now be analysed.

229. With specific reference to Claimant's FET claim, it argues in its post-hearing brief as follows:

6. ..... First, considered objectively, the language Italy cites would not warn an investor that Italy could legally retroactively revoke the rights it had guaranteed under its regulatory framework, in the GSE Tariff Confirmation Letters, and in the GSE's Contracts with the individual plant owners without providing compensation. In fact, Clifford Chance expressly recognized that a completed facility that had enrolled in the regime had rights that undeveloped projects did not have: "any photovoltaic plant that is not yet admitted to the Conto Energia at the time of such legislative amendments become effective may have to comply with the then-applicable requirements and be eligible only for the then-available incentives." That sentence clearly refers to prospective, not retroactive changes to the regulatory regime.

> *7. On the other hand, the final two sentences do reference retroactive changes, but do not lead to Italy's proposed conclusion. While Clifford Chance does state that Italian law technically does not prohibit retroactive changes, it also states that "no laws with retroactive effect have been issued in the field of energy law in Italy in the past. Further, Clifford Chance never suggested that retroactive changes stripping investors of their rights without compensation are permitted. Indeed, Clifford Chance acknowledged that "[o]nce the grant of the incentives is secured by the execution of the agreement with the GSE, the risk of a retroactive change in incentives can be reasonably deemed low." Thus, after reviewing the Clifford Chance report, CEF still had a reasonable expectation that Italy would not modify its legal regime retroactively without compensating investors, and invested in Project Enersol on the basis of that expectation. That is particularly the case in light of all the additional evidence regarding CEF's legitimate expectations in relation to its investments generally and Project Enersol in particular, such as the GSE Contracts setting forth the specific tariffs that project would receive.*

230. The Tribunal does not appreciate from any of the briefings which followed thereafter that Respondent gainsayed the foregoing position of Claimant. That does not mean, inevitably, that the Tribunal accepts what Claimant submits. It will make its own independent assessment of the consequences, if any, of what Clifford Chance says.

231. First, it is clear that Clifford Chance indicates that the risk of retrospective legislation in the energy sector is very low indeed; so low that it opines that it has never occurred in the past. Thus, as of 30 March 2012, Claimant is explicitly aware of the fact that no retrospective change in the law in the energy sector had ever occurred, up to that time, in Italy.

232. Secondly, Clifford Chance makes a clear distinction between investors which have not yet secured a precise incentive, and those that have consummated a GSE agreement, with the former plainly at greater risk of not getting what they might have expected at the time they commenced their works in the event of a change of the law. Those that have consummated a GSE agreement are, in Clifford

Chance's words, facing, reasonably, a low risk of retrospective change. That firm does not go any further in developing this point, possibly due to the fact that such an event (at that time) had never occurred in Italy in the energy sector.

233. The Tribunal, in its assessment of the international law standard of legitimate expectation, finds it difficult to see how a two-sentence articulation of a low-risk hypothetical (which had never occurred in the energy sector up to that moment) could comprehensively eviscerate the collective and explicitly-stated consequences of all of the four matters described at paras. 210-215 above for the purposes of what was Claimant's legitimate expectation on 30 March 2012. While later events (as discussed below concerning the judgment of the Constitutional Court) bore out Clifford Chance's opinion, the precise content of the legitimate expectation is measured against the conditions pertaining at the date of investment. The strictness of this temporal rule inures to Respondent's favour in respect of *Megasol* and *Phenix*.

234. In summary, the Tribunal is now in a position to answer the key question posed above at para. 218 above with "yes": did Claimant enjoy a legitimate expectation within the meaning of Article 10(1) of the ECT in respect of its *Enersol* investment as of 30 March 2012? The answer is yes, and the precise scope of that legitimate expectation is that *Enersol* was to receive incentives, in constant currency for a twenty-year period. However, that legitimate expectation does not, in the Tribunal's estimation, extend to one further aspect of Claimant's claim, namely, the change, brought about by *Spalmainincentivi* whereby payment of 100% of the incentive within 60 days was changed to 90% with the 10% balance paid the subsequent year. The Tribunal considers that Claimant has not asserted (save for a passing criticism in para. 208 of the SoC, which the Tribunal finds to be

insufficient) or proven that organs of Respondent offered explicit or implicit promises or guarantees that change of the type encompassed by the payment term change would not be made. Thus, even though Claimant considered this measure unfavorable to their investments, it has not argued or alleged any ground for an FET claim.

Has Claimant's legitimate expectation been transgressed in a manner prohibited by the ECT?

235. This question, which is at the heart of the issue of liability, can be formulated as follows: whether, in June / August 2014, when Respondent enacted the Law Decree No. 91/2014 converted into Law 116/2014, colloquially known "*Spalmaincentivi*", by which *Conto Energia* tariffs previously granted to existing PV plants were reduced in order to lessen the burden of electricity bills to consumers, did it breach the protection of Claimant's legitimate expectation as a matter of Article 10(1) of the ECT? By reference to the third of the three-step test postulated at para. 360(3) of the award in *Antaris*, the present question is refined further, namely, did the *Spalmaincentivi* breach the representations of Respondent which led to the legitimate expectations of Claimant in respect of *Enersol*?

236. The existence of a breach is not the automatic consequence of a finding that subsequent measures taken by the host state are in contrast with the legal regime and "assurances" of stability on which the foreign investor relied when it made its investment. To follow again *Antaris*, the reasons and justification of the state's action must also be evaluated, *"in the light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State"* (*Antaris*, para. 360(6)). This entails evaluating whether the subsequent action by the State *"at least in the absence of a stabilization clause, ...do not exceed the exercise of host State's normal regulatory power in pursuance of a public interest and do not*

modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change." (*Antaris* para. 360(7)) This means that the quantitative negative impact on the investment's value and profitability must be taken into account. Finally, (*Antaris* para. 360(9) *"The host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders"* (*Antaris* para. 360 (9).

237. As concerns the first element of the comparative analysis, consisting in "balancing and weighing" the expectations of the Claimant as a foreign investor protected by Article 10(1) ECT, with the right of Respondent as host State to adapt its regulatory framework to changing circumstances, the Tribunal has already duly highlighted the key and specific elements of Claimant's rights and expectation and their sources. As stated above at para. 222, "Claimant's expectation was both specific as to what it was to receive by way of incentives and their exact duration, and precise in its origin (namely, from explicit acts of Respondent)". Specifically, as said above in para. 217 Claimant's expectation was based on "a clear promise of twenty years of constant currency incentives pursuant to a private law contract".

238. On the other hand, looking at the actions by Italy which negatively affected the legitimate expectation of Claimant and their reasons, the Tribunal recalls that as an effect of the modifications of the original Law Decree 91/2014 when it was converted into Law 116/2014 the options of a cut in tariffs were offered to the PV operators. They all resulted in a photovoltaic producer not receiving the originally-

promised incentivised tariff for twenty years. Even the least damaging option (Option C), added in the conversion Law 116/2014 (the default option chosen by Claimant in respect of *Enersol*,) providing for a tariff cut of 6-8% for the residual years up to the end of the 20-year contractual period, resulted in the amount of the tariff obtained by Enersol being less than the one originally granted on which Claimant had relied in making its investment.

239. As to the reasons for the issuance of the *Spalmaincentivi* the Tribunal has taken note that the Decree Law and accompanying official documents, spell out the reasons for reducing the incentives provided to the PV operators through the various *Conto Energia*. The rationale was that of reducing the burden of electricity bill to the consumers, especially small and medium enterprises, in order to stimulate economic growth and competitiveness. The Tribunal has also taken note that the tariff cut was not the only measure taken to this end as concerns electricity tariffs in the Decree Law 91/2014.

240. The Tribunal is at pains to also observe that Respondent's three *Spalmaincentivi* options are not, in of themselves, an unreasonable measure. The sustainability of the incentive system for PV producers and other valuable objective of general interests were at stake, and it can readily be appreciated that the dignity which attaches to sovereigns must be given deference, though that is not infinite when balanced against a combination of international obligations freely assumed and, further, fact-specific circumstances of the extent of commitments given to investors.

241. The Tribunal does not consider that the reasons adduced by the Respondent to justify the cut of the tariff granted for a 20-year period to the Claimant's investment in *Enersol* and the fact that the cut was

not of such a magnitude as to render the investment unprofitable, but allowed it (*arguendo)* to still generate a fair return can prevail over the legitimate expectations of Claimant that it is entitled to benefit of the originally granted and agreed incentivized tariff

242. The Tribunal finds support for this conclusion in the words of *El Paso Energy International Company v. Argentine Republic*, that the *FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances.* As discussed already in this award, there are specific circumstances attaching themselves to Claimant's investment in *Enersol*: (a) the relevant *Contos* and *Romani Decree*; (b) the tariff recognition letters; (c) the connections to the national grid; and (d) the GSE Agreements. None of these could give any reasonable observer the slightest doubt but that Respondent had committed itself *vis a vis Enersol* to constant currency tariffs over a twenty year period. The contrast in the apparent (at the time of the *Enersol* investment) immutability and commitment of Respondent to the constancy of the tariffs with its later position can particularly be noted from the fact that a GSE contract under the *Conto V* regime clearly puts the photovoltaic producer on notice of the risk of unilateral changes to such terms.

243. It is readily apparent to the Tribunal that the greater the level of engagement as between a sovereign and an investor, such as here through Respondent's undertaking to maintain a specific incentivized tariff for 20 years, ultimately resulting in legitimate expectations which are clear in both scope and origin, the more rigorous the scrutiny must be of acts which, even if reasonable, cut across those legitimate expectations. It is an inherent aspect and quality attaching

to the dignity of a sovereign that promises made and obligations accrued by it are respectfully and carefully upheld and vindicated.

244. Having taken all of the foregoing into account, the Tribunal concludes that the three *Spalmaincentivi* options are, therefore, a breach by Respondent of Article 10(1) ECT in respect of Claimant's legitimate expectation concerning its investment in *Enersol*. Claimant was, as a matter of the *Spalmaincentivi* options, faced with three choices none of which would lead to the vindication or upholding of the legitimate expectation it had in respect of *Enersol* as on 30 March 2012.

245. Prior to making its final conclusion in respect of Claimant's FET claim as regards *Enersol*, the Tribunal also notes that Respondent argued at some length that its measures did not result in Claimant's investments becoming unprofitable. That may very well be the case, but this, in the Tribunal's view, does not provide an answer to Claimant's FET case in respect of *Enersol*. This is best encapsulated by a provision in the *Romani Decree*, namely, that *the incentive has the purpose of ensuring a fair remuneration of the investment and operating costs.* This is an entirely appropriate policy aim so that the incentives which Respondent grants to PV producers does not turn into a one-sided financial bonanza at the expense of the public purse. However, the decision as to what is a fair remuneration, while in the hands of Respondent, is made at the time the level of a particular incentive is set for a particular producer. There is no indication of any kind whatsoever in the first four *Contos*, the *Romani Decree*, the tariff recognition letters, and the GSE Agreements that, once an incentive rate is offered, and then accepted into a consummated contract, it would be subject to the vagaries of whatever might later be deemed to be a fair remuneration for the remaining lifetime of the arrangement.

246. In conclusion, and taking all of the foregoing into account, the Tribunal holds and finds that Law Decree No. 91/2014, or

Spalmaincentivi, Respondent breached the ECT protection of Claimant's legitimate expectation in respect of the latter's investment in *Enersol*. The consequences of this breach will be discussed later in this Award.

247. The above conclusions that the Respondent has breached the FET standard of Article 10(1) ECT by having breached the protection of the legitimate expectations of Claimant that the incentivized tariff would not be cut by a provision such as *Spalmaincentivi* reflects the views of a majority of the Tribunal (comprising Mr. Reichert and Prof. Dr. Sachs). Prof. Sacerdoti disagrees on those conclusions for the following reasons: "I believe that the weighing and balancing exercise between the expectations of Claimant in the stability of the 20-year tariff, on the one hand, and the right of Italy to change it in special circumstances in the public interest, as was done through the *Spalmaincentivi*, should lead to the conclusion that Respondent has not thereby breached Article 10(1) ECT. As to the expectations of the Claimant in the stability of the tariff granted to *Enersol*, I recognize they were properly based on a series of general and specific provisions (including the GSE Agreements) that made it reasonable to believe that the 20-year tariff incentive would not be subject to change. On the other hand, Claimant should have been aware that under Italian law (on which the due diligence reports it had obtained exclusively focused) the possibility that the State could unilaterally modify the tariff in special circumstances, for pressing reasons of public interest, provided that the negative impact would be modest, could not be ruled out. This is exactly what the Constitutional Court held in its judgment 16/2017 in relation to the *Spalmaincentivi*: *"The analysis of the rationale and of the content of the challenged provision [Article 26 of Law 116/2014] leads to exclude that the latter impacted on the long-term relationship – resulting from the agreements concluded with [GSE] - in an unreasonable, arbitrary and unpredictable way, so as to harm...the invoked principle*

[legitimate expectations]. *Indeed the regulatory change at hand is justified by a public interest, in terms of a fair balancing of the opposed interests at stake, which is meant to combine the policy of support to the production of energy from renewable sources with a better sustainability of the respective costs borne by the end consumers of electricity energy"* (at para. 8.2). As to the tariff cut put in place by the *Spalmaincentivi*, the evidence shows in my opinion that it was a reasonable measure, taken in a transparent way, aimed at pursuing a legitimate public interest - both looking at its aims and at the economic context - and that, finally, due care was taken to protect the interests of the investors (which by the way were predominantly Italians). This is because (a) the burden of the consumers' electricity bills reducing measures ("Taglia-bollette") was spread among various categories, among which that of the beneficiaries of the PV incentivized tariffs was but one, and (b) the negative impact was limited (6-8% cut) also due to the modification in the final Law 116/2014 of the initially harsher reduction. The cut has not affected the profitability of the investment (for which there is a market, cf para. 42 above), as certified by the fact that the damages that the Tribunal finds and awards to Claimant in respect of *Enersol* are just 6% of the enterprise value (EUR 164,700,000.00) determined by Claimant's quantum expert."

Umbrella Clause claims

248. Article 10(1) of the ECT provides as follows, in relevant part:

> *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.*

249. Claimant advances, either additionally or alternatively to its FET claims, umbrella clause claims against Respondent which repose on the GSE Agreements in respect of all of its investments, *Megasol*, *Phenix*, and *Enersol*. It argues that each of the GSE Agreements

(while subject to Italian law and jurisdiction) do not admit of (as of now) any other reading or interpretation save an obligation on the part of Respondent to pay incentives, in constant currency, for twenty years, with no possibility of amendment save by mutual consent.

250. At the centre of Respondent's defence to these umbrella clause claims is Decision No. 16/2017 of the Italian Constitutional Court and its position that the GSE Agreements were, in fact, found by such Decision to be "accessory".

251. Respondent's SoD, footnote 109, submits as follows (emphasis added):

> *Contracts concluded by public administrations can be divided into three broad categories. The first consists of the so-called "ordinary contracts", and are contracts that do not undergo modifications for the fact that one of the parties is a public authority. The parties act on a strictly equal footing. The second category consists of the so-called "special contracts", because contracts (private) law generally governs them, but, alongside the provisions of the civil code, other specific rules apply, which normally ascribe special powers to the government. Besides these specific provisions, however, also these contracts follow the general principles of private law. The third category comprises contracts with a "public subject matter", or "contracts of public law". Unlike the previous ones, these are connected to public measures, of which they are a necessary complement. Their scope is circumscribed by the public act and only exist in connection with such public act and the exercise of the public power. In turn, "contracts of public law" are usually divided into three further categories: "accessory contracts" to public measures, "auxiliary contracts" to public measures, and contracts "substituting" public measures. "Accessory contracts" are generally recognized as bearing distinctive features. As a general definition, it can be stated that "accessory" are those contracts governing reciprocal duties of parties that arise from a public measures. To a phase of authoritative exercise of public powers, it follows one built under the scheme of a contractual relationship: whereas the authoritative exercise of power establishes the legal situation, the contractual instrument regulates its operation. Even assuming that, because of these two sides, such a contract is "mixed" in nature, this would in fact mean that the management of the executive aspects of the relationship are regulated by private law, whereas the contract*

> *keeps a public nature. In particular, this would not change the fact that the particular nature of the subject matter of the contract (public interest), and its object (the management of this interest), leave intact a position of supremacy by the public power that would make it possible for the latter to unilaterally modify its conditions by modifying the authoritative act.*

252. The case before the Italian Constitutional Court concerned *Spalmaincentivi*. Various photovoltaic producers sought to have the changes to the tariff regime struck down. In particular, those parties alleged that their incentives were recognized by private law agreements.

253. The Italian Constitutional Court, when considering the relevant GSE contracts described them as follows:

> *This is even truer if one considers that the agreements reached with GSE cannot be qualified as contracts meant to determine the exclusive profit of the operator, with terms and conditions blocked at the initial conditions, for twenty years, even if technological changes may change profoundly. They are instead regulatory instruments, aimed at reaching the objecting of incentivizing certain sources of energy in equilibrium with other sources of renewable energy, and with the minimum sacrifice for the users who ultimately bear the economic burden.*
>
> .....
>
> *Setting aside the fact that such "contracts" are accessory to the provisions granting the incentives, one should recall the principle – which has been repeatedly stated by this court – that there cannot be a violation of the freedom of economic initiative when the general limited that have been put aim at promoting social welfare, as established by article 41, para. 2, of the Constitution, provided that the measures are not arbitrary and the intervention of the legislature does not pursue its aim through measures which are clearly incongruous..... Both these requirements, as already said, have been complied by the provisions reducing and rescheduling the incentives.*

254. The Tribunal is, therefore, compelled to the conclusion that the obligations which Respondent entered into with Claimant's

Investments (*i.e. Megasol, Phenix*, and *Enersol*) were, as a matter of Italian law subject to unilateral modification by Respondent. The GSE Agreements are all subject to Italian law, and the awards which Claimant cite do not have the effect of overriding a choice of governing law made by the parties thereto. The obligations of Respondent which it owed to Claimant's Investments were delineated by Italian law, which (when revealed by the Italian Constitutional Court to be accessory in nature) allowed it to unilaterally modify such obligations.

255. In such circumstances, the Tribunal dismisses Claimant's Umbrella Clause claims as argued for by it and summarised in its Opening Presentation at the hearing ("*Italy failed to fulfill the obligations it entered into with respect to CEF's investments, which were crystallized in Tariff Confirmation Letters and Contracts*"). Bearing in mind the alternative prayer for relief advanced by Respondent ("*Article 10(1) ECT, last sentence (the so-called "umbrella clause") does not apply in the case at stake, or, alternatively, that the Respondent did not violate it neither through statutory or regulatory measures, nor the GSE Conventions*"), the Tribunal considers the latter proposition to be well-founded. In particular, apart from the fact that the "obligations" are municipal matters, subject to Italian law, the Tribunal does not consider the measures implemented by Respondent to transgress the ECT requirement by a signatory state to observe "any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party". The measures, of which Claimant makes complaint, were addressed to all PV producers and were, in the Tribunal's assessment, compliant with Italian law (as emerged from the decision of the Italian Constitutional Court).

Failure to provide transparent legal framework claims - Unreasonable impairment claims

256. For convenience, the Tribunal considers these two claims together.

257. The Tribunal now records, in relevant part, Article 10(1) of the ECT:

> *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 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.*

258. By way of introductory comment, and consistent with its findings earlier in this award, none of the Taxation measures can be taken into account by the Tribunal when deciding whether either of these claims are successfully made by Claimant. Thus, only *Spalmaincentivi* can be considered by the Tribunal in its analysis.

259. In light of the earlier discussion of *Spalmaincentivi* and, in particular, the Tribunal's observations that the rationale for the measure was reasonable (which was not, in the specific circumstances of this case, an answer to the legitimate expectation claims), it would be entirely inconsistent to now find unreasonable impairment or a failure to provide a transparent legal framework.

Conclusion on Section B

260. It is useful at this point to summarise the conclusions which the Tribunal has reached on Section B (Merits & Liability (incl. concomitant Jurisdiction & Admissibility) Claimant has succeeded in establishing that, by *Spalmaincentivi*, Respondent breached, as a matter of Article 10(1) of the ECT, the FET protection it owed to

Claimant's legitimate expectation in respect of the latter's investment in *Enersol*. All other allegations made by Claimant of breach by Respondent of Article 10(1) of the ECT are dismissed, either as a matter of substance, or as falling without the ambit of the ECT as Taxation measures.

261. The Tribunal will now proceed, in the next section, consider what is the consequence of the established breach of the ECT by Respondent.

Damages & Interest

262. As a starting point, Claimant sets out its legal position as follows in the SoC:

> *286. To determine the compensation that Italy owes to CEF, the Tribunal should in the first instance look to any lex specialis in the ECT and, in the absence of any lex specialis, to the rules of customary international law. The only lex specialis standard of compensation found in the ECT is in Article 13, which sets out the conditions that Italy must satisfy in order to lawfully expropriate investments held by protected investors in Italy. The ECT does not expressly provide a standard of compensation for violations of the ECT, and thus the customary international law principle of full compensation fills the lacuna.*
>
> *287. The principle of full compensation was first established by the Permanent Court of International Justice in the seminal 1928 case of Chorzów Factory between Germany and Poland, which arose from Poland's unlawful seizure of a factory owned by a German national. According to the Permanent Court of International Justice:*
>
> > *It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate. ... [S]uch a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a*

consequence would not only be unjust, but also and above all incompatible with the aim of [the Convention].
* * * *
The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

263. In the SoD, Respondent's position is as follows, and seeks to differentiate the present case from that contemplated by the *Chorzow Factory* case:

> *680. In the case at stake, the Tribunal should necessarily consider the general and regulatory character of Italian measures, the absence of any fraudulent intent whatsoever, the fundamental public purpose characterizing each of the measures. Accordingly, it should equitably reduce the amount of compensation (if any) from the full value of damages.*
> *681. This conclusion is supported by case law. As quoted by the Claimant itself, in the Azurix Annulment Decision the Committee stated that "for breaches of BIT obligations other than the expropriation clause, the Tribunal has a discretion in determining the approach to damages". Since no expropriation is claimed by the Claimant, the Tribunal should employ its discretion precisely to take into account the reasons expressed above. Incidentally, such declaration of discretionary power is linked, in the Azurix case, to sustain that a tribunal is not compelled to use the "fair market value" in non-expropriation cases.*
> *682. In sum, Italy preliminarily contends that in the event that the Tribunal were to award a compensation (quod non, as argued sub V.2), the amount of such a compensation be in any case reduced by considering the arguments exposed in this Section.*

264. At para. 418 of the Reply, Claimant disputes Respondent's position:

> *Claimant does not request the full fair market value of their investments as damages in this case. They request the diminution in the fair market value of their investments caused by Italy's*

> *illegal measures. The fact that the diminution in value is not total – i.e., it was around 26% – properly limits damages to the amount of the diminution; it does not mean that the injury was insignificant or that damages should be denied altogether on the ground that the injury was not substantial enough to award a higher level of damages that the Claimant does not seek.*

265. The Tribunal does not see a reason to depart from the long-established principles articulated in the *Chorzow Factory* case. The way in which Claimant presents its case, as set out just above, is consistent with those principles and it seeks compensation to "re-establish the situation which would, in all probability, have existed if that act had not been committed".

266. The purpose of the protections found in the ECT are not, in the Tribunal's appreciation, designed to simply preserve profitability of an investment. Indeed if an investment continued to be profitable, but less so, following measures which transgressed the protections contained in the ECT, then Respondent's position would logically result in, potentially, no compensation being awarded. Thus, such an investor would be left with a lesser profit than would have been the case had the measures in breach of the ECT not been deployed. Such a scenario would denude the ECT protections of practical application.

267. The *Chorzow Factory* principles do not operate to reward an investor, or to make its investments more profitable than they would have been had the offending measures not been implemented. Rather, the purpose of *Chorzow Factory* is to "re-establish the situation which would, in all probability, have existed if that act had not been committed". Specifically, the Tribunal considers the analysis is must now make is what the position would have been in respect of the Claimant's investment in *Enersol* had the *Spalmaincentivi* not been implemented.

268. As to the amounts claimed by Claimant, in a Memorandum dated 21 February 2018, Mr Edwards set out his calculation of the loss suffered

in respect of *Enersol* as being EUR 10,300,000.00 (such loss assuming Robin Hood Tax, IMU/TASI, Administrative Fees and Imbalance Costs fall outside of the Tribunal's jurisdiction – which is the case as found earlier in this Award), excluding interest. Thus, EUR 10,300,000.00 is Claimant's remaining claim for compensation given that the Tribunal has not found the Respondent liable for any breach of the ECT in respect of either *Megasol* or *Phenix*.

269. Mr Edwards presents his calculations on the following basis, namely a comparison of the value of the *Enersol* investment as on 1 January 2015 just prior to the implementation of the *Spalmaincentivi*, with the value on the same date immediately after such implementation. He says (p. 4 of his presentation to the Tribunal dated 21 February 2018, which was a summary of his previously-expressed opinions for the purposes of the hearing) that 1 January 2015 is the date the most significant change was implemented. He describes his approach as follows (p. 5 of his presentation to the Tribunal dated 21 February 2018):

> *My assessment of the Claimant's loss is the difference between the value of its investments on the Date of Assessment as they actually were (the **Actual Position**) and as they would have been had the Principal Regulatory Changes not been made (the **Counterfactual Position**).*

270. As regards the "Actual Position" and "Counterfactual Position", Mr Edwards states the following as his methodology for valuation respectively (p. 5 of his presentation to the Tribunal dated 21 February 2018):

> *Market value of investments including impact of Principal Regulatory Changes on 1 January 2015 - Market value of investments absent impact of Principal Regulatory Changes on 1 January 2015 - DCF method used to value investments*

271. Respondent's Expert, GRIF, puts its position in the Rejoinder Report as follows:

3. On use of the DCF method and calculations in the First FTI Financial Report Offering this as a supposed weakness, the FTI-RII and the FTI-FRII repeatedly emphasise that our first two reports (GRIF Economic Report and GRIF Financial Report) do not criticise the DCF method or contest the approach used in the FTI Financial Report to calculate the Opposing Party's alleged losses.

An effective summary of the Opposing Party's position in this regard appears in the Claimant's Reply (paragraph 437): "In summary, GRIF's entire quantum analysis simply parrots Italy's argument on liability, disguised in the language of a quantum analysis. GRIF offers no opinion on the losses attributable to the Claims as pleaded, or indeed any criticism of FTI's calculation of those losses. Accordingly, the Tribunal should accept FTI's quantum analysis entirely."

That aside, it is clear that the Opposing Party's experts did not understand or else speciously ignored the terms of the issue in the case at hand, so our work completely escapes them. Our criticism of the FTI Financial Report's approach goes much deeper, as it contests its very foundation and thus the data arising from this these assumptions. In summary, and for purposes of clarity:

- We did not dispute the FTI Financial Report's calculations, but rather its basic assumptions and, as a consequence, the resulting data used to make these calculations.

- We identified the correct essential elements needed to reconstruct the objective and reasonable expectations of investors at the time the investments were made.

- We showed that when the correct essential elements are used, the measures adopted by the Italian Government caused no losses to the Opposing Party. Therefore, a discussion about calculation methods becomes unnecessary, including the one proposed in the FTI Financial Report. Finally, it makes even less sense to deepen potential mistakes in the calculation method proposed in the FTI Financial Report.

272. The Tribunal's appreciation of the position of GRIF is, therefore, that it does not dispute the calculations made by Mr Edwards, but rather approaches the issue of compensation upon a different premise. The following conclusion of GRIF later in the Rejoinder Expert Report encapsulates its position:

Considering average Italian production, the intervention through the "Spalmaincentivi" decree reduces feed-in tariffs to an extent much less than proportional to the increases in productivity that the plants are reporting, with the overall result that consumer expense is reduced without in any way negatively influencing the economic and financial plans of the plants built. In fact, investors continue to realise profits well beyond their expectations.

273. GRIF's presentation (dated 22 February 2018) to the Tribunal at the hearing states the following, at p. 25:

In the specific case, what happened is simply a little adjustment in order to keep a fair profit having taken into account that incentives were based on underestimated value of the solar radiation, with a consequent over incentive on the revenues side. The 8% adjustment reduces the extra-profits realised by PV plants of CEF Energy, but they are still realising more profits than those expected when the investments were made

274. Later in the same presentation (p. 27), in a similar vein, which echoes the Respondent's case on liability:

Italy did not impair CEF investments because Italy intervened after a period of over-incentive to restore the efficient level of the stream of revenues.

275. The Tribunal prefers the methodology of Mr Edwards, namely, his adoption of DCF. Quite apart from the fact that the DCF method is well-established and accepted by investment arbitration tribunals over many years for the purposes of calculation of compensation, the approach of GRIF would be inconsistent with the even longer-established *Chorzow Factory* principle. The latter requires an assessment of the position as if the act, found to be a breach of the international obligation in question, had not occurred. GRIF's approach would, taken to its logical conclusion, would result in ascertaining whether the investor was nonetheless making a "fair" profit notwithstanding the measure found to be in breach, and, therefore, such "fair" be sufficient compensation. That is not the established principle found in *Chorzow Factory*.

276. Returning to the amount claimed in respect of *Enersol*, as noted above, Mr Edwards presented his calculation of the 'actual –v- counterfactual' position in a Memorandum dated 21 February 2018 with the assumption (which was made upon the invitation of the Tribunal during the course of the hearing) that the Robin Hood Tax, IMU/TASI, Administrative Fees and Imbalance Costs fell outside of the Tribunal's jurisdiction. Mr Edwards' calculations in this respect are referenced to the spreadsheet (marked Appendix 5.1b) which accompanied his reply report.

277. The Tribunal does not understand GRIF to gainsay Mr Edwards' calculations (as discussed above, GRIF's position was to approach the underlying methodology differently, rather than to dispute the correctness of his calculations pursuant to the DCF method). Nonetheless, the Tribunal will now examine Mr Edwards' calculations as contained in the spreadsheet (marked Appendix 5.1b).

278. Within Mr Edwards' spreadsheet there is a sheet which is entitled "Key assumptions". There are seven assumptions listed with a "Yes/No" option adjacent. Changing these assumptions from Yes to No has a consequence for calculations elsewhere in the spreadsheet.

279. The Tribunal can immediately see, from the list of Key assumptions that the first four (Robin Hood tax, IMU/TASI, Administrative Fee, and Imbalance costs) must be set to "No" in order for consistency with earlier findings in this award.

280. The next Key Assumption is "Loss from IT Decrease". This is set, by Mr Edwards to Yes. The Tribunal agrees, as this is the issue discussed above.

281. The next Key Assumption is "Loss from IT Payment Term Change" which Mr Edwards has set to Yes. In light of what the Tribunal has already decided at para. 234 above, it, therefore, is setting this Key assumption to No.

282. The final Key assumption ("Include negative free cash flow") is already set to No by Mr Edwards and is not, therefore changed by the Tribunal.

283. Having set the Key assumptions in a manner consistent with the Tribunal's findings, the amount of the claim in respect of *Enersol* emerges from the calculations on the sheet entitled "Summary tables", namely, EUR 9,600,000.00.

284. To summarise, the Tribunal holds, insofar as it has the jurisdiction to do so, that the 'actual –v- counterfactual' position as of 1 January 2015 in respect of the Claimant's investment in *Enersol* results in an amount of EUR 9,600,000.00 by which such investment has been lessened by the *Spamalincentivi*.

285. Turning to interest, Claimant seeks pre- and post-Award compound interest from the Tribunal at, according to para. 305 of the SoC, "based on international commercial rates". While Claimant's calculation, as presented by Mr Edwards, alternate between Respondent's cost of debt and Claimant's cost of debt, the Tribunal prefers to award interest at the following rate: annually, LIBOR plus 2%. Compound interest, therefore, at a rate of LIBOR plus 2%, annually, on EUR 9,600,000.00 from 1 January 2015, until payment in full.

General

286. The Tribunal records that it has taken note of, and considered, all submissions and evidence put before it. It has referred in this award to those parts of the submissions and evidence it has considered necessary for the explanation of its reasoning; however, all submissions and evidence were taken account of, whether expressly referred to or not, in the formulation and articulation of the reasons and conclusions in this award.

Costs

287. First, pursuant to Article 43 of the SCC Rules, the "Costs of the Arbitration" are: (i) the Fees of the Tribunal; (ii) the Administrative Fee; and (iii) the expenses of the Tribunal and the SCC. The Parties are jointly and severally liable to pay the Costs of the Arbitration.

288. On 20 December 2018, the SCC determined the Costs of the Arbitration as follows:

Klaus Reichert
Fee EUR 210,625.00 plus any VAT

Klaus Michael Sachs
Fee EUR 126,375.00 plus any VAT
Expenses EUR 2,173.00 plus any VAT
Per diem allowance EUR 4,000.00

Giorgio Sacerdoti
Fee EUR 126,375.00 plus any VAT

Stockholm Chamber of Commerce
Administrative fee EUR 39,800.00 plus any VAT

Expenses/reimbursement EUR 7,928.07 plus any VAT of the Tribunal's costs in the course of the proceedings

289. Claimant has prevailed in this arbitration in a number of respects: (a) the "intra EU" jurisdiction issue, which has occupied a very considerable part of the written argument before the Tribunal, both before, and then, in particular, afterwards with extensive submissions on *Achmea*; and (b) its FET claim in respect of *Enersol* resulting in an award of EUR 9,600,000.00 plus interest. On the other hand, a number of Claimant's claims did not succeed in their entirety (*Megasol* and *Phenix*), and aspects of the *Enersol* claim were captured by Article 21 of the ECT. Placing all of these factors together does still, in the Tribunal's estimation, mean that Claimant was the prevailing party but the attenuated measure of its overall success will be appropriately taken into account in the amount of costs awarded against Respondent.

290. As regards allocation of liability as between the Parties for the Costs of the Arbitration, with the background of the matters set out in para. 289 above in mind, the Tribunal considers that an amount of EUR 100,000.00 (excluding VAT) to be paid by Respondent to Claimant is appropriate.

291. Secondly, turning to the costs incurred by Claimant (as per Article 44 of the SCC Rules), the amounts sought are as follows:

Legal Fees
King & Spalding, EUR 1,153,017.00
Orrick, Herrington & Sutcliffe, EUR 500,000.00

Expert Fees & Expenses
FTI Consulting, EUR 571,700.32

Prof. Antonio D'Atena, EUR 30,628.50

Claimant's Costs & Expenses, EUR 114,780.51

292. The total sought by Claimant in respect of the costs incurred by it is EUR 2,370,126.33.

293. With the background of the matters set out in para. 289 above in mind, the Tribunal considers that an amount of EUR 900,000.00 (excluding VAT) to be paid by Respondent to Claimant is appropriate.

294. The claim for interest on such costs is dismissed.

Award

For the foregoing reasons, and subject to para. 247 above, the Tribunal finds, holds, declares, and awards as follows, insofar as it has the jurisdiction to do so as set out in this Award:

1. The Tribunal has jurisdiction over all claims of Claimant except insofar as those are captured by Article 21 of the ECT, namely those concerning the following measures of Respondent impugned by Claimant: (a) Robin Hood Tax; (b) Qualification of assets for fiscal and cadastral purposes; (c) Imbalance charges; and (d) Administrative fees.

2. The Tribunal rejects, as unfounded as a matter of the merits, all claims of Claimant against Respondent's measures impugned by Claimant as being in breach of Article 10(1) of the ECT, except the claim that Respondent breached Article 10(1) of the ECT through the application of *Spalmaincentivi* to the incentivized tariffs in respect of Claimant's investments in *Enersol*

which is found to be in breach of Article 10(1) of the ECT, which claim the Tribunal upholds.

3. As a consequence of the breach found and held against Respondent, the Tribunal finds that Respondent caused damage to Claimant in the amount of EUR 9,600,000.00 (Euro nine million, six hundred thousand) and the Tribunal orders Respondent to pay such amount to Claimant as compensation, together with compound interest (compounded annually) from 1 January 2015 at LIBOR plus 2% thereon until full and final satisfaction of the Award.

4. The Parties are jointly and severally liable to pay the Costs of the Arbitration. The Costs of the Arbitration have been set as follows:

Klaus Reichert
Fee EUR 210,625.00 plus any VAT

Klaus Michael Sachs
Fee EUR 126,375.00 plus any VAT
Expenses EUR 2,173.00 plus any VAT
Per diem allowance EUR 4,000.00

Giorgio Sacerdoti
Fee EUR 126,375.00 plus any VAT

Stockholm Chamber of Commerce
Administrative fee EUR 39,800.00 plus any VAT

Expenses/reimbursement EUR 7,928.07 plus any VAT of the Tribunal's costs in the course of the proceedings

As between the Parties Respondent is liable, and ordered to pay Claimant EUR 100,000.00 (excluding VAT).

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5. Respondent is ordered to pay EUR 900,000.00 (excluding VAT) to Claimant in respect of costs.

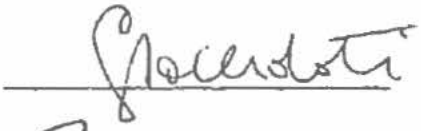
6. All other extant claims within the jurisdiction of the Tribunal are dismissed.

A party may bring an action against the award regarding the decision on the fee(s) of the arbitrator(s) within three months from the date when the party received the award. This action should be brought before the Stockholm District Court.

Place of Arbitration: Stockholm, Sweden

Date: 16 January 2019

Prof. Dr. Klaus Sachs: 

Prof. Giorgio Sacerdoti: 

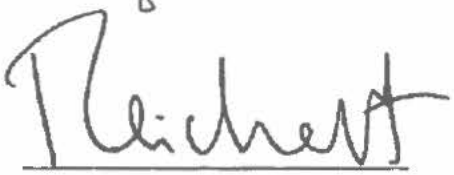
Mr. Klaus Reichert, S.C.: 

EXHIBIT B

CHARTER SECR

THE ENERGY CHARTER TREATY

AND RELATED DOCUMENTS

A LEGAL FRAMEWORK

FO TERNATIONAL ENERGY COOPER ON

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THE ENERGY CHARTER TREATY

AND RELATED DOCUMENTS

A LEGAL FRAMEWORK FOR

INTERNATIONAL ENERGY COOPERATION

FOREWORD

The Energy Charter Treaty is a unique instrument for the promotion of international cooperation in the energy sector. Following its entry into force on 16 April 1998, the Treaty, together with the related documents contained in this booklet, provides an important legal basis for the creation of an open international energy market.

The Charter process includes the countries of the enlarged European Union, Central and Eastern Europe, the Russian Federation, Central Asia and the Caucasus, as well as Japan, Australia and Mongolia. The Treaty remains open for accession by all countries committed to observance of its principles. It is very positive in this regard that states such as China, Iran, South Korea and the countries of ASEAN are taking a close interest in the Charter process, thus opening up the prospect of a further extension of its geographical scope.

The primary challenge facing the constituent members of the Energy Charter process in the coming years will be that of ensuring full implementation of the Treaty's commitments. This will entail increased focus on multilateral cooperation over transit, trade, investments, environmental protection and energy efficiency. By continuing to build on its existing work in these areas, the Charter process stands ready to play a key role in translating the aim of a truly open non-discriminatory energy market into reality.

This publication of the Energy Charter Treaty and related documents has been made possible thanks to a generous financial contribution from the Netherlands. On behalf of the Energy Charter Secretariat, I would like to express my sincere gratitude for this support. I trust that this publication will provide a valuable reference tool, and also help in raising broader awareness about the provisions of the Energy Charter Treaty.

Dr Ria Kemper
Secretary General
Energy Charter Secretariat

September 2004

TABLE OF CONTENTS

EXPLANATORY NOTE

1. This publication reproduces the text of the following documents:

   - Final Act of the European Energy Charter Conference with all Annexes thereto, as opened for signature in Lisbon on 17 December 1994 and corrected by the Protocol of Correction of 2 August 1996,
   - the Chairman's Statement at Adoption Session on 17 December 1994, as reported in the Note from the Secretariat 42/94 CONF 115,
   - the Joint Memorandum of the Delegations of the Russian Federation and the European Communities on Nuclear Trade, as reported in the Note from the Secretariat 42/94 CONF 115,
   - the Concluding Document of the Hague Conference on the European Energy Charter, as signed at The Hague on 17 December 1991,
   - Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, as adopted on 24 April 1998,
   - the Chairman's Statement at the Adoption Session on 24 April 1998, as reported in the Note from the Secretariat CS (98) 338 CC 124,
   - the Chairman's Conclusion on Implementation of Trade-Related Rules, as reported in the Note from the Secretariat CS (98) 338 CC 124, and

2. The introduction to the Energy Charter Treaty and the footnotes to this publication are included for convenience and must not be read as part of any official document or as an interpretation of any provisions therein.

3. This publication does not in any way involve the responsibility of the Energy Charter Conference or the Energy Charter Secretariat.

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AN INTRODUCTION TO THE ENERGY CHARTER TREATY

WHY AN ENERGY CHARTER?

The roots of the Energy Charter date back to a political initiative launched in Europe in the early 1990s, at a time when the end of the Cold War offered an unprecedented opportunity to overcome the previous economic divisions on the European continent. Nowhere were the prospects for mutually beneficial cooperation between East and West clearer than in the energy sector. Russia and many of its neighbours were rich in energy resources but needed major investments to ensure their development, whilst the states of western Europe had a strategic interest in diversifying their sources of energy supplies. There was therefore a recognised need to ensure that a commonly accepted foundation was established for developing energy cooperation between the states of the Eurasian continent. On the basis of these considerations, the Energy Charter process was born.

More than a decade later, the role of the Charter's legally-binding foundation, the Energy Charter Treaty, remains very significant. In a world of increasing globalisation and interdependence between net exporters of energy and net importers, the value of multilateral rules providing a balanced and efficient framework for international cooperation is widely recognised.

The Energy Charter Treaty provides a multilateral framework for energy cooperation that is unique under international law, and the strategic value of these rules is likely to increase in the context of efforts to build a legal foundation for global energy security, based on the principles of open, competitive markets and sustainable development.

The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into legal force in April 1998. To date the Treaty has been signed or acceded to by fifty-one states plus the European Communities (the total number of its Signatories is therefore fifty-two).

The Treaty was developed on the basis of the European Energy Charter of 1991. Whereas the latter document was drawn up as a declaration of political intent to promote East-West energy cooperation, the Energy Charter Treaty is a legally-binding multilateral instrument, the only one of its kind dealing specifically with inter-governmental cooperation in the energy sector.

The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, thus minimising the risks associated with energy-related investments and trade.

The Treaty's provisions focus on five broad areas: the protection and promotion of foreign energy investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable); free trade in energy materials, products and energy-related equipment, based on WTO rules; freedom of energy transit through pipelines and grids; reducing the negative environmental impact of the energy cycle through improving energy efficiency; and mechanisms for the resolution of State-to-State or Investor-to-State disputes.

INVESTMENT

The fundamental objective of the Energy Charter Treaty's provisions on investment issues is to ensure the creation of a "level playing field" for energy sector investments throughout the Charter's constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments.

The Treaty ensures the protection of foreign energy investments based on the principle of non-discrimination. By accepting the Treaty, a state takes on the obligation to extend national treatment, or most-favoured nation treatment (whichever is more favourable), to nationals and legal entities of other Signatory states who have invested in its energy sector. The Treaty thus carries the equivalent legal force of a unified network of bilateral investment protection treaties.

The majority of the Treaty's investment-related provisions, aimed at the creation of the appropriate investment climate, are self-implementing. However, the Energy Charter Conference maintains a constant political focus on investment climate issues, by providing regular assessments, through survey activities and peer reviews, of investment practices among its participating states.

In its present form, the Treaty obliges Contracting Parties to accord non-discriminatory treatment only to existing investments made by investors of other Contracting Parties. The adoption of a Supplementary Treaty that would extend this obligation to ensure non-discriminatory treatment also in the pre-investment phase (the so-called "Making of Investments" stage) remains under discussion among the Energy Charter's member states.

TRADE

The Energy Charter Treaty's trade provisions, which were initially based on the trading regime of the GATT, were modified by the adoption in April 1998 of a Trade Amendment to the Treaty.

This brought the Treaty's trade provisions into line with WTO rules and practice, which are founded on the fundamental principles of non-discrimination, transparency and a commitment to the progressive liberalisation of international trade. The Trade Amendment also expands the Treaty's scope to cover trade in energy-related equipment, and sets out a mechanism for introducing in future a legally-binding stand-still on customs duties and charges for energy-related imports and exports.

The Treaty's amended trade regime represents an important stepping stone for those Signatory states that have not yet acceded to the WTO. It allows them to familiarise themselves with the practices and disciplines that WTO membership entails, through application of its rules "by reference" to trade in energy materials and products and energy-related equipment.

TRANSIT

The Energy Charter Treaty's existing transit provisions oblige its Contracting Parties to facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit. This is a critical issue for the collective energy security of the Charter's Signatory states, since energy resources are increasingly being transported across multiple national boundaries on their way from producer to consumer.

For this reason, the Charter's participating states have looked to enhance the Treaty's provisions on transit through the elaboration of a Transit Protocol, on which formal negotiations commenced in early 2000. This item remains under discussion. The Transit Protocol's aim is to develop a regime of commonly-accepted operative principles covering transit flows of energy resources, both hydrocarbons and electricity, crossing at least two national boundaries, designed to ensure the security and non-interruption of transit.

The Energy Charter Conference approved in 1998 a set of rules of procedure for the conduct of conciliation during disputes over matters of energy transit. The Conference also took positive note in 2003 of the first edition of Model Agreements on Cross-Border Pipelines, prepared on the basis of a mandate from the Conference in 1999. All of these documents are available on the Energy Charter's web site (www.encharter.org)

ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS

The Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) was signed together with the Energy Charter Treaty in December 1994. PEEREA requires its participating states to formulate clear policy aims for improving energy efficiency and reducing the energy cycle's negative environmental impact.

Through the implementation of PEEREA, the Energy Charter provides transition economies with a menu of good practices and a forum in which to share experiences and policy advice on energy efficiency issues with leading OECD states. Within this forum, particular attention is paid to such aspects of a national energy efficiency strategy as taxation, pricing policy in the energy sector, environmentally-related subsidies and other mechanisms for financing energy efficiency objectives.

PEEREA's development is currently focused on a series of in-depth energy efficiency reviews, designed to produce concrete recommendations for individual governments concerning ways of improving their national energy efficiency strategies. To date such in-depth reviews have been conducted in Denmark, the Czech Republic, Slovakia, Estonia, Moldova, Lithuania, Poland, Hungary, Turkey, Bulgaria and Romania.

The UN-ECE "Environment for Europe" Ministerial Conference, which was held in Kyiv, Ukraine, in May 2003, based its findings in the area of energy efficiency on the work carried out on PEEREA's implementation.

DISPUTE SETTLEMENT MECHANISMS

The Energy Charter Treaty establishes dispute settlement procedures for cases of investment-related disputes between an investor and a Contracting Party, and for state-to-state dispute concerning the application or interpretation of the Energy Charter Treaty between Contracting Parties.

There is, in addition, a more specific mechanism under the Treaty for trade-related disputes between Contracting Parties (envisaging the application of a panel system along the lines of WTO Dispute Settlement Understanding procedures).

The existence of the Treaty's dispute settlement procedures is of considerable value in confidence-building terms. The fact that such procedures are available, and that the Treaty's Contracting Parties have taken on the unconditional obligation to accept their application where necessary, provides reassurance for investors that, in the case of a dispute, they will be entitled to have recourse to the above mechanisms in defence of their interests.

INSTITUTIONS: THE ENERGY CHARTER CONFERENCE

The Energy Charter Conference, an inter-governmental organization, is the governing and decision-making body for the Energy Charter process, and was established by the 1994 Energy Charter Treaty. All states who have signed or acceded to the Treaty are members of the Conference, which meets on a regular basis to:

- discuss policy issues affecting energy cooperation among the Treaty's signatories;
- review implementation of the provisions of the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects; and
- consider possible new instruments and projects on energy issues.

Meetings of the Conference are normally held in Brussels. Regular meetings of the Conference's subsidiary groups on investment, trade, transit and energy efficiency are held in between Conference meetings.

Members of the Energy Charter Conference:

Albania, Armenia, Australia*, Austria, Azerbaijan, Belarus*, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland*, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Netherlands, Norway*, Poland, Portugal, Romania, Russian Federation*, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan.

* Denotes Member state in which ratification of the Energy Charter Treaty is still pending as of September 2004

Observers to the Energy Charter Conference:

States:
Algeria, Bahrain, People's Republic of China, Canada*, Islamic Republic of Iran, Republic of Korea, Kuwait, Morocco, Nigeria, Oman, Qatar, Saudi Arabia, Serbia and Montenegro*, Tunisia, United Arab Emirates, United States of America*, Venezuela.

* Denotes Observer state which has signed the 1991 European Energy Charter

International Organisations:
ASEAN, EBRD, IEA, OECD, UN-ECE, World Bank, WTO, CIS Electric Power Council, BSEC, BASREC

THE ENERGY CHARTER SECRETARIAT

The Energy Charter Conference is served by a small permanent Secretariat based in Brussels. The Secretariat is staffed by energy sector experts from various countries of the Conference's constituency, and is headed by a Secretary General.

The Secretariat's functions are:

- to monitor implementation of the Energy Charter Treaty and Protocol's obligations;
- to organise and administer meetings of the Conference and its subsidiary bodies;
- to provide analytical support and advice to the Conference and its subsidiary bodies on all aspects of the Energy Charter process;
- to represent the Energy Charter Conference in the development of its relations with non-member states and other relevant international organisations and institutions;
- to support negotiations on new instruments mandated by the Conference;
- to conduct or facilitate dispute resolution/conciliation procedures.

THE ENERGY CHARTER PROCESS

Participation in the Energy Charter process is not limited merely to the act of signing the Energy Charter Treaty. The Energy Charter represents not only a legal framework, but also a multilateral policy forum where governments from across Eurasia participate in a dialogue on issues affecting cooperation in the energy sector.

Under the Charter's auspices, a programme of work is carried out aimed both at ensuring that the provisions of the Treaty are observed at national levels, and also at encouraging dialogue between member countries on such issues as energy market restructuring, promoting energy efficiency, and reducing barriers to energy investments and trade regionally and globally.

Examples of the Energy Charter's work in this area include:

- The development of a set of Best-Practice Guidelines on Energy Market Restructuring, designed to provide practical assistance to economies in transition by examining and summarising the lessons learned by various countries in conducting energy-sector privatisations and in establishing regulatory mechanisms to ensure fair competition within a liberalised energy market.

- The development of a study on the operation of Regional Electricity Markets in the Eurasian area, aimed at identifying existing barriers to trade in electricity of a legal, technical or regulatory nature and at proposing possible means to overcome them.

- An analysis of Natural Gas Markets in the Eurasian area and the prospects for their future development in line with the Energy Charter's goal of establishing open, competitive energy markets. This analysis is designed to provide a platform for policy discussions among the Charter's member governments on issues that need to be addressed in order to strengthen their cooperation in the area of natural gas investments and trade.

- A study on the development of Co-generation and District Heating in Europe, assessing inter alia the impact of energy market reforms in transition economies on the potential for using co-generation technologies to reduce greenhouse gas emissions.

GEOGRAPHICAL EXPANSION OF THE ENERGY CHARTER

The Energy Charter is an open process. Interested non-member countries are welcome to join, subject to the approval of the Energy Charter Conference and to a demonstration by the country concerned of its readiness to take on the obligations contained in the Energy Charter Treaty.

Although the Charter began its life as a European initiative, it has long since taken on a wider geographical dimension, reflecting the tendency towards a unified Eurasian energy market. Japan, Australia and the states of Central Asia signed the Treaty in 1994-1995. They were subsequently joined by Mongolia, which acceded to the Treaty in 1999. The Asian dimension of the Charter was further strengthened when Observer status was granted to the People's Republic of China in 2001, to the Republic of Korea in 2002, and to the ASEAN Centre for Energy in 2003. The Islamic Republic of Iran became an Observer in 2002. In the Mediterranean region, discussions have been held with Morocco and Tunisia on their possible accession to the Treaty.

Participation in the Energy Charter process represents a strategic opportunity for a state to signal its readiness for improved international cooperation; stimulate investor interest in its energy sector; and build confidence and energy security with and among its neighbouring states.

ENERGY CHARTER PUBLICATIONS AND ADDITIONAL INFORMATION

The Secretariat has issued reviews, papers and other publications relating to various aspects of the Energy Charter process in recent years. These are all available online through the web site of the Energy Charter at www.encharter.org. The Secretariat also publishes a regular newsletter, "Charter News", on current developments in the Charter process. Those wishing to subscribe can do so by contacting the Secretariat at info@encharter.org.

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FINAL ACT

OF THE EUROPEAN ENERGY

CHARTER CONFERENCE

FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE

I. The final Plenary Session of the European Energy Charter Conference was held at Lisbon on 16-17 December 1994. Representatives of the Republic of Albania, the Republic of Armenia, Australia, the Republic of Austria, the Azerbaijani Republic, the Kingdom of Belgium, the Republic of Belarus, the Republic of Bulgaria, Canada, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Communities, the Republic of Finland, the French Republic, the Republic of Georgia, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, the Republic of Iceland, Ireland, the Italian Republic, Japan, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Moldova, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, the Portuguese Republic, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the Republic of Tajikistan, the Republic of Turkey, Turkmenistan, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and the Republic of Uzbekistan (hereinafter referred to as "the representatives") participated in the Conference, as did invited observers from certain countries and international organizations.

BACKGROUND

II. During the meeting of the European Council in Dublin in June 1990, the Prime Minister of the Netherlands suggested that economic recovery in Eastern Europe and the then Union of Soviet Socialist Republics could be catalysed and accelerated by co-operation in the energy sector. This suggestion was welcomed by the Council, which invited the Commission of the European Communities to study how best to implement such co-operation. In February 1991 the Commission proposed the concept of a European Energy Charter.

Following discussion of the Commission's proposal in the Council of the European Communities, the European Communities invited the other countries of Western and Eastern Europe, of the Union of Soviet Socialist Republics and the non-European members of the Organisation for Economic Co-operation and Development to attend a conference in Brussels in July 1991

to launch negotiations on the European Energy Charter. A number of other countries and international organizations were invited to attend the European Energy Charter Conference as observers.

Negotiations on the European Energy Charter were completed in 1991 and the Charter was adopted by signature of a Concluding Document at a conference held at The Hague on 16-17 December 1991. Signatories of the Charter, then or subsequently, include all those listed in Section I above, other than observers.

The signatories of the European Energy Charter undertook:

- to pursue the objectives and principles of the Charter and implement and broaden their co-operation as soon as possible by negotiating in good faith a Basic Agreement and Protocols.

The European Energy Charter Conference accordingly began negotiations on a Basic Agreement — later called the Energy Charter Treaty — designed to promote East-West industrial co-operation by providing legal safeguards in areas such as investment, transit and trade. It also began negotiations on Protocols in the fields of energy efficiency, nuclear safety and hydrocarbons, although in the last case negotiations were later suspended until completion of the Energy Charter Treaty.

Negotiations on the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were successfully completed in 1994.

THE ENERGY CHARTER TREATY

III. As a result of its deliberations the European Energy Charter Conference has adopted the text of the Energy Charter Treaty (hereinafter referred to as the "Treaty") which is set out in Annex 1 and Decisions with respect thereto which are set out in Annex 2, and agreed that the Treaty would be open for signature at Lisbon from 17 December 1994 to 16 June 1995.

UNDERSTANDINGS

IV. By signing the Final Act, the representatives agreed to adopt the following Understandings with respect to the Treaty:

1. With respect to the Treaty as a whole

   (a) The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term co-operation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.

   (b) The provisions of the Treaty do not:

      (i) oblige any Contracting Party to introduce mandatory third party access; or

      (ii) prevent the use of pricing systems which, within a particular category of consumers, apply identical prices to customers in different locations.

   (c) Derogations from most favoured nation treatment are not intended to cover measures which are specific to an Investor or group of Investors, rather than applying generally.

2. 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.

3. 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.

4. With respect to Article 1(8)

Consistent with Australia's foreign investment policy, the establishment of a new mining or raw materials processing project in Australia with total investment of $A 10 million or more by a foreign interest, even where that foreign interest is already operating a similar business in Australia, is considered as the making of a new investment.

5. With respect to Article 1(12)

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

6. With respect to Article 5(1)

   The representatives' agreement to Article 5 is not meant to imply any position on whether or to what extent the provisions of the "Agreement on Trade-Related Investment Measures" annexed to the Final Act of the Uruguay Round of Multilateral Trade Negotiations are implicit in articles III and XI of the GATT.

7. With respect to Article 6

   (a) The unilateral and concerted anti-competitive conduct referred to in Article 6 (2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.

   b) "Enforcement" and "enforces" include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative action as well as by way of any decision or further law granting or continuing an authorization.

8. With respect to Article 7(4)

   The applicable legislation would include provisions on environmental protection, land use, safety, or technical standards.

9. 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.

10. With respect to Article 10(4)

    The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatization) and to the dismantling of monopolies (demonopolization).

11. With respect to Articles 10(4) and 29(6)

Contracting Parties may consider any connection between the provisions of Article 10(4) and Article 29(6).

12. With respect to Article 14(5)

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.

13. With respect to Article 19(1)(i)

It is for each Contracting Party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed.

14. With respect to Articles 22 and 23

With regard to trade in Energy Materials and Products governed by Article 29, that Article specifies the provisions relevant to the subjects covered by Articles 22 and 23.

15. 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 recognized 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.

16. With respect to Article 26(2)(a)

Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.

17. 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 organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970.

18. With respect to Article 29(2)(a)

(a) Where a provision of GATT 1947 or a Related Instrument referred to in this paragraph provides for joint action by parties to the GATT, it is intended that the Charter Conference take such action.

(b) The notion "applied on 1 March 1994 and practised with regard to Energy Materials and Products by parties to GATT 1947 among themselves" is not intended to refer to cases where a party to the GATT has invoked article XXXV of the GATT, thereby disapplying the GATT vis-à-vis another party to the GATT, but nevertheless applies unilaterally on a de facto basis some provisions of the GATT vis-à-vis that other party to the GATT.

19. With respect to Article 33

The provisional Charter Conference should at the earliest possible date decide how best to give effect to the goal of Title III of the European Energy Charter that Protocols be negotiated in areas of co-operation such as those listed in Title III of the Charter.

20. With respect to Article 34

(a) The provisional Secretary-General should make immediate contact with other international bodies in order to discover the terms on which they might be willing to undertake tasks arising from the Treaty and the Charter. The provisional Secretary-General might report back to the provisional Charter Conference at the meeting which Article 45(4) requires to be convened not later than 180 days after the opening date for signature of the Treaty.

(b) The Charter Conference should adopt the annual budget before the beginning of the financial year.

21. With respect to Article 34(3)(m)

The technical changes to Annexes might for instance include, the listing of non-signatories or of signatories that have evinced their intention not to ratify, or additions to Annexes N and VC. It is intended that the Secretariat would propose such changes to the Charter Conference when appropriate.

22. With respect to Annex TFU(1)

(a) If some of the parties to an agreement referred to in paragraph (1) have not signed or acceded to the Treaty at the time required for notification, those parties to the agreement which have signed or acceded to the Treaty may notify on their behalf.

(b) The need in general for notification of agreements of a purely commercial nature is not foreseen because such agreements should not raise a question of compliance with Article 29(2)(a), even when they are entered into by state agencies. The Charter Conference could, however, clarify for purposes of Annex TFU which types of agreements referred to in Article 29(2)(b) require notification under the Annex and which types do not.

DECLARATIONS

V. The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty.

VI. The representatives also noted the following Declarations that were made with respect to the Treaty:

1. With respect to Article 1(6)

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

2. With respect to Articles 5 and 10(11)

Australia notes that the provisions of Articles 5 and 10(11) do not diminish its rights and obligations under the GATT, including as elaborated in the Uruguay Round Agreement on Trade-Related Investment Measures, particularly with respect to the list of exceptions in Article 5(3), which it considers incomplete.

Australia further notes that it would not be appropriate for dispute settlement bodies established under the Treaty to give interpretations of GATT articles III and XI in the context of disputes between parties to the GATT or between an Investor of a party to the GATT and another party to the GATT. It considers that with respect to the application of Article 10(11) between an Investor and a party to the GATT, the only issue that can be considered under Article 26 is the issue of the awards of arbitration in the event that a GATT panel or the WTO dispute settlement body first establishes that a trade-related investment measure maintained by the Contracting Party is inconsistent with its obligations under the GATT or the Agreement on Trade-Related Investment Measures.

3. With respect to Article 7

The European Communities and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law.

They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.

4. With respect to Article 10[1]

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 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.

1 Editor's note: Canada and the United States of America have not signed the Energy Charter Treaty.

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. With respect to Article 25

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

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

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

The European Communities and their Member States further recall that:

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

6. With respect to Article 40

Denmark recalls that the European Energy Charter does not apply to Greenland and the Faroe Islands until notice to this effect has been received from the local governments of Greenland and the Faroe Islands.

In this respect Denmark affirms that Article 40 of the Treaty applies to Greenland and the Faroe Islands.

7. With respect to Annex G (4)

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

(b) The European Communities and Ukraine declare that, in accordance with the Agreement on Partnership and Co-operation signed at Luxembourg on 14 June 1994 and the Interim Agreement thereto, initialled there the same day, trade in nuclear materials between them shall be exclusively governed by the provisions of a specific agreement to be concluded between the European Atomic Energy Community and Ukraine.

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

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

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

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

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

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

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

(f) The European Communities and Uzbekistan declare that trade in nuclear materials between them shall be exclusively governed by the provisions of a specific agreement to be concluded between the European Atomic Energy Community and Uzbekistan.

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

THE ENERGY CHARTER PROTOCOL ON ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS

VII. The European Energy Charter Conference has adopted the text of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects which is set out in Annex 3.

THE EUROPEAN ENERGY CHARTER

VIII. The provisional Charter Conference and the Charter Conference provided for in the Treaty shall henceforth be responsible for making decisions on requests to sign the Concluding Document of the Hague Conference on the European Energy Charter and the European Energy Charter adopted thereby.

DOCUMENTATION

IX. The records of negotiations of the European Energy Charter Conference will be deposited with the Secretariat.

Done at Lisbon on the seventeenth day of December in the year one thousand nine hundred and ninety-four.[2]

2 For Signatories see the Energy Charter Secretariat website (www.encharter.org).

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THE ENERGY CHARTER TREATY

(ANNEX 1 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

THE ENERGY CHARTER TREATY [3]

(ANNEX 1 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

PREAMBLE

The Contracting Parties to this Treaty,

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990;

Having regard to 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;

Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their co-operation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;

Having regard to the objective of progressive liberalization of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the General Agreement on Tariffs and Trade and its Related Instruments and as otherwise provided for in this Treaty;

3 See Final Act of the European Energy Charter Conference, Understandings, n. 1. with respect to the Treaty as a whole, p. 25; Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 1. with respect to the Treaty as a whole, p. 135; note 29, p. 60 and note 40, p. 72.

Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and related equipment, technologies and services;

Looking to the eventual membership in the General Agreement on Tariffs and Trade of those Contracting Parties which are not currently parties thereto and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership;

Mindful of the rights and obligations of certain Contracting Parties which are also parties to the General Agreement on Tariffs and Trade and its Related Instruments;

Having regard to competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position;

Having regard also to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear non-proliferation obligations or understandings;

Recognizing the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and

Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,

HAVE AGREED AS FOLLOWS:

PART I
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.

(2) "Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force.

(3) "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

(4) "Energy Materials and Products", based on the Harmonized System of the Customs Co-operation Council and the Combined Nomenclature of the European Communities, means the items included in Annex EM.

(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.[4]

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:[5]

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

4 See Final Act of the European Energy Charter Conference, Understandings, n. 2. with respect to Article 1 (5), p. 25.

5 See Final Act of the European Energy Charter Conference, Understandings, n. 3. with respect to Article 1(6), p. 26; Final Act of the European Energy Charter Conference, Declarations, n. 1. with respect to Article 1(6), p. 30; and note 22, p. 54.

(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.

(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 organization organized in accordance with the law applicable in that Contracting Party;[6]

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

6 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 5. with Respect to Articles 24(4)(a) and 25, p. 137; note 38, p. 70; and note 39, p. 71.

(8) "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.[7]

(9) "Returns" means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.

(10) "Area" means with respect to a state that is a Contracting Party:

(a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organization which is a Contracting Party, Area means the Areas of the member states of such Organization, under the provisions contained in the agreement establishing that Organization.

(11) (a) "GATT" means "GATT 1947" or "GATT 1994", or both of them where both are applicable.

(b) "GATT 1947" means the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.

(c) "GATT 1994" means the General Agreement on Tariffs and Trade as specified in Annex 1A of the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified.

A party to the Agreement Establishing the World Trade Organization is considered to be a party to GATT 1994.

(d) "Related Instruments" means, as appropriate:

(i) agreements, arrangements or other legal instruments, including decisions, declarations and understandings, concluded under the auspices of GATT 1947 as subsequently rectified, amended or modified; or

7 See Final Act of the European Energy Charter Conference, Understandings, n. 4. with respect to Article 1(8), p. 26.

(ii) the Agreement Establishing the World Trade Organization including its Annex 1 (except GATT 1994), its Annexes 2, 3 and 4, and the decisions, declarations and understandings related thereto, as subsequently rectified, amended or modified.

(12) "Intellectual Property" includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.[8]

(13) (a) "Energy Charter Protocol" or "Protocol" means a treaty, the negotiation of which is authorized and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of co-operation pursuant to Title III of the Charter.

(b) "Energy Charter Declaration" or "Declaration" means a non-binding instrument, the negotiation of which is authorized and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.

(14) "Freely Convertible Currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

ARTICLE 2
PURPOSE OF THE TREATY

This Treaty establishes a legal framework in order to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

8 See Final Act of the European Energy Charter Conference, Understandings, n. 5. with respect to Article 1(12), p. 27.

PART II
COMMERCE

ARTICLE 3
INTERNATIONAL MARKETS

The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products.

ARTICLE 4
NON-DEROGATION FROM GATT AND RELATED INSTRUMENTS

Nothing in this Treaty shall derogate, as between particular Contracting Parties which are parties to the GATT, from the provisions of the GATT and Related Instruments as they are applied between those Contracting Parties.

ARTICLE 5
TRADE-RELATED INVESTMENT MEASURES [9]

(1) A Contracting Party shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT; this shall be without prejudice to the Contracting Party's rights and obligations under the GATT and Related Instruments and Article 29. [10]

(2) Such measures include any investment measure which is mandatory or enforceable under domestic law or under any administrative ruling, or compliance with which is necessary to obtain an advantage, and which requires:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports;

9 See Final Act of the European Energy Charter Conference, Declarations, n. 2. with respect to Articles 5 and 10(11), p. 30; Article 28, p. 76; and Annex D, p. 105.

10 See Final Act of the European Energy Charter Conference, Understandings, n. 6. with respect to Article 5(1), p. 27.

or which restricts:

(c) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(d) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(e) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

(3) Nothing in paragraph (1) shall be construed to prevent a Contracting Party from applying the trade-related investment measures described in subparagraphs (2)(a) and (c) as a condition of eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programmes. [11]

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

ARTICLE 6
COMPETITION [12]

(1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.

(2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector. [13]

11 See Final Act of the European Energy Charter Conference, Declarations, n. 2. with respect to Articles 5 and 10(11), p. 30.

12 See Final Act of the European Energy Charter Conference, Understandings, n. 7. with respect to Article 6, p. 27.

13 See Article 32(1), p. 79 and Annex T, pp. 113 and 114.

(3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.

(4) Contracting Parties may co-operate in the enforcement of their competition rules by consulting and exchanging information.

(5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and co-operation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development. [14]

(6) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy.

(7) The procedures set forth in paragraph (5) and Article 27(1) shall be the exclusive means within this Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article.

14 See Article 32(1), p. 79 and Annex T, pp. 113 and 119.

ARTICLE 7
TRANSIT [15]

(1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.

(2) Contracting Parties shall encourage relevant entities to co-operate in:

(a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products;

(b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party;

(c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products;

(d) facilitating the interconnection of Energy Transport Facilities.

(3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

(4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1). [16]

(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

15 See Final Act of the European Energy Charter Conference, Declarations, n. 3. with respect to Article 7, p. 31.

16 See Article 32(1), p. 79 and Annex T, pp. 113 and 122.

(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.

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

(7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute:

(a) A Contracting Party party to the dispute may refer it to the Secretary-General by a notification summarizing the matters in dispute. The Secretary-General shall notify all Contracting Parties of any such referral.

(b) Within 30 days of receipt of such a notification, the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.

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

(d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.

(e) Notwithstanding subparagraph (b) the Secretary-General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute.

(f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

(8) Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.

(9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4).

(10) For the purposes of this Article:

(a) "Transit" means

(i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or

(ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.

(b) "Energy Transport Facilities" consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.

ARTICLE 8
TRANSFER OF TECHNOLOGY

(1) The Contracting Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis to assist effective trade in Energy Materials and Products and Investment and to implement the objectives of the Charter subject to their laws and regulations, and to the protection of Intellectual Property rights.

(2) Accordingly, to the extent necessary to give effect to paragraph (1) the Contracting Parties shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

ARTICLE 9
ACCESS TO CAPITAL [17]

(1) The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties, on a basis no less favourable than that which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third state, whichever is the most favourable. [18]

17 See Final Act of the European Energy Charter Conference, Understandings, n. 9. with respect to Articles 9, 10 and Part V, p. 27.

18 See Article 32(1), p. 79 and Annex T, pp. 113 and 124.

(2) A Contracting Party may adopt and maintain programmes providing for access to public loans, grants, guarantees or insurance for facilitating trade or Investment abroad. It shall make such facilities available, consistent with the objectives, constraints and criteria of such programmes (including any objectives, constraints or criteria relating to the place of business of an applicant for any such facility or the place of delivery of goods or services supplied with the support of any such facility) for Investments in the Economic Activity in the Energy Sector of other Contracting Parties or for financing trade in Energy Materials and Products with other Contracting Parties.

(3) Contracting Parties shall, in implementing programmes in Economic Activity in the Energy Sector to improve the economic stability and investment climates of the Contracting Parties, seek as appropriate to encourage the operations and take advantage of the expertise of relevant international financial institutions.

(4) Nothing in this Article 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
INVESTMENT PROMOTION AND PROTECTION

ARTICLE 10
PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS [19]

(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. [20] 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. [21]

(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).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic

19 See Final Act of the European Energy Charter Conference, Understandings, n. 9. with respect to Articles 9, 10 and Part V, p. 27 and Declarations, n. 4. with respect to Article 10, p. 31.

20 See Final Act of the European Energy Charter Conference, Understandings, n. 17. with respect to Articles 26 and 27, p. 28 and Chairman's Statement at Adoption Session on 17 December 1994, p. 157.

21 See Article 26(3)(c), p. 73; Article 27(2), p. 75 and Annex IA, p. 98.

Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.[22]

(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

(a) limit to the minimum the exceptions to the Treatment described in paragraph (3);

(b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

(6) (a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(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.[23]

(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each

22 See Final Act of the European Energy Charter Conference, Understandings, n. 10. with respect to Article 10(4), p. 27; n. 11 with respect to Articles 10(4) and 29(6), p. 28; Final Act of the European Energy Charter Conference, Declarations, n. 1. with respect to Article 1(6), p. 30 and Chairman's Statement at Adoption Session on 17 December 1994, p. 157.

23 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 2. with respect to Article 10(7), p. 135; Article 32(1), p. 79 and Annex T pp. 113 and 126.

Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.

(9) Each state or Regional Economic Integration Organization which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarizing all laws, regulations or other measures relevant to:

(a) exceptions to paragraph (2); or

(b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

(10) Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

(11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part. [24]

(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 authorizations.

24 See Final Act of the European Energy Charter Conference, Declarations, n. 2. with respect to Articles 5 and 10(11), p. 30.

ARTICLE 11
KEY PERSONNEL

(1) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith requests by Investors of another Contracting Party, and key personnel who are employed by such Investors or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services.

(2) A Contracting Party shall permit Investors of another Contracting Party which have Investments in its Area, and Investments of such Investors, to employ any key person of the Investor's or the Investment's choice regardless of nationality and citizenship provided that such key person has been permitted to enter, stay and work in the Area of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such key person.

ARTICLE 12
COMPENSATION FOR LOSSES

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

ARTICLE 13
EXPROPRIATION

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization 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.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

ARTICLE 14
TRANSFERS RELATED TO INVESTMENTS [25]

(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 amortization of principal and accrued interest payments pursuant to a loan agreement;

(d) unspent earnings [26] 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. [27]

(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.

25 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 3. with respect to Article 14, p. 135.

26 See Article 32(1), p. 79 and Annex T, pp. 113 and 127.

27 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 4. with respect to Article 14 (2), p. 136.

(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. [28]

(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 GATT and Related Instruments 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 authorized or specified in an investment agreement, investment authorization, or other written agreement between the Contracting Party and either an Investor of another Contracting Party or its Investment.

ARTICLE 15
SUBROGATION

(1) If a Contracting Party or its designated agency (hereinafter referred to as the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the "Party Indemnified") in the Area of another Contracting Party (hereinafter referred to as the "Host Party"), the Host Party shall recognize:

(a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and

(b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.

(2) The Indemnifying Party shall be entitled in all circumstances to:

(a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and

(b) the same payments due pursuant to those rights and claims,

as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.

28 See Final Act of the European Energy Charter Conference, Understandings, n. 12. with respect to Article 14(5), p. 28.

(3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.

ARTICLE 16
RELATION TO OTHER AGREEMENTS [29]

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.

ARTICLE 17
NON-APPLICATION OF PART III IN CERTAIN CIRCUMSTANCES

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 organized; 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

29 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 1. with respect to the Treaty as a whole, p. 135 and n. 3. with respect to Article 14, p. 135.

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

PART IV
MISCELLANEOUS PROVISIONS

ARTICLE 18
SOVEREIGNTY OVER ENERGY RESOURCES

(1) The Contracting Parties recognize state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.

(2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources. [30]

(3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.

(4) The Contracting Parties undertake to facilitate access to energy resources, inter alia, by allocating in a non-discriminatory manner on the basis of published criteria authorizations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

ARTICLE 19
ENVIRONMENTAL ASPECTS

(1) In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall

30 See Final Act of the European Energy Charter Conference, Declarations, n. V., p. 30 and Chairman's Statement at Adoption Session on 17 December 1994, p. 157.

strive to take precautionary measures to prevent or minimize environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. Contracting Parties shall accordingly:

(a) take account of environmental considerations throughout the formulation and implementation of their energy policies;

(b) promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle;

(c) having regard to Article 34(4), encourage co-operation in the attainment of the environmental objectives of the Charter and co-operation in the field of international environmental standards for the Energy Cycle, taking into account differences in adverse effects and abatement costs between Contracting Parties;

(d) have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution;

(e) promote the collection and sharing among Contracting Parties of information on environmentally sound and economically efficient energy policies and Cost-Effective practices and technologies;

(f) promote public awareness of the Environmental Impacts of energy systems, of the scope for the prevention or abatement of their adverse Environmental Impacts, and of the costs associated with various prevention or abatement measures;

(g) promote and co-operate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimize harmful Environmental Impacts of all aspects of the Energy Cycle in an economically efficient manner;

(h) encourage favourable conditions for the transfer and dissemination of such technologies consistent with the adequate and effective protection of Intellectual Property rights;

(i) promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects; [31]

31 See Final Act of the European Energy Charter Conference, Understandings, n. 13. with respect to Article 19(1)(i), p. 28.

(j) promote international awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards;

(k) participate, upon request, and within their available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties.

(2) At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.

(3) For the purposes of this Article:

(a) "Energy Cycle" means the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimizing harmful Environmental Impacts;

(b) "Environmental Impact" means any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(c) "Improving Energy Efficiency" means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output;

(d) "Cost-Effective" means to achieve a defined objective at the lowest cost or to achieve the greatest benefit at a given cost.

ARTICLE 20
TRANSPARENCY

(1) Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the GATT and relevant Related Instruments.

(2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor.

(3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request. [32]

ARTICLE 21
TAXATION

(1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

(2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:

(a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).

32 See Article 32(1), p. 79 and Annex T, pp. 113 and 128.

(3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:

(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or

(b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

(4) Article 29(2) to (6) shall apply to Taxation Measures other than those on income or on capital.

(5) (a) Article 13 shall apply to taxes.

(b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:

(i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;

(ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Co-operation and Development;

(iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an

expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;

(iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

(6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.

(7) For the purposes of this Article:

(a) The term "Taxation Measure" includes:

(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and

(ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

(b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

(c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.

(d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties.

ARTICLE 22
STATE AND PRIVILEGED ENTERPRISES [33]

(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty. [34]

(2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.

(3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty. [35]

(4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.

(5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual.

ARTICLE 23
OBSERVANCE BY SUB-NATIONAL AUTHORITIES [36]

(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.

(2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.

33 See Final Act of the European Energy Charter Conference, Understandings, n. 14. with respect to Articles 22 and 23, p. 28 and note 44, p. 77.

34 See Article 32(1), p. 79.

35 See Article 32(1), p. 79 and Annex T, pp. 113 and 130.

36 See Final Act of the European Energy Charter Conference, Understandings, n. 14. with respect to Articles 22 and 23, p. 28 and note 44, p. 77.

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ARTICLE 24
EXCEPTIONS [37]

(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

37 See Final Act of the European Energy Charter Conference, Understandings, n. 15. with respect to Article 24, p. 28 and note 44, p. 77.

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 [38]; or

(b) which is accorded by a bilateral or multilateral agreement concerning economic co-operation 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.

38 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 5. with respect to Articles 24(4)(a) and 25, p. 137 and note 6, p. 42.

ARTICLE 25
ECONOMIC INTEGRATION AGREEMENTS [39]

(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.

(3) This Article shall not affect the application of the GATT and Related Instruments according to Article 29.

39 See Final Act of the European Energy Charter Conference, Declarations, n. 5. with respect to Article 25, p. 32 and Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 5. with respect to Article 24(4)(a) and 25, p. 137 and note 6, p. 42.

PART V
DISPUTE SETTLEMENT [40]

ARTICLE 26
SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY [41]

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute; [42]

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(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 in accordance with the provisions of this Article.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of

40 See Decisions with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference), n. 1. with respect to the Treaty as a whole, p. 135 and Final Act of the European Energy Charter Conference, Understandings, n. 9. with respect to Articles 9, 10 and Part V, p. 27.

41 See Final Act of the European Energy Charter Conference, Understandings, n. 17. with respect to Articles 26 and 27, p. 28.

42 See Final Act of the European Energy Charter Conference, Understandings, n. 16. with respect to Article 26(2)(a), p. 28.

the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

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

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(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.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

ARTICLE 27
SETTLEMENT OF DISPUTES BETWEEN CONTRACTING PARTIES [43]

(1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.

43 See Final Act of the European Energy Charter Conference, Understandings, n. 17. with respect to Articles 26 and 27, p. 28 and Article 28, p. 76.

(2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.

(3) Such an ad hoc arbitral tribunal shall be constituted as follows:

(a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;

(b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d);

(c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in paragraph (2), the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with subparagraph (d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice;

(d) Appointments requested to be made in accordance with this paragraph shall be made by the Secretary-General of the Permanent Court of International Arbitration within 30 days of the receipt of a request to do so. If the Secretary-General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy;

(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, of the members to be appointed;

(f) In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members;

(g) The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law;

(h) The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute;

(i) Where, in making an award, a tribunal finds that a measure of a regional or local government or authority within the Area of a Contracting Party listed in Part I of Annex P is not in conformity with this Treaty, either party to the dispute may invoke the provisions of Part II of Annex P;

(j) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute;

(k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in The Hague, and use the premises and facilities of the Permanent Court of Arbitration;

(l) A copy of the award shall be deposited with the Secretariat which shall make it generally available.

ARTICLE 28
NON-APPLICATION OF ARTICLE 27 TO CERTAIN DISPUTES

A dispute between Contracting Parties with respect to the application or interpretation of Article 5 or 29 shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree.

PART VI
TRANSITIONAL PROVISIONS

ARTICLE 29
INTERIM PROVISIONS ON TRADE-RELATED MATTERS [44]

(1) The provisions of this Article shall apply to trade in Energy Materials and Products while any Contracting Party is not a party to the GATT and Related Instruments.

(2) (a) Trade in Energy Materials and Products between Contracting Parties at least one of which is not a party to the GATT or a relevant Related Instrument shall be governed, subject to subparagraphs (b) and (c) and to the exceptions and rules provided for in Annex G, by the provisions of GATT 1947 and Related Instruments, as applied on 1 March 1994 and practised with regard to Energy Materials and Products by parties to GATT 1947 among themselves, as if all Contracting Parties were parties to GATT 1947 and Related Instruments. [45]

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

(c) As concerns trade between any two parties to the GATT, subparagraph (a) shall not apply if either of those parties is not a party to GATT 1947.

(3) Each signatory to this Treaty, and each state or Regional Economic Integration Organization acceding to this Treaty, shall on the date of its signature or of its deposit of its instrument of accession provide to the Secretariat a list of all tariff rates and other charges levied on Energy Materials and Products at the time of importation or exportation, notifying the level of such rates and charges applied on such date of signature or deposit. Any changes to such rates or other charges shall be notified to the Secretariat, which shall inform the Contracting Parties of such changes.

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44 See Final Act of the European Energy Charter Conference, Understandings, n. 14. with respect to Articles 22 and 23, p. 28; 15. with respect to Article 24, p. 28 and Article 28, p. 76.

45 See Final Act of the European Energy Charter Conference, Understandings, n. 18. with respect to Article 29(2)(a), p. 29 and Chairman's Statement at Adoption Session on 17 December 1994, p. 157.

(4) Each Contracting Party shall endeavour not to increase any tariff rate or other charge levied at the time of importation or exportation:

(a) in the case of the importation of Energy Materials and Products described in Part I of the Schedule relating to the Contracting Party referred to in article II of the GATT, above the level set forth in that Schedule, if the Contracting Party is a party to the GATT;

(b) in the case of the exportation of Energy Materials and Products, and that of their importation if the Contracting Party is not a party to the GATT, above the level most recently notified to the Secretariat, except as permitted by the provisions made applicable by subparagraph (2)(a).

(5) A Contracting Party may increase such tariff rate or other charge above the level referred to in paragraph (4) only if:

(a) in the case of a rate or other charge levied at the time of importation, such action is not inconsistent with the applicable provisions of the GATT other than those provisions of GATT 1947 and Related Instruments listed in Annex G and the corresponding provisions of GATT 1994 and Related Instruments; or

(b) it has, to the fullest extent practicable under its legislative procedures, notified the Secretariat of its proposal for such an increase, given other interested Contracting Parties reasonable opportunity for consultation with respect to its proposal, and accorded consideration to any representations from such Contracting Parties.

(6) Signatories undertake to commence negotiations not later than 1 January 1995 with a view to concluding by 1 January 1998, as appropriate in the light of any developments in the world trading system, a text of an amendment to this Treaty which shall, subject to conditions to be laid down therein, commit each Contracting Party not to increase such tariffs or charges beyond the level prescribed under that amendment. [46]

(7) ANNEX D shall apply to disputes regarding compliance with provisions applicable to trade under this Article and, unless both Contracting Parties agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a party to the GATT, except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:

(a) has been notified in accordance with and meets the other requirements of subparagraph (2)(b) and Annex TFU; or

46 See Final Act of the European Energy Charter Conference, Understandings, n. 11, with respect to Article 10(4) and 29(6), p. 28.

(b) establishes a free-trade area or a customs union as described in article XXIV of the GATT.

ARTICLE 30
DEVELOPMENTS IN INTERNATIONAL TRADING ARRANGEMENTS

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

ARTICLE 31
ENERGY-RELATED EQUIPMENT

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

ARTICLE 32
TRANSITIONAL ARRANGEMENTS

(1) In recognition of the need for time to adapt to the requirements of a market economy, a Contracting Party listed in Annex T may temporarily suspend full compliance with its obligations under one or more of the following provisions of this Treaty, subject to the conditions in paragraphs (3) to (6):

Article 6(2) and (5) [47]

Article 7(4) [48]

Article 9(1) [49]

Article 10(7) specific measures [50]

Article 14(1)(d) related only to transfer of unspent earnings [51]

47 "Competition"; p. 46.

48 "Transit"; p. 48.

49 "Access to Capital"; p. 51.

50 "Promotion, Protection, and Treatment of Investments"; p. 53.

51 "Transfers Related to Investments"; p. 58.

Article 20(3) [52]

Article 22(1) and (3) [53]

(2) Other Contracting Parties shall assist any Contracting Party which has suspended full compliance under paragraph (1) to achieve the conditions under which such suspension can be terminated. This assistance may be given in whatever form the other Contracting Parties consider most effective to respond to the needs notified under subparagraph (4)(c) including, where appropriate, through bilateral or multilateral arrangements.

(3) The applicable provisions, the stages towards full implementation of each, the measures to be taken and the date or, exceptionally, contingent event, by which each stage shall be completed and measure taken are listed in Annex T for each Contracting Party claiming transitional arrangements. Each such Contracting Party shall take the measure listed by the date indicated for the relevant provision and stage as set out in Annex T. Contracting Parties which have temporarily suspended full compliance under paragraph (1) undertake to comply fully with the relevant obligations by 1 July 2001. Should a Contracting Party find it necessary, due to exceptional circumstances, to request that the period of such temporary suspension be extended or that any further temporary suspension not previously listed in Annex T be introduced, the decision on a request to amend Annex T shall be made by the Charter Conference.

(4) A Contracting Party which has invoked transitional arrangements shall notify the Secretariat no less often than once every 12 months:

(a) of the implementation of any measures listed in its Annex T and of its general progress to full compliance;

(b) of the progress it expects to make during the next 12 months towards full compliance with its obligations, of any problem it foresees and of its proposals for dealing with that problem;

(c) of the need for technical assistance to facilitate completion of the stages set out in Annex T as necessary for the full implementation of this Treaty, or to deal with any problem notified pursuant to subparagraph (b) as well as to promote other necessary market-oriented reforms and modernization of its energy sector;

(d) of any possible need to make a request of the kind referred to in paragraph (3).

52 "Transparency"; p. 64.

53 "State and Privileged Enterprises"; p. 68.

(5) The Secretariat shall:

(a) circulate to all Contracting Parties the notifications referred to in paragraph (4);

(b) circulate and actively promote, relying where appropriate on arrangements existing within other international organizations, the matching of needs for and offers of technical assistance referred to in paragraph (2) and subparagraph (4)(c);

(c) circulate to all Contracting Parties at the end of each six month period a summary of any notifications made under subparagraph (4)(a) or (d).

(6) The Charter Conference shall annually review the progress by Contracting Parties towards implementation of the provisions of this Article and the matching of needs and offers of technical assistance referred to in paragraph (2) and subparagraph (4)(c). In the course of that review it may decide to take appropriate action.

PART VII
STRUCTURE AND INSTITUTIONS

ARTICLE 33
ENERGY CHARTER PROTOCOLS AND DECLARATIONS [54]

(1) The Charter Conference may authorize the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter.

(2) Any signatory to the Charter may participate in such negotiation.

(3) A state or Regional Economic Integration Organization shall not become a party to a Protocol or Declaration unless it is, or becomes at the same time, a signatory to the Charter and a Contracting Party to this Treaty.

(4) Subject to paragraph (3) and subparagraph (6)(a), final provisions applying to a Protocol shall be defined in that Protocol.

(5) A Protocol shall apply only to the Contracting Parties which consent to be bound by it, and shall not derogate from the rights and obligations of those Contracting Parties not party to the Protocol.

(6) (a) A Protocol may assign duties to the Charter Conference and functions to the Secretariat, provided that no such assignment may be made by an amendment to a Protocol unless that amendment is approved by the Charter Conference, whose approval shall not be subject to any provisions of the Protocol which are authorized by subparagraph (b).

(b) A Protocol which provides for decisions thereunder to be taken by the Charter Conference may, subject to subparagraph (a), provide with respect to such decisions:

(i) for voting rules other than those contained in Article 36;

(ii) that only parties to the Protocol shall be considered to be Contracting Parties for the purposes of Article 36 or eligible to vote under the rules provided for in the Protocol.

54 See Final Act of the European Energy Charter Conference, Understandings, n. 19. with respect to Article 33, p. 29.

ARTICLE 34
ENERGY CHARTER CONFERENCE [55]

(1) The Contracting Parties shall meet periodically in the Energy Charter Conference (referred to herein as the "Charter Conference") at which each Contracting Party shall be entitled to have one representative. Ordinary meetings shall be held at intervals determined by the Charter Conference.

(2) Extraordinary meetings of the Charter Conference may be held at such times as may be determined by the Charter Conference, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to the Contracting Parties by the Secretariat, it is supported by at least one-third of the Contracting Parties.

(3) The functions of the Charter Conference shall be to:

(a) carry out the duties assigned to it by this Treaty and any Protocols;

(b) keep under review and facilitate the implementation of the principles of the Charter and of the provisions of this Treaty and the Protocols;

(c) facilitate in accordance with this Treaty and the Protocols the co-ordination of appropriate general measures to carry out the principles of the Charter;

(d) consider and adopt programmes of work to be carried out by the Secretariat;

(e) consider and approve the annual accounts and budget of the Secretariat;

(f) consider and approve or adopt the terms of any headquarters or other agreement, including privileges and immunities considered necessary for the Charter Conference and the Secretariat;

(g) encourage co-operative efforts aimed at facilitating and promoting market-oriented reforms and modernization of energy sectors in those countries of Central and Eastern Europe and the former Union of Soviet Socialist Republics undergoing economic transition;

(h) authorize and approve the terms of reference for the negotiation of Protocols, and consider and adopt the texts thereof and of amendments thereto;

(i) authorize the negotiation of Declarations, and approve their issuance;

(j) decide on accessions to this Treaty;

55 See Final Act of the European Energy Charter Conference, Understandings, n. 20. with respect to Article 34, p. 29.

(k) authorize the negotiation of and consider and approve or adopt association agreements;

(l) consider and adopt texts of amendments to this Treaty;

(m) consider and approve modifications of and technical changes to the Annexes to this Treaty; [56]

(n) appoint the Secretary-General and take all decisions necessary for the establishment and functioning of the Secretariat including the structure, staff levels and standard terms of employment of officials and employees.

(4) In the performance of its duties, the Charter Conference, through the Secretariat, shall co-operate with and make as full a use as possible, consistently with economy and efficiency, of the services and programmes of other institutions and organizations with established competence in matters related to the objectives of this Treaty.

(5) The Charter Conference may establish such subsidiary bodies as it considers appropriate for the performance of its duties.

(6) The Charter Conference shall consider and adopt rules of procedure and financial rules.

(7) In 1999 and thereafter at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent to which the provisions of the Treaty and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat.

ARTICLE 35
SECRETARIAT

(1) In carrying out its duties, the Charter Conference shall have a Secretariat which shall be composed of a Secretary-General and such staff as are the minimum consistent with efficient performance.

(2) The Secretary-General shall be appointed by the Charter Conference. The first such appointment shall be for a maximum period of five years.

56 See Final Act of the European Energy Charter Conference, Understandings, n. 21. with respect to Article 34(3)(m), p. 29.

(3) In the performance of its duties the Secretariat shall be responsible to and report to the Charter Conference.

(4) The Secretariat shall provide the Charter Conference with all necessary assistance for the performance of its duties and shall carry out the functions assigned to it in this Treaty or in any Protocol and any other functions assigned to it by the Charter Conference.

(5) The Secretariat may enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions.

ARTICLE 36
VOTING

(1) Unanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions by the Charter Conference to:

(a) adopt amendments to this Treaty other than amendments to Articles 34 and 35 and Annex T;

(b) 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;

(c) authorize the negotiation of and approve or adopt the text of association agreements;

(d) approve modifications to Annexes EM, NI, G and B;

(e) approve technical changes to the Annexes to this Treaty; and

(f) approve the Secretary-General's nominations of panelists under Annex D, paragraph (7).

The Contracting Parties shall make every effort to reach agreement by consensus on any other matter requiring their decision under this Treaty. If agreement cannot be reached by consensus, paragraphs (2) to (5) shall apply.

(2) Decisions on budgetary matters referred to in Article 34(3)(e) shall be taken by a qualified majority of Contracting Parties whose assessed contributions as specified in Annex B represent, in combination, at least three-fourths of the total assessed contributions specified therein.

(3) Decisions on matters referred to in Article 34(7) shall be taken by a three-fourths majority of the Contracting Parties.

(4) Except in cases specified in subparagraphs (1)(a) to (f), paragraphs (2) and (3), and subject to paragraph (6), decisions provided for in this Treaty shall be taken by a three-fourths majority of the Contracting Parties Present and Voting at the meeting of the Charter Conference at which such matters fall to be decided.

(5) For purposes of this Article, "Contracting Parties Present and Voting" means Contracting Parties present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.

(6) Except as provided in paragraph (2), no decision referred to in this Article shall be valid unless it has the support of a simple majority of the Contracting Parties.

(7) A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa.

(8) In the event of persistent arrears in a Contracting Party's discharge of financial obligations under this Treaty, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.

ARTICLE 37
FUNDING PRINCIPLES

(1) Each Contracting Party shall bear its own costs of representation at meetings of the Charter Conference and any subsidiary bodies.

(2) The cost of meetings of the Charter Conference and any subsidiary bodies shall be regarded as a cost of the Secretariat.

(3) The costs of the Secretariat shall be met by the Contracting Parties assessed according to their capacity to pay, determined as specified in Annex B, the provisions of which may be modified in accordance with Article 36(1)(d).

(4) A Protocol shall contain provisions to assure that any costs of the Secretariat arising from that Protocol are borne by the parties thereto.

(5) The Charter Conference may in addition accept voluntary contributions from one or more Contracting Parties or from other sources. Costs met from such contributions shall not be considered costs of the Secretariat for the purposes of paragraph (3).

PART VIII
FINAL PROVISIONS

ARTICLE 38
SIGNATURE

This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations which have signed the Charter.

ARTICLE 39
RATIFICATION, ACCEPTANCE OR APPROVAL

This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository.

ARTICLE 40
APPLICATION TO TERRITORIES [57]

(1) Any state or Regional Economic Integration Organization may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depository, declare that the Treaty shall be binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.

(2) Any Contracting Party may at a later date, by a declaration deposited with the Depository, bind itself under this Treaty with respect to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depository of such declaration.

(3) Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification to the Depository. The withdrawal shall, subject to the applicability of Article 47(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depository.

57 See Final Act of the European Energy Charter Conference, Declarations, n. 6. with respect to Article 40, p. 32.

(4) The definition of "Area" in Article 1(10) shall be construed having regard to any declaration deposited under this Article.

ARTICLE 41
ACCESSION

This Treaty shall be open for accession, from the date on which the Treaty is closed for signature, by states and Regional Economic Integration Organizations which have signed the Charter, on terms to be approved by the Charter Conference. The instruments of accession shall be deposited with the Depository.

ARTICLE 42
AMENDMENTS

(1) Any Contracting Party may propose amendments to this Treaty.

(2) The text of any proposed amendment to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.

(3) Amendments to this Treaty, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depository which shall submit them to all Contracting Parties for ratification, acceptance or approval.

(4) Instruments of ratification, acceptance or approval of amendments to this Treaty shall be deposited with the Depository. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after deposit with the Depository of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

ARTICLE 43
ASSOCIATION AGREEMENTS

(1) The Charter Conference may authorize the negotiation of association agreements with states or Regional Economic Integration Organizations, or with international organizations, in order to pursue the objectives and principles of the Charter and the provisions of this Treaty or one or more Protocols.

(2) The relationship established with and the rights enjoyed and obligations incurred by an associating state, Regional Economic Integration Organization, or international organization shall be appropriate to the particular circumstances of the association, and in each case shall be set out in the association agreement.

ARTICLE 44
ENTRY INTO FORCE

(1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organization which is a signatory to the Charter as of 16 June 1995.

(2) For each state or Regional Economic Integration Organization which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession.

(3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organization shall not be counted as additional to those deposited by member states of such Organization.

ARTICLE 45
PROVISIONAL APPLICATION

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.

(7) A state or Regional Economic Integration Organization which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

ARTICLE 46
RESERVATIONS

No reservations may be made to this Treaty.

ARTICLE 47
WITHDRAWAL

(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty.

(2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depository, or on such later date as may be specified in the notification of withdrawal.

(3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

(4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.

ARTICLE 48
STATUS OF ANNEXES AND DECISIONS

The Annexes to this Treaty and the Decisions set out in Annex 2 to the Final Act of the European Energy Charter Conference signed at Lisbon on 17 December 1994 are integral parts of the Treaty.

ARTICLE 49
DEPOSITORY

The Government of the Portuguese Republic shall be the Depository of this Treaty.

ARTICLE 50
AUTHENTIC TEXTS

In witness whereof the undersigned, being duly authorized to that effect, have signed this Treaty in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic.

Done at Lisbon on the seventeenth day of December in the year one thousand nine hundred and ninety-four. [58]

58 For Signatories see the Energy Charter Secretariat website (www.encharter.org).

ANNEXES TO THE ENERGY CHARTER TREATY

1. ANNEX EM
ENERGY MATERIAL AND PRODUCTS
(IN ACCORDANCE WITH ARTICLE 1(4))

Nuclear energy

26.12 Uranium or thorium ores and concentrates.

26.12.10 Uranium ores and concentrates.

26.12.20 Thorium ores and concentrates.

28.44 Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.

28.44.10 Natural uranium and its compounds.

28.44.20 Uranium enriched in U235 and its compounds; plutonium and its compounds.

28.44.30 Uranium depleted in U235 and its compounds; thorium and its compounds.

28.44.40 Radioactive elements and isotopes and radioactive compounds other than 28.44.10, 28.44.20 or 28.44.30.

28.44.50 Spent (irradiated) fuel elements (cartridges) of nuclear reactors.

28.45.10 Heavy water (deuterium oxide).

Coal, Natural Gas, Petroleum and Petroleum Products, Electrical Energy

27.01 Coal, briquettes, ovoids and similar solid fuels manufactured from coal.

27.02 Lignite, whether or not agglomerated excluding jet.

27.03 Peat (including peat litter), whether or not agglomerated.

27.04 Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon.

27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.

27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.

27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g., benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).

27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars.

27.09 Petroleum oils and oils obtained from bituminous minerals, crude.

27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.

27.11 Liquified petroleum gases and other gaseous hydrocarbons
- natural gas
- propane
- butanes
- ethylene, propylene, butylene and butadiene (27.11.14)
- other

In gaseous state:
- natural gas
- other

27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.

27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks.

27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (e.g., bituminous mastics, cut-backs).

27.16 Electrical energy.

Other Energy

44.01.10 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms.

44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

2. ANNEX NI
NON-APPLICABLE ENERGY MATERIALS AND PRODUCTS FOR DEFINITIONS OF "ECONOMIC ACTIVITY IN THE ENERGY SECTOR"
(IN ACCORDANCE WITH ARTICLE 1(5))

27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g., benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).

44.01.10 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms.

44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.

3. ANNEX TRM
NOTIFICATION AND PHASE-OUT (TRIMS)
(IN ACCORDANCE WITH ARTICLE 5(4))

(1) Each Contracting Party shall notify to the Secretariat all trade-related investment measures which it applies that are not in conformity with the provisions of Article 5, within:

(a) 90 days after the entry into force of this Treaty if the Contracting Party is a party to the GATT; or

(b) 12 months after the entry into force of this Treaty if the Contracting Party is not a party to the GATT.

Such trade-related investment measures of general or specific application shall be notified along with their principal features.

(2) In the case of trade-related investment measures applied under discretionary authority, each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.

(3) Each Contracting Party shall eliminate all trade-related investment measures which are notified under paragraph (1) within:

(a) two years from the date of entry into force of this Treaty if the Contracting Party is a party to the GATT; or

(b) three years from the date of entry into force of this Treaty if the Contracting Party is not a party to the GATT.

(4) During the applicable period referred to in paragraph (3) a Contracting Party shall not modify the terms of any trade-related investment measure which it notifies under paragraph (1) from those prevailing at the date of entry into force of this Treaty so as to increase the degree of inconsistency with the provisions of Article 5 of this Treaty.

(5) Notwithstanding the provisions of paragraph (4), a Contracting Party, in order not to disadvantage established enterprises which are subject to a trade-related investment measure notified under paragraph (1), may apply during the phase-out period the same trade-related investment measure to a new Investment where:

(a) the products of such Investment are like products to those of the established enterprises; and

(b) such application is necessary to avoid distorting the conditions of competition between the new Investment and the established enterprises.

Any trade-related investment measure so applied to a new Investment shall be notified to the Secretariat. The terms of such a trade-related investment measure shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

(6) Where a state or Regional Economic Integration Organization accedes to this Treaty after the Treaty has entered into force:

(a) the notification referred to in paragraphs (1) and (2) shall be made by the later of the applicable date in paragraph (1) or the date of deposit of the instrument of accession; and

(b) the end of the phase-out period shall be the later of the applicable date in paragraph (3) or the date on which the Treaty enters into force for that state or Regional Economic Integration Organization.

4. ANNEX N
LIST OF CONTRACTING PARTIES REQUIRING AT LEAST 3 SEPARATE AREAS TO BE INVOLVED IN A TRANSIT (IN ACCORDANCE WITH ARTICLE 7(10)(A))

1. Canada and United States of America [59]

5. ANNEX VC
LIST OF CONTRACTING PARTIES WHICH HAVE MADE VOLUNTARY BINDING COMMITMENTS IN RESPECT OF ARTICLE 10(3) (IN ACCORDANCE WITH ARTICLE 10(6))

6. ANNEX ID
LIST OF CONTRACTING PARTIES NOT ALLOWING AN INVESTOR TO RESUBMIT THE SAME DISPUTE TO INTERNATIONAL ARBITRATION AT A LATER STAGE UNDER ARTICLE 26 (IN ACCORDANCE WITH ARTICLE 26(3)(B)(I))

1. Australia *
2. Azerbaijan
3. Bulgaria
   Canada [59]
4. Croatia
5. Cyprus
6. The Czech Republic
7. European Communities
8. Finland
9. Greece
10. Hungary
11. Ireland
12. Italy
13. Japan
14. Kazakhstan
15. Mongolia
16. Norway *
17. Poland
18. Portugal
19. Romania
20. The Russian Federation *
21. Slovenia
22. Spain
23. Sweden
24. Turkey
    United States of America [59]

* Denotes State for which ratification of the Energy Charter Treaty is still pending as of September 2004.

59 Editor's note: Canada and the United States of America have not signed the Energy Charter Treaty.

7. ANNEX IA
LIST OF CONTRACTING PARTIES NOT ALLOWING AN INVESTOR OR CONTRACTING PARTY TO SUBMIT A DISPUTE CONCERNING THE LAST SENTENCE OF ARTICLE 10(1) TO INTERNATIONAL ARBITRATION
(IN ACCORDANCE WITH ARTICLES 26(3)(C) AND 27(2))

1. Australia *
   Canada [60]
2. Hungary
3. Norway *

8. ANNEX P
SPECIAL SUB-NATIONAL DISPUTE PROCEDURE
(IN ACCORDANCE WITH ARTICLE 27(3)(I))

PART I

1. Australia *
   Canada [60]

PART II

(1) Where, in making an award, the tribunal finds that a measure of a regional or local government or authority of a Contracting Party (hereinafter referred to as the "Responsible Party") is not in conformity with a provision of this Treaty, the Responsible Party shall take such reasonable measures as may be available to it to ensure observance of the Treaty in respect of the measure.

(2) The Responsible Party shall, within 30 days from the date the award is made, provide to the Secretariat written notice of its intentions as to ensuring observance of the Treaty in respect of the measure. The Secretariat shall present the notification to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the notice. If it is impracticable to ensure observance immediately, the Responsible Party shall have a reasonable period of time in which to do so. The reasonable period of time shall be agreed by both parties to the dispute. In the event that such agreement is not reached, the Responsible Party shall propose a reasonable period for approval by the Charter Conference.

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* Denotes State for which ratification of the Energy Charter Treaty is still pending as of September 2004.

60 Editor's note: Canada has not signed the Energy Charter Treaty.

(3) Where the Responsible Party fails, within the reasonable period of time, to ensure observance in respect of the measure, it shall at the request of the other Contracting Party party to the dispute (hereinafter referred to as the "Injured Party") endeavour to agree with the Injured Party on appropriate compensation as a mutually satisfactory resolution of the dispute.

(4) If no satisfactory compensation has been agreed within 20 days of the request of the Injured Party, the Injured Party may with the authorization of the Charter Conference suspend such of its obligations to the Responsible Party under the Treaty as it considers equivalent to those denied by the measure in question, until such time as the Contracting Parties have reached agreement on a resolution of their dispute or the non-conforming measure has been brought into conformity with the Treaty.

(5) In considering what obligations to suspend, the Injured Party shall apply the following principles and procedures:

(a) The Injured Party should first seek to suspend obligations with respect to the same Part of the Treaty as that in which the tribunal has found a violation.

(b) If the Injured Party considers that it is not practicable or effective to suspend obligations with respect to the same Part of the Treaty, it may seek to suspend obligations in other Parts of the Treaty. If the Injured Party decides to request authorization to suspend obligations under this subparagraph, it shall state the reasons therefor in its request to the Charter Conference for authorization.

(6) On written request of the Responsible Party, delivered to the Injured Party and to the President of the tribunal that rendered the award, the tribunal shall determine whether the level of obligations suspended by the Injured Party is excessive, and if so, to what extent. If the tribunal cannot be reconstituted, such determination shall be made by one or more arbitrators appointed by the Secretary-General. Determinations pursuant to this paragraph shall be completed within 60 days of the request to the tribunal or the appointment by the Secretary-General. Obligations shall not be suspended pending the determination, which shall be final and binding.

(7) In suspending any obligations to a Responsible Party, an Injured Party shall make every effort not to affect adversely the rights under the Treaty of any other Contracting Party.

9. ANNEX G
EXCEPTIONS AND RULES GOVERNING THE APPLICATION OF THE PROVISIONS OF THE GATT AND RELATED INSTRUMENTS [61] (IN ACCORDANCE WITH ARTICLE 29(2)(A))

(1) The following provisions of GATT 1947 and Related Instruments shall not be applicable under Article 29(2)(a):

(a) General Agreement on Tariffs and Trade

II	Schedules of Concessions (and the Schedules to the General Agreement on Tariffs and Trade)
IV	Special Provisions relating to Cinematographic Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXII	Consultation
XXIII	Nullification or Impairment
XXV	Joint Action by the Contracting Parties
XXVI	Acceptance. Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules
XXVIIIbis	Tariff Negotiations
XXIX	The relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXII	Contracting Parties
XXXIII	Accession
XXXV	Non-application of the Agreement between particular Contracting Parties
XXXVI	Principles and Objectives
XXXVII	Commitments
XXXVIII	Joint Action
Annex H	Relating to Article XXVI
Annex I	Notes and Supplementary Provisions (related to above GATT articles)

Safeguard Action for Development Purposes

Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance.

61 See Chairman's Statement at Adoption Session on 17 December 1994, p. 157.

(b) Related Instruments

(i) Agreement on Technical Barriers to Trade (Standards Code)

Preamble	(paragraphs 1, 8, 9)
1.3	General provisions
2.6.4	Preparation, adoption and application of technical regulations and standards by central government bodies
10.6	Information about technical regulations, standards and certification systems
11	Technical assistance to other Parties
12	Special and differential treatment of developing countries
13	The Committee on Technical Barriers to Trade
14	Consultation and dispute settlement
15	Final provisions (other than 15.5 and 15.13)
Annex 2	Technical Expert Groups
Annex 3	Panels

(ii) Agreement on Government Procurement

(iii) Agreement on Interpretation and Application of Articles VI, XVI and XXIII (Subsidies and Countervailing Measures)

10	Export subsidies on certain primary products
12	Consultations
13	Conciliation, dispute settlement and authorized counter measures
14	Developing countries
16	Committee on Subsidies and Countervailing Measures
17	Conciliation
18	Dispute settlement
19.2	Acceptance and accession
19.4	Entry into force
19.5(a)	National legislation
19.6	Review
19.7	Amendments
19.8	Withdrawal
19.9	Non-application of this Agreement between particular signatories
19.11	Secretariat
19.12	Deposit
19.13	Registration

(iv) Agreement on Implementation of Article VII (Customs Valuation)

1.2(b)(iv)	Transaction value

11.1	Determination of customs value
14	Application of Annexes (second sentence)
18	Institutions (Committee on Customs Valuation)
19	Consultation
20	Dispute settlement
21	Special and differential treatment of developing countries
22	Acceptance and accession
24	Entry into force
25.1	National legislation
26	Review
27	Amendments
28	Withdrawal
29	Secretariat
30	Deposit
31	Registration
Annex II	Technical Committee on Customs Valuation
Annex III	Ad Hoc Panels

Protocol to the Agreement on Implementation of Article VII (except I.7 and I.8; with necessary conforming introductory language)

(v) Agreement on Import Licensing Procedures

1.4	General provisions (last sentence)
2.2	Automatic import licensing (footnote 2)
4	Institutions, consultation and dispute settlement
5	Final provisions (except paragraph 2)

(vi) Agreement on Implementation of Article VI (Antidumping Code)

13	Developing Countries
14	Committee on Anti-Dumping Practices
15	Consultation, Conciliation and Dispute Settlement
16	Final Provisions (except paragraphs 1 and 3)

(vii) Arrangement Regarding Bovine Meat

(viii) International Dairy Arrangement

(ix) Agreement on Trade in Civil Aircraft

(x) Declaration on Trade Measures Taken for Balance-of-Payments Purposes.

(c) All other provisions in the GATT or Related Instruments which relate to:

(i) governmental assistance to economic development and the treatment of developing countries, except for paragraphs (1) to (4) of the Decision of 28 November 1979 (L/4903) on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries;

(ii) the establishment or operation of specialist committees and other subsidiary institutions;

(iii) signature, accession, entry into force, withdrawal, deposit and registration.

(d) All agreements, arrangements, decisions, understandings or other joint action pursuant to the provisions listed in subparagraphs (a) to (c).

(2) Contracting Parties shall apply the provisions of the "Declaration on Trade Measures Taken for Balance-of-Payments Purposes" to measures taken by those Contracting Parties which are not parties to the GATT, to the extent practicable in the context of the other provisions of this Treaty.

(3) With respect to notifications required by the provisions made applicable by Article 29(2)(a):

(a) Contracting Parties which are not parties to the GATT or a Related Instrument shall make their notifications to the Secretariat. The Secretariat shall circulate copies of the notifications to all Contracting Parties. Notifications to the Secretariat shall be in one of the authentic languages of this Treaty. The accompanying documents may be solely in the language of the Contracting Party;

(b) such requirements shall not apply to Contracting Parties to this Treaty which are also parties to the GATT and Related Instruments, which contain their own notification requirements.

(4) Trade in nuclear materials may be governed by agreements referred to in the Declarations related to this paragraph contained in the Final Act of the European Energy Charter Conference. [62]

62 See Final Act of the European Energy Charter Conference, Declarations, n. 7. with respect to Annex G(4), p. 33; Chairman's Statement at Adoption Session on 17 December 1994, p. 157 and Joint Memorandum, p. 159.

10. ANNEX TFU
PROVISIONS REGARDING TRADE AGREEMENTS BETWEEN STATES WHICH WERE CONSTITUENT PARTS OF THE FORMER UNION OF SOVIET SOCIALIST REPUBLICS (IN ACCORDANCE WITH ARTICLE 29(2)(B))

(1) Any agreement referred to in Article 29(2)(b) shall be notified in writing to the Secretariat by or on behalf of all of the parties to such agreement which sign or accede to this Treaty:

(a) in respect of an agreement in force as of a date three months after the date on which the first of such parties signs or deposits its instrument of accession to the Treaty, no later than six months after such date of signature or deposit; and

(b) in respect of an agreement which enters into force on a date subsequent to the date referred to in subparagraph (a), sufficiently in advance of its entry into force for other states or Regional Economic Integration Organizations which have signed or acceded to the Treaty (hereinafter referred to as the "Interested Parties") to have a reasonable opportunity to review the agreement and make representations concerning it to the parties thereto and to the Charter Conference prior to such entry into force. [63]

(2) The notification shall include:

(a) copies of the original texts of the agreement in all languages in which it has been signed;

(b) a description, by reference to the items included in Annex EM, of the specific Energy Materials and Products to which it applies;

(c) an explanation, separately for each relevant provision of the GATT and Related Instruments made applicable by Article 29(2)(a), of the circumstances which make it impossible or impracticable for the parties to the agreement to conform fully with that provision;

(d) the specific measures to be adopted by each party to the agreement to address the circumstances referred to in subparagraph (c); and

(e) a description of the parties' programmes for achieving a progressive reduction and ultimate elimination of the agreement's non-conforming provisions.

63 See Final Act of the European Energy Charter Conference, Understandings, n. 22, with respect to Annex TFU(1), p. 29.

(3) Parties to an agreement notified in accordance with paragraph (1) shall afford to the Interested Parties a reasonable opportunity to consult with them with respect to such agreement, and shall accord consideration to their representations. Upon the request of any of the Interested Parties, the agreement shall be considered by the Charter Conference, which may adopt recommendations with respect thereto.

(4) The Charter Conference shall periodically review the implementation of agreements notified pursuant to paragraph (1) and the progress having been made towards the elimination of provisions thereof that do not conform with provisions of the GATT and Related Instruments made applicable by Article 29(2)(a). Upon the request of any of the Interested Parties, the Charter Conference may adopt recommendations with respect to such an agreement.

(5) An agreement described in Article 29(2)(b) may in case of exceptional urgency be allowed to enter into force without the notification and consultation provided for in subparagraph (1)(b), paragraphs (2) and (3), provided that such notification takes place and the opportunity for such consultation is afforded promptly. In such a case the parties to the agreement shall nevertheless notify its text in accordance with subparagraph (2)(a) promptly upon its entry into force.

(6) Contracting Parties which are or become parties to an agreement described in Article 29(2)(b) undertake to limit the non-conformities thereof with the provisions of the GATT and Related Instruments made applicable by Article 29(2)(a) to those necessary to address the particular circumstances and to implement such an agreement so as least to deviate from those provisions. They shall make every effort to take remedial action in light of representations from the Interested Parties and of any recommendations of the Charter Conference.

11. ANNEX D
INTERIM PROVISIONS FOR TRADE DISPUTE SETTLEMENT (IN ACCORDANCE WITH ARTICLE 29(7))

(1) (a) In their relations with one another, Contracting Parties shall make every effort through co-operation and consultations to arrive at a mutually satisfactory resolution of any dispute about existing measures that might materially affect compliance with the provisions applicable to trade under Article 5 or 29.

(b) A Contracting Party may make a written request to any other Contracting Party for consultations regarding any existing measure of the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 5 or 29. A Contracting Party which requests consultations shall to the fullest extent possible indicate the measure complained of and specify the provisions of Article 5 or 29 and of the GATT and Related Instruments that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretariat, which shall periodically inform the Contracting Parties of pending consultations that have been notified.

(c) A Contracting Party shall treat any confidential or proprietary information identified as such and contained in or received in response to a written request, or received in the course of consultations, in the same manner in which it is treated by the Contracting Party providing the information.

(d) In seeking to resolve matters considered by a Contracting Party to affect compliance with provisions applicable to trade under Article 5 or 29 as between itself and another Contracting Party, the Contracting Parties participating in consultations or other dispute settlement shall make every effort to avoid a resolution that adversely affects the trade of any other Contracting Party.

(2) (a) If, within 60 days from the receipt of the request for consultation referred to in subparagraph (1)(b), the Contracting Parties have not resolved their dispute or agreed to resolve it by conciliation, mediation, arbitration or other method, either Contracting Party may deliver to the Secretariat a written request for the establishment of a panel in accordance with subparagraphs (b) to (f). In its request the requesting Contracting Party shall state the substance of the dispute and indicate which provisions of Article 5 or 29 and of the GATT and Related Instruments are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.

(b) The interests of other Contracting Parties shall be taken into account during the resolution of a dispute. Any other Contracting Party having a substantial interest in a matter shall have the right to be heard by the panel and to make written submissions to it, provided that both the disputing Contracting Parties and the Secretariat have received written notice of its interest no later than the date of establishment of the panel, as determined in accordance with subparagraph (c).

(c) A panel shall be deemed to be established 45 days after the receipt of the written request of a Contracting Party by the Secretariat pursuant to subparagraph (a).

(d) A panel shall be composed of three members who shall be chosen by the Secretary-General from the roster described in paragraph (7). Except where the disputing Contracting Parties agree otherwise, the members of a panel shall not be citizens of Contracting Parties which either are party to the dispute or have notified their interest in accordance with subparagraph (b), or citizens of states members of a Regional Economic Integration Organization which either is party to the dispute or has notified its interest in accordance with subparagraph (b).

(e) The disputing Contracting Parties shall respond within ten working days to the nominations of panel members and shall not oppose nominations except for compelling reasons.

(f) Panel members shall serve in their individual capacities and shall neither seek nor take instruction from any government or other body. Each Contracting Party undertakes to respect these principles and not to seek to influence panel members in the performance of their tasks. Panel members shall be selected with a view to ensuring their independence, and that a sufficient diversity of backgrounds and breadth of experience are reflected in a panel.

(g) The Secretariat shall promptly notify all Contracting Parties that a panel has been constituted.

(3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Annex. Rules of procedure shall be as close as possible to those of the GATT and Related Instruments. A panel shall also have the right to adopt additional rules of procedure not inconsistent with the rules of procedure adopted by the Charter Conference or with this Annex. In a proceeding before a panel each disputing Contracting Party and any other Contracting Party which has notified its interest in accordance with subparagraph (2)(b), shall have the right to at least one hearing before the panel and to provide a written submission. Disputing Contracting Parties shall also have the right to provide a written rebuttal. A panel may grant a request by any other Contracting Party which has notified its interest in accordance with subparagraph (2)(b) for access to any written submission made to the panel, with the consent of the Contracting Party which has made it.

The proceedings of a panel shall be confidential. A panel shall make an objective assessment of the matters before it, including the facts of the dispute and the compliance of measures with the provisions applicable to trade under Article 5 or 29. In exercising its functions, a panel shall consult with the disputing Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by the disputing Contracting Parties, a panel shall base its decision on the arguments and submissions of the disputing Contracting Parties. Panels shall be guided by the interpretations given to the GATT and Related Instruments within the framework of the GATT, and shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a party to the GATT to other parties to the GATT to which it applies the GATT and which have not been taken by those other parties to dispute resolution under the GATT.

Unless otherwise agreed by the disputing Contracting Parties, all procedures involving a panel, including the issuance of its final report, should be completed within 180 days of the date of establishment of the panel; however, a failure to complete all procedures within this period shall not affect the validity of a final report.

(b) A panel shall determine its jurisdiction; such determination shall be final and binding. Any objection by a disputing Contracting Party that a dispute is not within the jurisdiction of the panel shall be considered by the panel, which shall decide whether to deal with the objection as a preliminary question or to join it to the merits of the dispute.

(c) In the event of two or more requests for establishment of a panel in relation to disputes that are substantively similar, the Secretary-General may with the consent of all the disputing Contracting Parties appoint a single panel.

(4) (a) After having considered rebuttal arguments, a panel shall submit to the disputing Contracting Parties the descriptive sections of its draft written report, including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties. The disputing Contracting Parties shall be afforded an opportunity to submit written comments on the descriptive sections within a period set by the panel.

Following the date set for receipt of comments from the Contracting Parties, the panel shall issue to the disputing Contracting Parties an interim written report, including both the descriptive sections and the panel's proposed findings and conclusions. Within a period set by the panel a disputing Contracting Party may submit to the panel a written request that the panel review specific aspects of the interim report before issuing a final report. Before issuing a final report the panel may, in its discretion, meet with the disputing Contracting Parties to consider the issues raised in such a request.

The final report shall include descriptive sections (including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties), the panel's findings and conclusions, and a discussion of arguments made on specific aspects of the interim report at the stage of its review. The final report shall deal with every substantial issue raised before the panel and necessary to the resolution of the dispute and shall state the reasons for the panel's conclusions.

A panel shall issue its final report by providing it promptly to the Secretariat and to the disputing Contracting Parties. The Secretariat shall at the earliest practicable opportunity distribute the final report, together with any written views that a disputing Contracting Party desires to have appended, to all Contracting Parties.

(b) Where a panel concludes that a measure introduced or maintained by a Contracting Party does not comply with a provision of Article 5 or 29 or with a provision of the GATT or a Related Instrument that applies under Article 29, the panel may recommend in its final report that the Contracting Party alter or abandon the measure or conduct so as to be in compliance with that provision.

(c) Panel reports shall be adopted by the Charter Conference. In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be adopted by the Charter Conference until at least 30 days after it has been provided to all Contracting Parties by the Secretariat. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretariat at least 10 days prior to the date on which the report is to be considered for adoption by the Charter Conference, and the Secretariat shall promptly provide them to all Contracting Parties. The disputing Contracting Parties and Contracting Parties which notified their interest in accordance with subparagraph (2)(b) shall have the right to participate fully in the consideration of the panel report on that dispute by the Charter Conference, and their views shall be fully recorded.

(d) In order to ensure effective resolution of disputes to the benefit of all Contracting Parties, prompt compliance with rulings and recommendations of a final panel report that has been adopted by the Charter Conference is essential. A Contracting Party which is subject to a ruling or recommendation of a final panel report that has been adopted by the Charter Conference shall inform the Charter Conference of its intentions regarding compliance with such ruling or recommendation. In the event that immediate compliance is impracticable, the Contracting Party concerned shall explain its reasons for non-compliance to the Charter Conference and, in light of this explanation, shall have a reasonable period of time to effect compliance. The aim of dispute resolution is the modification or removal of inconsistent measures.

(5) (a) Where a Contracting Party has failed within a reasonable period of time to comply with a ruling or recommendation of a final panel report that has been adopted by the Charter Conference, a Contracting Party to the dispute injured by such non-compliance may deliver to the non-complying Contracting Party a written request that the non-complying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the non-complying Contracting Party shall promptly enter into such negotiations.

(b) If the non-complying Contracting Party refuses to negotiate, or if the Contracting Parties have not reached agreement within 30 days after delivery of the request for negotiations, the injured Contracting Party may make a written request for authorization of the Charter Conference to suspend obligations owed by it to the non-complying Contracting Party under Article 5 or 29.

(c) The Charter Conference may authorize the injured Contracting Party to suspend such of its obligations to the non-complying Contracting Party, under provisions of Article 5 or 29 or under provisions of the GATT or Related Instruments that apply under Article 29, as the injured Contracting Party considers equivalent in the circumstances.

(d) The suspension of obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with Article 5 or 29 has been removed, or until a mutually satisfactory solution is reached.

(6) (a) Before suspending such obligations the injured Contracting Party shall inform the non-complying Contracting Party of the nature and level of its proposed suspension. If the non-complying Contracting Party delivers to the Secretary-General a written objection to the level of suspension of obligations proposed by the injured Contracting Party, the objection shall be referred to arbitration as provided below. The proposed suspension of obligations shall be stayed until the arbitration has been completed and the determination of the arbitral panel has become final and binding in accordance with subparagraph (e).

(b) The Secretary-General shall establish an arbitral panel in accordance with subparagraphs (2)(d) to (f), which if practicable shall be the same panel which made the ruling or recommendation referred to in subparagraph (4)(d), to examine the level of obligations that the injured Contracting Party proposes to suspend. Unless the Charter Conference decides otherwise the rules of procedure for panel proceedings shall be adopted in accordance with subparagraph (3)(a).

(c) The arbitral panel shall determine whether the level of obligations proposed to be suspended by the injured Contracting Party is excessive in relation to the injury it experienced, and if so, to what extent. It shall not review the nature of the obligations suspended, except insofar as this is inseparable from the determination of the level of suspended obligations.

(d) The arbitral panel shall deliver its written determination to the injured and the non-complying Contracting Parties and to the Secretariat within 60 days of the establishment of the panel or within such other period as may be agreed by the injured and the non-complying Contracting Parties. The Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the determination.

(e) The determination of the arbitral panel shall become final and binding 30 days after the date of its presentation to the Charter Conference, and any level of suspension of benefits allowed thereby may thereupon be put into effect by the injured Contracting Party in such manner as that Contracting Party considers equivalent in the circumstances, unless prior to the expiration of the 30 days period the Charter Conference decides otherwise.

(f) In suspending any obligations to a non-complying Contracting Party, an injured Contracting Party shall make every effort not to affect adversely the trade of any other Contracting Party.

(7) Each Contracting Party may designate two individuals who shall, in the case of Contracting Parties which are also party to the GATT, if they are willing and able to serve as panellists under this Annex, be panellists currently nominated for the purpose of GATT dispute panels. The Secretary-General may also designate, with the approval of the Charter Conference, not more than ten individuals, who are willing and able to serve as panellists for purposes of dispute resolution in accordance with paragraphs (2) to (4). The Charter Conference may in addition decide to designate for the same purposes up to 20 individuals, who serve on dispute settlement rosters of other international bodies, who are willing and able to serve as panellists. The names of all of the individuals so designated shall constitute the dispute settlement roster. Individuals shall be designated strictly on the basis of objectivity, reliability and sound judgement and, to the greatest extent possible, shall have expertise in international trade and energy matters, in particular as relates to provisions applicable under Article 29. In fulfilling any function under this Annex, designees shall not be affiliated with or take instructions from any Contracting Party. Designees shall serve for renewable terms of five years and until their successors have been designated. A designee whose term expires shall continue to fulfil any function for which that individual has been chosen under this Annex. In the case of death, resignation or incapacity of a designee, the Contracting Party or the Secretary-General, whichever designated said designee, shall have the right to designate another individual to serve for the remainder of that designee's term, the designation by the Secretary-General being subject to approval of the Charter Conference.

(8) Notwithstanding the provisions contained in this Annex, Contracting Parties are encouraged to consult throughout the dispute resolution proceeding with a view to settling their dispute.

(9) The Charter Conference may appoint or designate other bodies or fora to perform any of the functions delegated in this Annex to the Secretariat and the Secretary-General.

12. ANNEX B
FORMULA FOR ALLOCATING CHARTER COSTS
(IN ACCORDANCE WITH ARTICLE 37(3))

(1) Contributions payable by Contracting Parties shall be determined by the Secretariat annually on the basis of their percentage contributions required under the latest available United Nations Regular Budget Scale of Assessment (supplemented by information on theoretical contributions for any Contracting Parties which are not UN members).

(2) The contributions shall be adjusted as necessary to ensure that the total of all Contracting Parties' contributions is 100%.

13. ANNEX PA
LIST OF SIGNATORIES WHICH DO NOT ACCEPT THE PROVISIONAL APPLICATION OBLIGATION OF ARTICLE 45(3)(B) (IN ACCORDANCE WITH ARTICLE 45(3)(C))

1. The Czech Republic
2. Germany
3. Hungary
4. Lithuania
5. Poland
6. Slovakia

14. ANNEX T [64]
CONTRACTING PARTIES' TRANSITIONAL MEASURES (IN ACCORDANCE WITH ARTICLE 32(1))

List of Contracting Parties entitled to transitional arrangements

Albania
Armenia
Azerbaijan
Belarus *
Bulgaria
Croatia
The Czech Republic
Estonia
Georgia
Hungary
Kazakhstan
Kyrgyzstan
Latvia
Lithuania
Moldova
Poland
Romania
The Russian Federation *

* Denotes State for which ratification of the Energy Charter Treaty is still pending as of September 2004.

64 Editor's Note: The Transitional Measures have now been phased out and Annex T has been retained in this booklet for transparency.

Slovakia
Slovenia
Tajikistan
Turkmenistan
Ukraine
Uzbekistan

List of provisions subject to transitional arrangements

Article 6(2)
Article 6(5)
Article 7(4)
Article 9(1)
Article 10(7)
Article 14(1)(d)
Article 20(3)
Article 22(3)

ARTICLE 6(2)

"Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector."

COUNTRY: ALBANIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	There is no law on protection of competition in Albania. The law No 7746 of 28 July 1993 on Hydrocarbons and the law No 7796 of 17 February 1994 on Minerals do not include such provisions. There is no law on electricity which is in the stage of preparation. This law is planned to be submitted to the Parliament by the end of 1996. In these laws Albania intends to include provisions on anti-competitive conduct.
Phase-out:	1 January 1998.

COUNTRY: ARMENIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	At present a state monopoly exists in Armenia in most energy sectors. There is no law on protection of competition, thus the rules of competition are not yet being implemented. There are no laws on energy. The draft laws on energy are planned to be submitted to the Parliament in 1994. The laws are envisaged to include provisions on anti-competitive behaviour, which would be harmonized with the EC legislation on competition.
Phase-out:	31 December 1997.

COUNTRY: AZERBAIJAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	The anti-monopoly legislation is at the stage of elaboration .
Phase-out:	1 January 2000.

COUNTRY: BELARUS

Sector:	All energy sectors.
Level of Government:	National.
Description:	Anti-monopoly legislation is at the stage of elaboration.
Phase-out:	1 January 2000.

COUNTRY: GEORGIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Laws on demonopolization are at present at the stage of elaboration in Georgia and that is why the State has so far the monopoly for practically all energy sources and energy resources, which restricts the possibility of competition in the energy and fuel complex.
Phase-out:	1 January 1999.

COUNTRY: KAZAKHSTAN

Sector: All energy sectors.

Level of Government: National.

Description: The law on Development of Competition and Restriction of Monopolistic Activities (No 656 of 11 June 1991) has been adopted, but is of a general nature. It is necessary to develop the legislation further, in particular by means of adopting relevant amendments or adopting a new law.

Phase-out: 1 January 1998.

COUNTRY: KYRGYZSTAN

Sector: All energy sectors.

Level of Government: National.

Description: The law on Anti-monopoly Policies has already been adopted. The transitional period is needed to adapt provisions of this law to the energy sector which is now strictly regulated by the state.

Phase-out: 1 July 2001.

COUNTRY: MOLDOVA

Sector: All energy sectors.

Level of Government: National.

Description: The law on Restriction of Monopolistic Activities and Development of Competition of 29 January 1992 provides an organizational and legal basis for the development of competition, and of measures to prevent, limit and restrict monopolistic activities; it is oriented towards implementing market economy conditions. This law, however, does not provide for concrete measures of anti-competitive conduct in the energy sector, nor does it cover completely the requirements of Article 6.

In 1995 drafts of a law on Competition and a State Programme of Demonopolization of the Economy will be submitted to the Parliament. The draft law on Energy which will be also submitted to the Parliament in 1995 will cover issues on demonopolization and development of competition in the energy sector.

Phase-out: 1 January 1998.

COUNTRY: ROMANIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	The rules of competition are not yet implemented in Romania. The draft law on Protection of Competition has been submitted to the Parliament and is scheduled to be adopted during 1994. The draft contains provisions with respect to anti-competitive behaviour, harmonized with the EC's law on Competition.
Phase-out:	31 December 1996.

COUNTRY: THE RUSSIAN FEDERATION

Sector:	All energy sectors.
Level of Government:	The Federation.
Description:	A comprehensive framework of anti-monopoly legislation has been created in the Russian Federation but other legal and organizational measures to prevent, limit or suppress monopolistic activities and unfair competition will have to be adopted and in particular in the energy sector.
Phase-out:	1 July 2001.

COUNTRY: SLOVENIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Law on Protection of Competition adopted in 1993 and published in Official Journal No 18/93 treats anti-competitive conduct generally. The existing law also provides for conditions for the establishment of competition authorities. At present the main competition authority is the Office of Protection of Competition in the Ministry of Economic Relations and Development. With regard to importance of energy sector a separate law in this respect is foreseen and thus more time for full compliance is needed.
Phase-out:	1 January 1998.

COUNTRY: TAJIKISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	In 1993 Tajikistan passed the law on Demonopolization and Competition. However, due to the difficult economic situation in Tajikistan, the jurisdiction of the law has been temporarily suspended.
Phase-out:	31 December 1997.

COUNTRY: TURKMENISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	Under the Ruling of the President of Turkmenistan No 1532 of 21 October 1993 the Committee on Restricting Monopolistic Activities has been etablished and is acting now, the function of which is to protect enterprises and other entities from monopoly conduct and practices and to promote the formation of market principles on the basis of the development of competition and entrepreneurship. Further development of legislation and regulations is needed which would regulate anti-monopoly conduct of enterprises in the Economic Activity in the Energy Sector.
Phase-out:	1 July 2001.

COUNTRY: UZBEKISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	The law on Restricting Monopoly Activities has been adopted in Uzbekistan and has been in force since July 1992. However, the law (as is specified in article 1, paragraph 3) does not extend to the activities of enterprises in the energy sector.
Phase-out:	1 July 2001.

ARTICLE 6(5)

"If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and co-operation as that Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development."

COUNTRY: ALBANIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	In Albania there are no established institutions to enforce the competition rules. Such institutions will be provided for in the law on the Protection of Competition which is planned to be finalized in 1996.
Phase-out:	1 January 1999.

COUNTRY: ARMENIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Institutions to enforce the provisions of this paragraph have not been established in Armenia. The laws on Energy and Protection of Competition are planned to include provisions to establish such institutions.
Phase-out:	31 December 1997.

COUNTRY: AZERBAIJAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	Anti-monopoly authorities shall be established after the adoption of anti-monopoly legislation.
Phase-out:	1 January 2000.

COUNTRY: BELARUS

Sector:	All energy sectors.
Level of Government:	National.
Description:	Anti-monopoly authorities shall be established after the adoption of anti-monopoly legislation.
Phase-out:	1 January 2000.

COUNTRY: GEORGIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Laws on demonopolization are at present at the stage of elaboration in Georgia and that is why there are no competition authorities established yet.
Phase-out:	1 January 1999.

COUNTRY: KAZAKHSTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	An Anti-monopoly Committee has been established in Kazakhstan, but its activity needs improvement, both from legislative and organizational points of view, in order to elaborate an effective mechanism handling the complaints on anti-competitive conduct.
Phase-out:	1 January 1998.

COUNTRY: KYRGYZSTAN

Sector: All energy sectors.

Level of Government: National.

Description: There is no mechanism in Kyrgyzstan to control the anti-competitive conduct and the relevant legislation. It is necessary to establish relevant anti-monopoly authorities.

Phase-out: 1 July 2001.

COUNTRY: MOLDOVA

Sector: All energy sectors.

Level of Government: National.

Description: The Ministry of Economy is responsible for the control of competitive conduct in Moldova. Relevant amendments have been made to the law on Breach of Administrative Rules, which envisage some penalties for violating rules of competition by monopoly enterprises.

The draft law on Competition which is now at the stage of elaboration will have provisions on the enforcement of competition rules.

Phase-out: 1 January 1998.

COUNTRY: ROMANIA

Sector: All energy sectors.

Level of Government: National.

Description: Institutions to enforce the provisions of this paragraph have not been established in Romania.

The Institutions charged with the enforcement of competition rules are provided for in the draft law on Protection of Competition which is scheduled to be adopted during 1994.

The draft also provides a period of nine months for enforcement, starting with the date of its publication.

According to the Europe Agreement establishing an association between Romania and the European Communities, Romania was granted a period of five years to implement competition rules.

Phase-out: 1 January 1998.

COUNTRY: TAJIKISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	Tajikistan has adopted laws on Demonopolization and Competition, but institutions to enforce competition rules are in the stage of development.
Phase-out:	31 December 1997.

COUNTRY: UZBEKISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	The law on Restricting Monopoly Activities has been adopted in Uzbekistan and has been in force since July 1992. However, the law (as is specified in article 1, paragraph 3) does not extend to the activities of the enterprises in the energy sector.
Phase-out:	1 July 2001.

ARTICLE 7(4)

"In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1)."

COUNTRY: AZERBAIJAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	It is necessary to adopt a set of laws on energy, including licensing procedures regulating transit. During a transition period it is envisaged to build and modernize power transmission lines, as well as generating capacities with the aim of bringing their technical level to the world requirements and adjusting to conditions of a market economy.
Phase-out:	31 December 1999.

COUNTRY: BELARUS

Sector:	All energy sectors.
Level of Government:	National.
Description:	Laws on energy, land and other subjects are being worked out at present, and until their final adoption, uncertainty remains as to the conditions for establishing new transport capacities for energy carriers in the territory of Belarus.
Phase-out:	31 December 1998.

COUNTRY: BULGARIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Bulgaria has no laws regulating Transit of Energy Materials and Products. An overall restructuring is ongoing in the energy sector, including development of institutional framework, legislation and regulation.
Phase-out:	The transitional period of 7 years is necessary to bring the legislation concerning the Transit of Energy Materials and Products in full compliance with this provision. 1 July 2001.

COUNTRY: GEORGIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	It is necessary to prepare a set of laws on the matter. At present there are substantially different conditions for the transport and transit of various energy sources in Georgia (electric power, natural gas, oil products, coal).
Phase-out:	1 January 1999.

COUNTRY: HUNGARY

Sector:	Electricity industry.
Level of Government:	National.
Description:	According to the current legislation establishment and operation of high-voltage transmission lines is a state monopoly. The creation of the new legal and regulatory framework for establishment, operation and ownership of high-voltage transmission lines is under preparation. The Ministry of Industry and Trade has already taken the initiative to put forward a new Act on Electricity Power, that will have its impact also on the Civil Code and on the Act on Concession. Compliance can be achieved after entering in force of the new law on Electricity and related regulatory decrees.
Phase-out:	31 December 1996.

COUNTRY: POLAND

Sector:	All energy sectors.
Level of Government:	National.
Description:	Polish law on Energy, being in the final stage of coordination, stipulates for creating new legal regulations similar to those applied by free market countries (licenses to generate, transmit, distribute and trade in energy carriers). Until it is adopted by the Parliament a temporary suspension of obligations under this paragraph is required.
Phase-out:	31 December 1995.

ARTICLE 9(1)

"The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties, on a basis no less favourable

than that which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third state, whichever is the most favourable."

COUNTRY: AZERBAIJAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	Relevant legislation is at the stage of elaboration.
Phase-out:	1 January 2000.

COUNTRY: BELARUS

Sector:	All energy sectors.
Level of Government:	National.
Description:	Relevant legislation is at the stage of elaboration.
Phase-out:	1 January 2000.

COUNTRY: GEORGIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Relevant legislation is at the stage of preparation.
Phase-out:	1 January 1997.

COUNTRY: KAZAKHSTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	The bill on Foreign Investments is at the stage of authorization approval with the aim to adopt it by the Parliament in autumn 1994.
Phase-out:	1 July 2001.

COUNTRY: KYRGYZSTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	Relevant legislation is currently under preparation.
Phase-out:	1 July 2001.

ARTICLE 10(7) - SPECIFIC MEASURES

"Each Contracting Party shall accord to Investments in its Area of Investors of another Contracting Party, 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."

COUNTRY: BULGARIA

Sector: All energy sectors.

Level of Government: National.

Description: Foreign persons may not acquire property rights over land. A company with more than fifty per cent of foreign person's share may not acquire property right over agricultural land;

Foreigners and foreign legal persons may not aquire property rights over land except by way of inheritance according to the law. In this case they have to make it over;

A foreign person may aquire property rights over buildings, but without property rights over the land;

Foreign persons or companies with foreign controlling participation must obtain a permit before performing the following activities:

- exploration, development and extraction of natural resources from the territorial sea, continental shelf or exclusive economic zone;
- acquisition of real estate in geographic regions designated by the Council of Ministers.
- The permits are issued by the Council of Ministers or by a body authorized by the Council of Ministers.

Phase-out: 1 July 2001.

ARTICLE 14(1)(D)

"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:

unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;"

COUNTRY: BULGARIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	Foreign nationals employed by companies with more than 50 per cent of foreign participation, or by a foreign person registered as sole trader or a branch or a representative office of a foreign company in Bulgaria, receiving their salary in Bulgarian leva, may purchase foreign currency not exeeding 70 per cent of their salary, including social security payments.
Phase-out:	1 July 2001.

COUNTRY: HUNGARY

Sector:	All energy sectors.
Level of Government:	National.
Description:	According to the Act on Investments of Foreigners in Hungary, article 33, foreign top managers, executive managers, members of the Supervisory Board and foreign employees may transfer their income up to 50 per cent of their aftertax earnings derived from the company of their employment through the bank of their company.
Phase-out:	The phase out of this particular restriction depends on the progress Hungary is able to make in the implementation of the foreign exchange liberalization programme whose final target is the full convertibility of the Forint. This restriction does not create barriers to foreign investors. Phase-out is based on stipulations of Article 32. 1 July 2001.

ARTICLE 20(3)

"Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request."

COUNTRY: ARMENIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	In Armenia there are no official enquiry points yet to which requests for information about the relevant laws and other regulations could be addressed. There is no information centre either. There is a plan to establish such a centre in 1994-1995. Technical assistance is required.
Phase-out:	31 December 1996.

COUNTRY: AZERBAIJAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	There are no official enquiry points so far in Azerbaijan to which requests for information about relevant laws and regulations could be addressed. At present such information is concentrated in various organizations.
Phase-out:	31 December 1997.

COUNTRY: BELARUS

Sector:	All energy sectors.
Level of Government:	National.
Description:	Official enquiry offices which could give information on laws, regulations, judicial decisions and administrative rulings do not exist yet in Belarus. As far as the judicial decisions and administrative rulings are concerned there is no practice of their publishing.
Phase-out:	31 December 1998.

COUNTRY: KAZAKHSTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	The process of establishing enquiry points has begun. As far as the judicial decisions and administrative rulings are concerned they are not published in Kazakhstan (except for some decisions made by the Supreme Court), because they are not considered to be sources of law. To change the existing practice will require a long transitional period.
Phase-out:	1 July 2001.

COUNTRY: MOLDOVA

Sector:	All energy sectors.
Level of Government:	National.
Description:	It is necessary to establish enquiry points.
Phase-out:	31 December 1995.

COUNTRY: THE RUSSIAN FEDERATION

Sector:	All energy sectors.
Level of Government:	The Federation and the Republics constituting Federation.
Description:	No official enquiry points exist in the Russian Federation as of now to which requests for information about relevant laws and other regulation acts could be addressed. As far as the judicial decisions and administrative rulings are concerned they are not considered to be sources of law.
Phase-out:	31 December 2000.

COUNTRY: SLOVENIA

Sector:	All energy sectors.
Level of Government:	National.
Description:	In Slovenia there are no official enquiry points yet to which requests for information about relevant laws and other regulatory acts could be addressed. At present such information is available in various ministries. The Law on Foreign Investments which is under preparation foresees establishment of such an enquiry point.
Phase-out:	1 January 1998.

COUNTRY: TAJIKISTAN

Sector:	All energy sectors.
Level of Government:	National.
Description:	There are no enquiry points yet in Tajikistan to which requests for information about relevant laws and other regulations could be addressed. It is only a question of having available funding.
Phase-out:	31 December 1997.

COUNTRY: UKRAINE

Sector:	All energy sectors.
Level of Government:	National.
Description:	Improvement of the present transparency of laws up to the level of international practice is required. Ukraine will have to establish enquiry points providing information about laws, regulations, judicial decisions and administrative rulings and standards of general application.
Phase-out:	1 January 1998.

ARTICLE 22(3)

"Each Contracting Party shall ensure that if it establishes or maintains a state entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty".

COUNTRY: THE CZECH REPUBLIC

Sector:	Uranium and nuclear industries.
Level of Government:	National.
Description:	In order to deplete uranium ore reserves that are stocked by Administration of State Material Reserves, no imports of uranium ore and concentrates, including uranium fuel bundles containing uranium of non-Czech origin, will be licensed.
Phase-out:	1 July 2001.

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DECISIONS WITH RESPECT TO

THE ENERGY CHARTER TREATY

(ANNEX 2 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

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DECISIONS WITH RESPECT TO THE ENERGY CHARTER TREATY

(ANNEX 2 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

The European Energy Charter Conference has adopted the following Decisions:

1. With respect to the Treaty as a whole

   In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.

2. With respect to Article 10(7)

   The Russian Federation may require that companies with foreign participation obtain legislative approval for the leasing of federally-owned property, provided that the Russian Federation shall ensure without exception that this process is not applied in a manner which discriminates among Investments of Investors of other Contracting Parties.

3. With respect to Article 14 [65]

   (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

65 See Chairman's Statement at Adoption Session on 17 December 1994, p. 157; and Exchange of Letters with the European Communities on Decision n. 3 of the Energy Charter Treaty, p. 160.

(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. [66]

(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.

4. With respect to Article 14(2)

Without prejudice to the requirements of Article 14 and its other international obligations, Romania shall endeavour during the transition to full convertibility of its national currency to take appropriate steps to improve the efficiency of its procedures for the transfers of Investment Returns and shall in any case guarantee such transfers in a Freely Convertible Currency without restriction or a delay exceeding six months. Romania shall ensure 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.

66 Editor's note: A notification of the Russian Federation has been received by the provisional Secretariat on 29 June 1995.

5. 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.

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ENERGY CHARTER PROTOCOL

ON ENERGY EFFICIENCY

AND RELATED

ENVIRONMENTAL ASPECTS

(ANNEX 3 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

ENERGY CHARTER PROTOCOL ON ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS

(ANNEX 3 TO THE FINAL ACT OF THE EUROPEAN ENERGY CHARTER CONFERENCE)

PREAMBLE

THE CONTRACTING PARTIES to this Protocol,

Having regard to 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; and in particular to the declarations therein that co-operation is necessary in the field of energy efficiency and related environmental protection;

Having regard also to the Energy Charter Treaty, opened for signature from 17 December 1994 to 16 June 1995;

Mindful of the work undertaken by international organizations and fora in the field of energy efficiency and environmental aspects of the energy cycle;

Aware of the improvements in supply security, and of the significant economic and environmental gains, which result from the implementation of cost-effective energy efficiency measures; and aware of their importance for restructuring economies and improving living standards;

Recognizing that improvements in energy efficiency reduce negative environmental consequences of the energy cycle including global warming and acidification;

Convinced that energy prices should reflect as far as possible a competitive market, ensuring market-oriented price formation, including fuller reflection of environmental costs and benefits, and recognizing that such price formation is vital to progress in energy efficiency and associated environmental protection;

Appreciating the vital role of the private sector including small and medium-sized enterprises in promoting and implementing energy efficiency measures, and intent on ensuring a favourable institutional framework for economically viable investment in energy efficiency;

Recognizing that commercial forms of co-operation may need to be complemented by intergovernmental co-operation, particularly in the area of energy policy formulation and analysis as well as in other areas which are essential to the enhancement of energy efficiency but not suitable for private funding; and

Desiring to undertake co-operative and coordinated action in the field of energy efficiency and related environmental protection and to adopt a Protocol providing a framework for using energy as economically and efficiently as possible:

HAVE AGREED AS FOLLOWS:

PART I
INTRODUCTION

ARTICLE 1
SCOPE AND OBJECTIVES OF THE PROTOCOL

(1) This Protocol defines policy principles for the promotion of energy efficiency as a considerable source of energy and for consequently reducing adverse Environmental Impacts of energy systems. It furthermore provides guidance on the development of energy efficiency programmes, indicates areas of co-operation and provides a framework for the development of co-operative and coordinated action. Such action may include the prospecting for, exploration, production, conversion, storage, transport, distribution, and consumption of energy, and may relate to any economic sector.

(2) The objectives of this Protocol are:

(a) the promotion of energy efficiency policies consistent with sustainable development;

(b) the creation of framework conditions which induce producers and consumers to use energy as economically, efficiently and environmentally soundly as possible, particularly through the organization of efficient energy markets and a fuller reflection of environmental costs and benefits; and

(c) the fostering of co-operation in the field of energy efficiency.

ARTICLE 2
DEFINITIONS

As used in this Protocol:

(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.

(2) "Contracting Party" means a state or Regional Economic Integration Organization which has consented to be bound by this Protocol and for which the Protocol is in force.

(3) "Regional Economic Integration Organization" means an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Protocol, including the authority to take decisions binding on them in respect of those matters.

(4) "Energy Cycle" means the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimizing harmful Environmental Impacts.

(5) "Cost-Effectiveness" means to achieve a defined objective at the lowest cost or to achieve the greatest benefit at a given cost.

(6) "Improving Energy Efficiency" means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output.

(7) "Environmental Impact" means any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.

PART II
POLICY PRINCIPLES

ARTICLE 3
BASIC PRINCIPLES

Contracting Parties shall be guided by the following principles:

(1) Contracting Parties shall co-operate and, as appropriate, assist each other in developing and implementing energy efficiency policies, laws and regulations.

(2) Contracting Parties shall establish energy efficiency policies and appropriate legal and regulatory frameworks which promote, inter alia:

(a) efficient functioning of market mechanisms including market-oriented price formation and a fuller reflection of environmental costs and benefits;

(b) reduction of barriers to energy efficiency, thus stimulating investments;

(c) mechanisms for financing energy efficiency initiatives;

(d) education and awareness;

(e) dissemination and transfer of technologies;

(f) transparency of legal and regulatory frameworks.

(3) Contracting Parties shall strive to achieve the full benefit of energy efficiency throughout the Energy Cycle. To this end they shall, to the best of their competence, formulate and implement energy efficiency policies and co-operative or coordinated actions based on Cost-Effectiveness and economic efficiency, taking due account of environmental aspects.

(4) Energy efficiency policies shall include both short-term measures for the adjustment of previous practices and long-term measures to improve energy efficiency throughout the Energy Cycle.

(5) When co-operating to achieve the objectives of this Protocol, Contracting Parties shall take into account the differences in adverse effects and abatement costs between Contracting Parties.

(6) Contracting Parties recognize the vital role of the private sector. They shall encourage action by energy utilities, responsible authorities and specialised agencies, and close co-operation between industry and administrations.

(7) Co-operative or coordinated action shall take into account relevant principles adopted in international agreements, aimed at protection and improvement of the environment, to which Contracting Parties are parties.

(8) Contracting Parties shall take full advantage of the work and expertise of competent international or other bodies and shall take care to avoid duplication.

ARTICLE 4
DIVISION OF RESPONSIBILITY AND COORDINATION

Each Contracting Party shall strive to ensure that energy efficiency policies are coordinated among all of its responsible authorities.

ARTICLE 5
STRATEGIES AND POLICY AIMS

Contracting Parties shall formulate strategies and policy aims for Improving Energy Efficiency and thereby reducing Environmental Impacts of the Energy Cycle as appropriate in relation to their own specific energy conditions. These strategies and policy aims shall be transparent to all interested parties.

ARTICLE 6
FINANCING AND FINANCIAL INCENTIVES

(1) Contracting Parties shall encourage the implementation of new approaches and methods for financing energy efficiency and energy-related environmental protection investments, such as joint venture arrangements between energy users and external investors (hereinafter referred to as "Third Party Financing").

(2) Contracting Parties shall endeavour to take advantage of and promote access to private capital markets and existing international financing institutions in order to facilitate investments in Improving Energy Efficiency and in environmental protection related to energy efficiency.

(3) Contracting Parties may, subject to the provisions of the Energy Charter Treaty and to their other international legal obligations, provide fiscal or financial incentives to energy users in order to facilitate market penetration of energy efficiency technologies, products and services. They shall strive to do so in a manner that both ensures transparency and minimizes the distortion of international markets.

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ARTICLE 7
PROMOTION OF ENERGY EFFICIENT TECHNOLOGY

(1) Consistent with the provisions of the Energy Charter Treaty, Contracting Parties shall encourage commercial trade and co-operation in energy efficient and environmentally sound technologies, energy-related services and management practices.

(2) Contracting Parties shall promote the use of these technologies, services and management practices throughout the Energy Cycle.

ARTICLE 8
DOMESTIC PROGRAMMES

(1) In order to achieve the policy aims formulated according to Article 5, each Contracting Party shall develop, implement and regularly update energy efficiency programmes best suited to its circumstances.

(2) These programmes may include activities such as the:

(a) development of long-term energy demand and supply scenarios to guide decision-making;

(b) assessment of the energy, environmental and economic impact of actions taken;

(c) definition of standards designed to improve the efficiency of energy using equipment, and efforts to harmonize these internationally to avoid trade distortions;

(d) development and encouragement of private initiative and industrial co-operation, including joint ventures;

(e) promotion of the use of the most energy efficient technologies that are economically viable and environmentally sound;

(f) encouragement of innovative approaches for investments in energy efficiency improvements, such as Third Party Financing and co-financing;

(g) development of appropriate energy balances and data bases, for example with data on energy demand at a sufficiently detailed level and on technologies for Improving Energy Efficiency;

(h) promotion of the creation of advisory and consultancy services which may be operated by public or private industry or utilities and which provide information about energy efficiency programmes and technologies, and assist consumers and enterprises;

(i) support and promotion of cogeneration and of measures to increase the efficiency of district heat production and distribution systems to buildings and industry;

(j) establishment of specialized energy efficiency bodies at appropriate levels, that are sufficiently funded and staffed to develop and implement policies.

(3) In implementing their energy efficiency programmes, Contracting Parties shall ensure that adequate institutional and legal infrastructures exist.

PART III
INTERNATIONAL CO-OPERATION

ARTICLE 9
AREAS OF CO-OPERATION

The co-operation between Contracting Parties may take any appropriate form. Areas of possible co-operation are listed in the Annex.

PART IV
ADMINISTRATIVE AND LEGAL ARRANGEMENTS

ARTICLE 10
ROLE OF THE CHARTER CONFERENCE

(1) All decisions made by the Charter Conference in accordance with this Protocol shall be made by only those Contracting Parties to the Energy Charter Treaty who are Contracting Parties to this Protocol.

(2) The Charter Conference shall endeavour to adopt, within 180 days after the entry into force of this Protocol, procedures for keeping under review and facilitating the implementation of its provisions, including reporting requirements, as well as for identifying areas of co-operation in accordance with Article 9.

ARTICLE 11
SECRETARIAT AND FINANCING

(1) The Secretariat established under Article 35 of the Energy Charter Treaty shall provide the Charter Conference with all necessary assistance for the performance of its duties under this Protocol and provide such other services in support of the Protocol as may be required from time to time, subject to approval by the Charter Conference.

(2) The costs of the Secretariat and Charter Conference arising from this Protocol shall be met by the Contracting Parties to this Protocol according to their capacity to pay, determined according to the formula specified in Annex B to the Energy Charter Treaty.

ARTICLE 12
VOTING

(1) Unanimity of Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions to:

(a) adopt amendments to this Protocol; and

(b) approve accessions to this Protocol under Article 16.

Contracting Parties shall make every effort to reach agreement by consensus on any other matter requiring their decision under this Protocol. If agreement cannot be reached by consensus, decisions on non-budgetary matters shall be taken by a three-fourths majority of Contracting Parties Present and Voting at the meeting of the Charter Conference at which such matters fall to be decided.

Decisions on budgetary matters shall be taken by a qualified majority of Contracting Parties whose assessed contributions under Article 11(2) represent, in combination, at least three-fourths of the total assessed contributions.

(2) For purposes of this Article, "Contracting Parties Present and Voting" means Contracting Parties to this Protocol present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.

(3) Except as provided in paragraph (1) in relation to budgetary matters, no decision referred to in this Article shall be valid unless it has the support of a simple majority of Contracting Parties.

(4) A Regional Economic Integration Organization shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Protocol; provided that such an Organization shall not exercise its right to vote if its member states exercise theirs, and vice versa.

(5) In the event of persistent arrears in a Contracting Party's discharge of financial obligations under this Protocol, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.

ARTICLE 13
RELATION TO THE ENERGY CHARTER TREATY

(1) In the event of inconsistency between the provisions of this Protocol and the provisions of the Energy Charter Treaty, the provisions of the Energy Charter Treaty shall, to the extent of the inconsistency, prevail.

(2) Article 10(1) and Article 12(1) to (3) shall not apply to votes in the Charter Conference on amendments to this Protocol which assign duties or functions to the Charter Conference or the Secretariat, the establishment of which is provided for in the Energy Charter Treaty.

PART V
FINAL PROVISONS

ARTICLE 14
SIGNATURE

This Protocol shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organizations whose representatives have signed the Charter and the Energy Charter Treaty.

ARTICLE 15
RATIFICATION, ACCEPTANCE OR APPROVAL

This Protocol shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depository.

ARTICLE 16
ACCESSION

This Protocol shall be open for accession, from the date on which the Protocol is closed for signature, by states and Regional Economic Integration Organizations which have signed the Charter and are Contracting Parties to the Energy Charter Treaty, on terms to be approved by the Charter Conference. The instruments of accession shall be deposited with the Depository.

ARTICLE 17
AMENDMENTS

(1) Any Contracting Party may propose amendments to this Protocol.

(2) The text of any proposed amendment to this Protocol shall be communicated to Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.

(3) Amendments to this Protocol, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depository which shall submit them to all Contracting Parties for ratification, acceptance or approval.

(4) Instruments of ratification, acceptance or approval of amendments to this Protocol shall be deposited with the Depository. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the thirtieth day after deposit with the Depository of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the thirtieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

ARTICLE 18
ENTRY INTO FORCE

(1) This Protocol shall enter into force on the thirtieth day after the date of deposit of the fifteenth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organization which is a signatory to the Charter and a Contracting Party to the Energy Charter Treaty or on the same date as the Energy Charter Treaty enters into force, whichever is later.

(2) For each state or Regional Economic Integration Organization for which the Energy Charter Treaty has entered into force and which ratifies, accepts, or approves this Protocol or accedes thereto after the Protocol has entered into force in accordance with paragraph (1), the Protocol shall enter into force on the thirtieth day after the date of deposit by such state or Regional Economic Integration Organization of its instrument of ratification, acceptance, approval or accession.

(3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organization shall not be counted as additional to those deposited by member states of such Organization.

ARTICLE 19
RESERVATIONS

No reservations may be made to this Protocol.

ARTICLE 20
WITHDRAWAL

(1) At any time after this Protocol has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Protocol.

(2) Any Contracting Party which withdraws from the Energy Charter Treaty shall be considered as also having withdrawn from this Protocol.

(3) The effective date of withdrawal under paragraph (1) shall be ninety days after receipt of notification by the Depository. The effective date of withdrawal under paragraph (2) shall be the same as the effective date of withdrawal from the Energy Charter Treaty.

ARTICLE 21
DEPOSITORY

The Government of the Portuguese Republic shall be the Depository of this Protocol.

ARTICLE 22
AUTHENTIC TEXTS

In witness whereof the undersigned, being duly authorized to that effect, have signed this Protocol in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic.

Done at Lisbon on the seventeenth day of December in the year one thousand nine hundred and ninety-four. [67]

67 For Signatories see the Energy Charter Secretariat website (www.encharter.org).

ANNEX
ILLUSTRATIVE AND NON-EXHAUSTIVE LIST OF POSSIBLE AREAS OF COOPERATION PURSUANT TO ARTICLE 9

Development of energy efficiency programmes, including identifying energy efficiency barriers and potentials, and the development of energy labelling and efficiency standards;

Assessment of the Environmental Impacts of the Energy Cycle;

Development of economic, legislative and regulatory measures;

Technology transfer, technical assistance and industrial joint ventures subject to international property rights regimes and other applicable international agreements;

Research and development;

Education, training, information and statistics;

Identification and assessment of measures such as fiscal or other market-based instruments, including tradeable permits to take account of external, notably environmental, costs and benefits.

Energy analysis and policy formulation:

- assessment of energy efficiency potentials;
- energy demand analysis and statistics;
- development of legislative and regulatory measures;
- integrated resource planning and demand side management;
- Environmental Impact assessment, including major energy projects.

Evaluation of economic instruments for Improving Energy Efficiency and environmental objectives.

Energy efficiency analysis in refining, conversion, transport and distribution of hydro-carbons.

Improving Energy Efficiency in power generation and transmission:

- cogeneration;
- plant component (boilers, turbines, generators, etc);
- network integration.

Improving Energy Efficiency in the building sector:

- thermal insulation standards, passive solar and ventilation;
- space heating and air conditioning systems;
- high efficiency low NOx burners;

- metering technologies and individual metering;
- domestic appliances and lighting.

Municipalities and local community services:

- district heating systems;
- efficient gas distribution systems;
- energy planning technologies;
- twinning of towns or of other relevant territorial entities;
- energy management in cities and in public buildings;
- waste management and energy recovery of waste.

Improving Energy Efficiency in the industrial sector:

- joint ventures;
- energy cascading, cogeneration and waste heat recovery;
- energy audits.

Improving Energy Efficiency in the transport sector:

- motor vehicle performance standards;
- development of efficient transport infrastructures.

Information:

- awareness creation;
- data bases: access, technical specifications, information systems;
- dissemination, collection and collation of technical information;
- behavioural studies.

Training and education:

- exchanges of energy managers, officials, engineers and students;
- organization of international training courses.

Financing:

- development of legal framework;
- Third Party Financing;
- joint ventures;
- co-financing.

CHAIRMAN'S STATEMENT AT ADOPTION SESSION ON 17 DECEMBER 1994 [68]

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.

In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.

Further, the Russian Federation has stated its view that, except where the Treaty expressly indicates a contrary intention, no provision of this Treaty shall derogate from the provisions of GATT 1947 as made applicable by Article 29(2), Annex G and relevant Declarations. This again is clearly the intention of the negotiating parties and a basis for the approach to trade contained in Article 29 of the Treaty.

Having followed the long and difficult discussions on the Freedom of Transfers, I note that certain countries in transition have drawn attention to their interpretation of Decision N° 3 which I think to be correct: the rights granted to Investors of other Contracting Parties under paragraph 1(a) of Decision N° 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.

I have also noted the Russian delegation's concerns on nuclear trade with the European Communities. It is clear that as far as the Energy Charter Treaty is concerned, nuclear trade will be governed by Article 29(2)(a), Annex G and the joint declarations, concerning the implementation of the GATT rules by reference. I take note of the fact that the Russian Federation and the EC have agreed that a joint memorandum be annexed to the report of our session.

68 Editor's note: Annex I to document CONF 115 of 6 January 1995 (not published). This Statement was read out by the Chairman to the final Plenary Session of the European Energy Charter Conference on 17 December 1994 at Lisbon and also circulated in written form. The Conference agreed without objection to this proposal for resolving the outstanding interpretative issues.

Finally, I note that the representative of Norway supported by the representatives of Armenia, Belarus, Estonia, European Communities and their Member States, Finland, Iceland, Lithuania, Liechtenstein, Kazakhstan, Moldova, the Russian Federation, Sweden, Switzerland and Ukraine have declared that the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.

JOINT MEMORANDUM OF THE DELEGATIONS OF THE RUSSIAN FEDERATION AND THE EUROPEAN COMMUNITIES ON NUCLEAR TRADE [69]

The delegations of the Russian Federation and of the European Communities have examined the situation of the nuclear trade between both Parties and they acknowledged the following:

- The statement of the European Commission in the Joint Committee held on 1 and 2 December 1994 clearly indicates that "the European Commission and the Euratom Supply Agency have never made it their policy to apply quotas on imports of nuclear materials from Russia and do not intend to do so in the future unless a situation should arise requiring safeguard measures in accordance with Article 15 of the Agreement between the European Economic Community, the European Atomic Energy Community and the Union of Soviet Socialist Republics on Trade and Economic and Commercial Co-operation signed in Brussels on 18 December 1989. This means, a fortiori, that no quotas have been or will be applied on a utility by utility basis".

- The relevant provisions of the Agreement on Partnership and Co-operation establishing a partnership between the European Communities and their Member States on the one part, and the Russian Federation on the other part, signed in Corfu on 24 June 1994, on national treatment with respect to nuclear materials imported from Russia are fully applicable.

- They acknowledge the intention expressed by the European Commission to look at the way the Euratom Supply Agency is implementing its supply policy, with a view to take full account of both Parties' legitimate interests, including inter alia the interest expressed by Russia in increasing the volume of trade.

Representatives of the Commission and of the Russian Government will meet in the near future in order to examine the difficulties encountered by Russian exporters of nuclear materials.

69 Editor's note: Annex II to document CONF 115 of 6 January 1995 (not published).

EXCHANGE OF LETTERS ON DECISION N° 3 OF THE ENERGY CHARTER TREATY

LETTER FROM THE EUROPEAN COMMUNITIES TO RUSSIA

Lisbon, 17 December 1994

Sir,

The purpose of this letter is to confirm that with regard to Decision N° 3 of the Energy Charter Treaty (ECT) concerning transfer of payments and especially to the footnote [70] to this Decision, Article 105 in our Partnership and Co-operation Agreement (PCA), signed at Corfu, 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision N° 3.

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

Marcelino Oreja Günter Rexrodt

On behalf of the European Communities

70 Editor's note: 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 Co-operation 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."

EXCHANGE OF LETTERS ON DECISION N° 3 OF THE ENERGY CHARTER TREATY

LETTER FROM THE RUSSIAN FEDERATION

Lisbon, 17 December 1994

Dear Sir,

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 [71] to this Decision, Article 105 of the Agreement on Partnership and Co-operation 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.

For the Government of the Russian Federation

O. Davydov

71 See note 70, p. 160.

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NYSCEF DOC. NO. 5 RECEIVED NYSCEF: 08/16/2019

AMENDMENT

TO THE TRADE-RELATED

PROVISIONS

OF THE ENERGY CHARTER

TREATY

FILED: NEW YORK COUNTY CLERK 08/16/2019 05:56 PM INDEX NO. 654707/2019
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GUIDE TO THE AMENDMENT TO THE TRADE-RELATED PROVISIONS OF THE ENERGY CHARTER TREATY

This Note outlines the elements of the Amendment agreed by the Conference in April 1998 and where those elements are to be found in the text.

1. The Amendment consists of the Final Act which contains three Understandings and two Joint Declarations related to the Amendment; Annex 1 to the Final Act is the Amendment itself which consists of seven Articles; Annex 2 to the Final Act contains two Decisions.

2. Article 1 of the Amendment (Annex 1 to the Final Act) contains the text of Article 29 (Interim Provisions on Trade-Related Matters) to replace that of the Energy Charter Treaty (ECT).

   Article 2 contains other consequential amendments to the ECT (except the amendments to Annexes D and G).

   Article 3 contains amendments to Annex D of the ECT (trade-related dispute settlement mechanism).

   Article 4 contains the text of Annex W (application of provisions of the WTO Agreement) to replace Annex G of the ECT.

   Article 5 contains the new trade-related Annexes to be inserted in the ECT Annexes EM II, EQ I, EQ II, BR and BRQ).

   Article 6 is the provisional application provision of the Amendment.

   Article 7 makes the Decisions an integral part of the ECT.

3. The Amendment expands the ECT trade regime to cover Energy-Related Equipment. It replaces the outdated GATT 47 references and terms with the relevant WTO references and terms. Furthermore, coherence in application of WTO rules under the ECT and under the WTO is ensured (see e.g. Article 2, the new definition of WTO amending ECT Article 1(11), and Annex W, paragraph (B)(10)).

4. The text of Article 29 provides for a best endeavours tariff commitment for both Energy Materials and Products (Annex EM I) and Energy-Related Equipment (Annex EQ I) (see paragraphs (4) and (5)).

   This is complemented by the possibility to move to a future legally binding commitment for agreed items which are presently subject to the best endeavours commitment (see paragraphs (6) and (7)).

Accordingly, there is provision for moving items to the level of a legally binding tariff commitment at a later date by a Conference decision requiring a unanimous vote, without having to go through a formal amendment procedure. That procedure is reflected in Article 2 through the amendment to ECT Article 34(3) (new subparagraph (o)) and Article 36(1) (new subparagraph (g)).

5. The present Annex EM of the ECT on Energy Materials and Products becomes Annex EM I (see Article 2 renaming Annex EM). Energy-Related Equipment is listed in the new Annex EQ I (see Article 5 of the Amendment). Energy-Related Equipment is defined in the same manner as Energy Materials and Products (see Article 2 of the Amendment inserting a new Article 1(4bis) in the ECT). Items subject to a legally binding tariff commitment will be listed in Annexes EM II and EQ II, both of which are empty until the Conference decides otherwise. Annual reviews by the Conference on the possibility of moving items to a legally binding commitment are provided for in Understanding No. 3.

6. The Charter Conference, in deciding on moving items to the legally binding standstill commitment, will also decide on the listing of countries in Annexes BR/BRQ. This is provided for in paragraph (7) of Article 29 and in Article 2 of the Amendment including a new subparagraph (n) in ECT Article 34(3). Understanding No. 2 deals with commitments by non-WTO countries listed in Annexes BR and BRQ. Decision No. 1 provides an opting out procedure for countries which are not applying the Amendment and which are not listed in those Annexes when the Conference takes a decision to move items to a legally binding tariff commitment.

7. Decision No. 2 provides that the Final Provisions of the Amendment shall be based on Part VIII of the ECT so far as relevant. This concerns in particular the entry into force of the Amendment (Article 42 of the ECT).

FINAL ACT OF THE INTERNATIONAL CONFERENCE AND DECISION OF THE ENERGY CHARTER CONFERENCE

I. Between 17 December 1994 and 18 December 1997 the Provisional Energy Charter Conference met to negotiate an amendment to the trade-related provisions of the Energy Charter Treaty. A Conference to adopt the amendment was held at Brussels on 23-24 April 1998. Representatives of the Republic of Albania, the Republic of Armenia, Australia, the Republic of Austria, the Azerbaijani Republic, the Kingdom of Belgium, the Republic of Belarus, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the European Communities, the Republic of Finland, the French Republic, the Republic of Georgia, the Federal Republic of Germany, the Hellenic Republic, the Republic of Hungary, the Republic of Iceland, Ireland, the Italian Republic, Japan, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Republic of Moldova, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of Poland, the Portuguese Republic, Romania, the Russian Federation, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, the Swiss Confederation, the Republic of Tajikistan, the former Yugoslav Republic of Macedonia, the Republic of Turkey, Turkmenistan, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the Republic of Uzbekistan (hereinafter referred to as "the representatives") participated in the Conference, as did invited observers from certain countries and international organizations.

II. The Energy Charter Conference, which was definitively established on the entry into force on 16 April 1998 of the Energy Charter Treaty, also met on 23 and 24 April 1998 to consider adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty in accordance with the provisions of the Energy Charter Treaty.

AMENDMENT TO THE TRADE-RELATED PROVISIONS OF THE ENERGY CHARTER TREATY

III. The text of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (hereinafter referred to as the "Amendment") which is set out in Annex 1 and Decisions with respect thereto which are set out in Annex 2

were adopted in accordance with the modalities of the international conference called for this purpose and under the Energy Charter Treaty in accordance with the procedure provided for in the Treaty.

UNDERSTANDINGS

IV. The following Understandings with respect to the Amendment were adopted:

1. Understanding with respect to Article 29(2)(a) and Annex W:

   Notwithstanding the listing of paragraph 6 of article XXIV of the GATT 1994 in Annex W (A)(1)(a)(i), any signatory affected by an increase in customs duties or other charges of any kind imposed on or in connection with importation or exportation referred to in the first sentence of that paragraph, is entitled to seek consultations in the Charter Conference.

2. Understanding with respect to Article 29(7):

   In the case of a signatory, not a member of the WTO, which is listed in Annexes BR or BRQ or both, any concession offered formally in the process of its accession to the WTO with respect to Energy Materials or Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II shall, for the purpose of this Article, be regarded as a commitment under the WTO.

3. Understanding with respect to Articles 29(6) and (7) and 34(3)(o):

   The Charter Conference shall conduct an annual review with respect to any possibility of moving items of Energy Materials and Products or Energy-Related Equipment from Annexes EM I or EQ I to Annexes EM II or EQ II. [72]

DECLARATIONS

V. The following Declarations were made with respect to the Amendment:

Joint Declaration on Trade-Related Intellectual Property Rights

Signatories confirm their commitment to provide effective protection of intellectual property rights following the highest international standards.

72 See Chairman's Statement at the Adoption Session on 24 April 1998, p. 206.

Intellectual property rights include for the purpose of this Declaration in particular copyright and related rights (including computer programmes and data bases), trademarks, geographical indications, patents, designs, topographies of semiconductor products and undisclosed information.

Joint Declaration by the Russian Federation and the European Union

The Russian Federation has raised the issue of trade in nuclear materials. The Russian Federation and the EU agreed that the Partnership and Cooperation Agreement between the Russian Federation, the European Union and its Member States, which entered into force on 1 December 1997, is the appropriate framework to deal with this issue, as confirmed in the conclusions of 27 January 1998 Cooperation Council.

AMENDMENT TO THE TRADE-RELATED PROVISIONS OF THE ENERGY CHARTER TREATY

(ANNEX 1 TO THE FINAL ACT OF THE INTERNATIONAL CONFERENCE AND DECISION OF THE ENERGY CHARTER CONFERENCE)

ARTICLE 1

Article 29 of the Treaty shall be replaced by the following text: [73]

ARTICLE 29
INTERIM PROVISIONS ON TRADE-RELATED MATTERS

(1) The provisions of this Article shall apply to trade in Energy Materials and Products and Energy-Related Equipment while any Contracting Party is not a member of the WTO.

(2) (a) Trade in Energy Materials and Products and Energy-Related Equipment between Contracting Parties at least one of which is not a member of the WTO shall be governed, subject to subparagraph (b) and to the exceptions and rules provided for in Annex W, by the provisions of the WTO Agreement, as applied and practised with regard to Energy Materials and Products and Energy-Related Equipment by members of the WTO among themselves, as if all Contracting Parties were members of the WTO. [74]

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

73 See Chairman's Conclusion on the Implementation of Trade-Related Rules, at the Energy Charter Conference on 24 April 1998, p. 207.

74 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 1. with respect to Article 29(2)(a) and Annex W, p. 168.

(3) (a) Each signatory to this Treaty, and each state or Regional Economic Integration Organization acceding to this Treaty before 24 April 1998, shall on the date of its signature or of its deposit of its instrument of accession provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy Materials and Products, notifying the level of such customs duties and charges applied on such date of signature or deposit. Each signatory to this Treaty, and each state or Regional Economic Integration Organization acceding to this Treaty before 24 April 1998, shall on that date provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy-Related Equipment, notifying the level of such customs duties and charges applied on that date.

(b) Each state or Regional Economic Integration Organization acceding to this Treaty on or after 24 April 1998, shall, on the date of its deposit of its instrument of accession, provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy Materials and Products and Energy-Related Equipment, notifying the level of such customs duties and charges applied on such date of deposit.

Any changes to such customs duties or charges of any kind imposed on or in connection with importation or exportation shall be notified to the Secretariat, which shall inform the Contracting Parties of such changes.

(4) Each Contracting Party shall endeavour not to increase any customs duty or charge of any kind imposed on or in connection with importation or exportation:

(a) in the case of the importation of Energy Materials and Products listed in Annex EM I or Energy-Related Equipment listed in Annex EQ I and described in Part I of the Schedule relating to the Contracting Party referred to in article II of the GATT 1994, above the level set forth in that Schedule, if the Contracting Party is a member of the WTO;

(b) in the case of the exportation of Energy Materials and Products listed in Annex EM I or Energy-Related Equipment listed in Annex EQ I, and that of their importation if the Contracting Party is not a member of the WTO, above the level most recently notified to the Secretariat, except as permitted by the provisions made applicable by subparagraph (2)(a).

(5) A Contracting Party may increase such customs duty or other charge above the level referred to in paragraph (4) only if:

(a) in case of a customs duty or other charge imposed on or in connection with importation, such action is not inconsistent with the applicable provisions of the WTO Agreement, other than those provisions of the WTO Agreement listed in Annex W; or

(b) it has, to the fullest extent practicable under its legislative procedures, notified the Secretariat of its proposal for such an increase, given other interested Contracting Parties reasonable opportunity for consultation with respect to its proposal, and accorded consideration to any representations from such Contracting Parties.

(6) In respect of trade between Contracting Parties at least one of which is not a member of the WTO, no such Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with importation or exportation of Energy Materials and Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II above the lowest of the levels applied on the date of the decision by the Charter Conference to list the particular item in the relevant Annex. [75]

A Contracting Party may increase such customs duty or other charge above that level only if:

(a) in case of a customs duty or other charge imposed on or in connection with importation, such action is not inconsistent with the applicable provisions of the WTO Agreement, other than those provisions of the WTO Agreement listed in Annex W; or

(b) in exceptional circumstances not elsewhere provided for in this Treaty, the Charter Conference decides to waive the obligation otherwise imposed on a Contracting Party by this paragraph, consenting to an increase in a customs duty, subject to any conditions the Charter Conference may impose.

(7) Notwithstanding paragraph (6), in the case of trade referred to in that paragraph, Contracting Parties listed in Annex BR in respect of Energy Materials and Products listed in Annex EM II, or in Annex BRQ in respect

75 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 3. with respect to Article 29(6) and (7) and 34(3)(o), p. 168.

of Energy-Related Equipment listed in Annex EQ II, shall not increase any customs duty or other charge above the level resulting from their commitments or any provisions applicable to them under the WTO Agreement. [76]

(8) Other duties and charges imposed on or in connection with importation or exportation of Energy Materials and Products or Energy-Related Equipment shall be subject to the provisions of the Understanding on the Interpretation of Article II: 1(b) of the GATT 1994 as modified according to Annex W.

(9) ANNEX D shall apply:

(a) to disputes regarding compliance with provisions applicable to trade under this Article;

(b) to disputes regarding the application by a Contracting Party of any measure, whether or not it conflicts with the provisions of this Article, which is considered by another Contracting Party to nullify or impair any benefit accruing to it directly or indirectly under this Article; and

(c) unless the Contracting Parties parties to the dispute agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a member of the WTO,

Except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:

(i) has been notified in accordance with and meets the other requirements of sub-paragraph (2)(b) and Annex TFU; or

(ii) establishes a free-trade area or a customs union as described in article XXIV of the GATT 1994.

ARTICLE 2

The Treaty shall be amended as follows:

In the Preamble, paragraph seven, replace "General Agreement on Tariffs and Trade and its Related Instruments" with "Agreement Establishing the World Trade Organization"

In the Preamble, paragraph eight, replace "related equipment" with "Energy-Related Equipment".

76 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 2. with respect to Article 29(7), p. 168 and Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 3. with respect to Article 29(6) and (7) and 34(3)(o), p. 168.

In the Preamble, paragraph nine, replace "General Agreement on Tariffs and Trade" and "parties thereto" with "World Trade Organization" and "members thereof"

In the Preamble, paragraph ten, replace "parties to the General Agreement on Tariffs and Trade and its Related Instruments" with "members of the World Trade Organization ".

In Article 1, replace the text of paragraph (4) with:

"(4) "Energy Materials and Products", based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities, means the items included in Annexes EM I or EM II ."

In Article 1, after the text of paragraph (4) insert:

"(4bis) "Energy-Related Equipment", based on the Harmonised System of the World Customs Organization, means the items included in Annexes EQ I or EQ II ."

In Article 1, replace the text of paragraph (11) with :

"(a) "WTO" means the World Trade Organization established by the Agreement Establishing the World Trade Organization.

(b) "WTO Agreement" means the Agreement Establishing the World Trade Organization, its Annexes and the decisions, declarations and understandings related thereto, as subsequently rectified, amended and modified from time to time.

(c) "GATT 1994" means the General Agreement on Tariffs and Trade as specified in Annex 1A to the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified from time to time."

In Article 3, after "Energy Materials and Products" insert "and Energy-Related Equipment".

In Article 4, title, replace "GATT and Related Instruments" with "WTO Agreement" and in the text of Article 4, replace "parties to the GATT" with "members of the WTO" and replace "GATT and Related Instruments" with "WTO Agreement".

In Article 5, paragraph (1), insert "1994" following "article III and XI of the GATT" and replace "GATT and Related Instruments" with "WTO Agreement".

In Article 14, paragraph (6), replace "GATT and Related Instruments" with "WTO Agreement".

In Article 20, paragraph (1), replace "GATT and relevant Related Instruments" with "WTO Agreement", and after "Energy Materials and Products" insert "or Energy-Related Equipment".

In Article 21, paragraph (4), replace "Article 29(2) to (6)" with "Article 29(2) to (8)".

In Article 25, paragraph (3), replace "GATT and Related Instruments" with "WTO Agreement".

In Article 34, paragraph (3) add after sub-paragraph (m):

"(n) consider and approve the listing of signatories in Annexes BR or BRQ or in both these Annexes; [77]

(o) consider and approve the addition of items to Annex EM II from Annex EM I with the corresponding deletion of those items from Annex EM I and consider and approve the addition of items to Annex EQ II from Annex EQ I with the corresponding deletion of those items from Annex EQ I;". [78]

In Article 34, paragraph (3) replace the denomination of sub-paragraph "(n)" with sub-paragraph "(p)".

In Article 36(1)(d), replace "G" with "W".

In Article 36, in paragraph (1) after subparagraph (f) add:

"(g) approve the addition of items to Annex EM II from Annex EM I with the corresponding deletion of those items from Annex EM I and approve the addition of items to Annex EQ II from Annex EQ I with the corresponding deletion of those items from Annex EQ I."

In Article 36, paragraph (4) replace "(f)" with "(g)".

In the 'Table of Contents' of Annexes to the Energy Charter Treaty, rename "Annex EM" as "Annex EM I", insert as 2 to 4 the additional Annexes "Annex EM II Energy Materials and Products (In accordance with Article 1(4))", "Annex EQ I List of Energy-Related Equipment (In accordance with Article 1(4bis))" and "Annex EQ II List of Energy-Related Equipment (In accordance with Article 1(4bis))".

In 9. Annex G, replace "GATT and Related Instruments" with "WTO Agreement", and rename "Annex G" as "Annex W".

77 See Decisions in Connection with the Adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (Annex 2 to the Final Act), n. 1, p. 205 and Chairman's Statement at the Adoption Session on 24 April 1998, p. 206.

78 See Decisions in Connection with the Adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (Annex 2 to the Final Act), n. 1, p. 205 and Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 3. with respect to Article 29(6) and (7) and 34(3)(o), p. 168.

Renumber Annexes 2 to 10 as Annexes 5 to 13. Insert as 14 and 15 the additional Annexes "Annex BR List of Contracting Parties which shall not increase any customs duty or other charge above the level resulting from their commitments or any provisions applicable to them under the WTO Agreement (In accordance with Article 29(7))" and "Annex BRQ List of Contracting Parties which shall not increase any customs duty or other charge above the level resulting from their commitments or any provisions applicable to them under the WTO Agreement (In accordance with Article 29(7))".

Renumber Annexes 11 to 14 as Annexes 16 to 19.

In respect of Annex D, replace "(In accordance with Article 29(7))" with "(In accordance with Article 29(9))."

In Annex EM, rename "EM" as "EM I".

In Annex TRM, paragraph (1)(a) and (b) and in paragraph (3)(a) and (b), replace "party to the GATT" with "member of the WTO".

In Annex TFU, paragraphs (2)(c), (4), first sentence, and (6), first sentence, replace "GATT and Related Instruments" with "WTO Agreement".

ARTICLE 3

Annex D of the Treaty shall be amended as follows: [79]

In the heading replace "(In accordance with Article 29(7))" with "(In accordance with Article 29(9))."

At the end of paragraph (1)(a), delete the period and add thereafter following "29":

> ", or about any measures that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29."

In paragraph (1)(b), at the end of the first sentence, delete the period and insert thereafter following "29":

> ", or any measure that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29."

and in the second sentence, replace "GATT and Related Instruments" with "WTO Agreement".

79 See Chairman's Conclusion on the Implementation of Trade-Related Rules, at the Energy Charter Conference on 24 April 1998, p. 207.

In paragraph (1)(d), insert after the comma before "the Contracting Parties":

> "or to nullify or impair any benefit accruing to it directly or indirectly under the provisions applicable to trade under Article 29, "

In paragraph (2)(a), second sentence, replace "GATT and Related Instruments" with "WTO Agreement".

In paragraph (3)(a), second sentence, replace "GATT and Related Instruments" with "WTO Agreement"

and replace the penultimate sentence with :

> "Panels shall be guided by the interpretations given to the WTO Agreement within the framework of the WTO Agreement and shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a member of the WTO to other members of the WTO to which it applies the WTO Agreement and which have not been taken by those other members to dispute resolution under the WTO Agreement."

In paragraph (4)(b), first sentence, replace "GATT or a Related Instrument" with "WTO Agreement".

In paragraph (5)(c), replace "GATT or Related Instruments" with "WTO Agreement".

In paragraph (7), first sentence, replace "party to the GATT" with

> "member of the WTO"

and replace "panellists currently nominated for the purpose of GATT dispute panels" with:

> "persons whose names appear on the indicative list of governmental and non-governmental individuals, referred to in article 8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement or who have in the past served as panellists on a GATT or WTO dispute settlement panel."

Add after paragraph (9):

"(10) Where a Contracting Party invokes Article 29(9)(b), this Annex shall apply, subject to the following modifications:

(a) the complaining party shall present a detailed justification in support of any request for consultations or for the establishment of a panel regarding a measure which it considers to nullify or impair any benefit accruing to it directly or indirectly under Article 29;

(b) where a measure has been found to nullify or impair benefits under Article 29 without violation thereof, there is no obligation to withdraw the measure; however, in such a case the panel shall recommend that the Contracting Party concerned make a mutually satisfactory adjustment;

(c) the arbitral panel provided for in paragraph (6)(b), upon the request of either party, may determine the level of benefits that have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute".

ARTICLE 4

The following Annex shall replace Annex G of the Treaty:

ANNEX W
EXCEPTIONS AND RULES GOVERNING THE APPLICATION OF THE PROVISIONS OF THE WTO AGREEMENT (IN ACCORDANCE WITH ARTICLE 29(2)(A))

(A) Exceptions to the Application of the Provisions of the WTO Agreement.

The following provisions of the WTO Agreement shall not be applicable under Article 29(2)(a):

(1) Agreement Establishing the World Trade Organization

All except article IX, paragraphs 3 and 4 and XVI, paragraphs 1, 3 and 4

(a) ANNEX 1A to the WTO Agreement:

Multilateral Agreements on Trade in Goods:

(i) General Agreement on Tariffs and Trade 1994

II	Schedules of Concessions, paragraphs (1)(a),(1)(b,1st sentence), (1)(c) and (7)
IV	Special Provisions relating to Cinematographic Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXII	Consultation
XXIII	Nullification and Impairment

XXIV	Customs Unions and Free-Trade Areas, paragraph 6 [80]
XXV	Joint Action by the Contracting Parties
XXVI	Acceptance, Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules
XXVIIIbis	Tariff Negotiations
XXIX	The Relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXII	Contracting Parties
XXXIII	Accession
XXXV	Non-application of the Agreement between Particular Contracting Parties
XXXVI	Principles and Objectives
XXXVII	Commitments
XXXVIII	Joint Action
Annex H	Relating to Article XXVI
Annex I	Notes and Supplementary Provisions (related to the above-mentioned GATT provisions)

Understanding on the Interpretation of Article II: 1(b) of the GATT 1994

2	Date of incorporation of other duties and charges into the schedule
4	Challenges, (1st sentence only)
6	Dispute settlement
8	Supersession of BISD 27S/24

Understanding on the Interpretation of Article XVII of the GATT 1994

1	only the phrase "for review by the working party to be set up under paragraph (5)"
5	Working Party on state trading

80 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understandings, n. 1. with respect to Article 29(2)(a) and Annex W, p. 168.

Understanding on the Balance-of-Payments Provisions of the GATT 1994

5 Committee on Balance-of-Payments Restrictions, except last sentence

7 Review by the Committee, the phrase "or under paragraph 12(b) of Article XVIII"

8 Simplified consultation procedures

13 Conclusions of Balance-of-Payments consultations, first sentence, third sentence: the phrase "and XVIII: B, the 1979 Declaration" and last sentence.

Understanding on the Interpretation of Article XXIV of the GATT 1994

All except paragraph 13

Understanding in Respect of Waivers of Obligations under the GATT 1994

3 Nullification and Impairment

Understanding on the Interpretation of Article XXVIII of the GATT 1994

Marrakesh Protocol to the GATT 1994

(ii) Agreement on Agriculture

(iii) Agreement on the Application of Sanitary and Phytosanitary Measures

(iv) Agreement on Textiles and Clothing

(v) Agreement on Technical Barriers to Trade

Preamble (paragraphs 1, 8, 9)

1.3 General Provisions

10.5 The words "Developed country" and the words "French or Spanish" which shall be replaced by "Russian"

10.6 The phrase "and draw attention of developing country Members .... interest to them."

10.9 Information about technical regulations, standards and certification systems (languages)

11 Technical assistance to other Parties

12	Special and differential treatment of developing countries
13	The Committee on Technical Barriers to Trade
14	Consultation and Dispute Settlement
15	Final Provisions (other than 15.2 and 15.5)
Annex 2	Technical Expert Groups

(vi) Agreement on Trade-Related Investment Measures

(vii) Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping)

15	Developing Country Members
16	Committee on Anti-Dumping Practices
17	Consultation and Dispute Settlement
18	Final Provisions, paragraphs 2 and 6

(viii) Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation)

Preamble, paragraph 2, the phrase "and to secure additional benefits for the international trade of developing countries"

14	Application of Annexes (second sentence except as far as it refers to Annex III paragraphs 6 and 7)
18	Institutions (Committee on Customs Valuation)
19	Consultation and Dispute Settlement
20	Special and differential treatment of developing countries
21	Reservations
23	Review
24	Secretariat
Annex II	Technical Committee on Customs Valuation
Annex III	Extra Provisions (except paragraphs 6 and 7)

(ix) Agreement on Preshipment Inspection

Preamble, paragraphs 2 and 3

3.3	Technical Assistance
6	Review
7	Consultation

8	Dispute Settlement

(x) Agreement on Rules of Origin

Preamble, 8th indent	
4	Institutions
6	Review
7	Consultation
8	Dispute Settlement
9	Harmonization of Rules of Origin
Annex I	Technical Committee on Rules of Origin

(xi) Agreement on Import Licensing Procedures

1.4(a)	General Provisions (last sentence)
2.2	Automatic Import Licensing (footnote 5)
3.5(iv)	Non-Automatic Import Licensing (last sentence)
4	Institutions
6	Consultations and Dispute Settlement
7	Review (except paragraph 3)
8	Final provisions (except paragraph 2)

(xii) Agreement on Subsidies and Countervailing Measures

4	Remedies (except paragraphs 4.1, 4.2 and 4.3)
5	Adverse Effects, last sentence
6	Serious Prejudice (paragraphs 6.6, the phrases "subject to the provisions of paragraph 3 of Annex V" and "arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7", 6.8 the phrase ", including information submitted in accordance with the provisions of Annex V" and 6.9)
7	Remedies (except paragraphs 7.1, 7.2 and 7.3)
8	Identification of Non-Actionable Subsidies, paragraph 8.5 and Footnote 25
9	Consultations and Authorised Remedies
24	Committee on Subsidies and Countervailing Measures and Subsidiary Bodies
26	Surveillance
27	Special and Differential Treatment of Developing Country Members

29 Transformation into Market Economy, paragraph 29.2 (except first sentence)

30 Dispute Settlement

31 Provisional Application

32.2, 32.7 and 32.8 (only insofar as it refers to Annexes V and VII) Final Provisions

Annex V Procedures for Developing Information concerning Serious Prejudice

Annex VII Developing Countries

(xiii) Agreement on Safeguards

9 Developing Country Members

12 Notification and Consultation, paragraph 10

13 Surveillance

14 Dispute Settlement

ANNEX Exception

(b) ANNEX 1B to the WTO Agreement:

General Agreement on Trade in Services

(c) ANNEX 1C to the WTO Agreement:

Agreement on Trade-Related Aspects of Intellectual Property Rights [81]

(d) ANNEX 2 to the WTO Agreement:

Understanding on Rules and Procedures Governing the Settlement of Disputes

(e) ANNEX 3 to the WTO Agreement:

Trade Policy Review Mechanism

(f) ANNEX 4 to the WTO Agreement:

Plurilateral Trade Agreements:

(i) Agreement on Trade in Civil Aircraft

(ii) Agreement on Government Procurement

81 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Declarations, Joint Declaration on Trade-Related Intellectual Property Rights, p. 168.

(g) Ministerial Decisions, Declarations and Understanding:

(i) Decision on Measures in favour of Least-Developed Countries

(ii) Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policy Making

(iii) Decision on Notification Procedures

(iv) Declaration on the Relationship of the WTO with the IMF

(v) Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries

(vi) Decision on Notification of First Integration under Article 2.6 of the Agreement on Textiles and Clothing

(vii) Decision on Review of the ISO/IEC Information Centre Publication

(viii) Decision on Proposed Understanding on WTO-ISO Standards Information System

(ix) Decision on Anti-Circumvention

(x) Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994

(xi) Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures

(xii) Decision Regarding Cases Where Customs Administrations Have Reason to Doubt the Truth or Accuracy of the Declared Value

(xiii) Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires

(xiv) Decision on Institutional Arrangements for the GATS

(xv) Decision on certain Dispute Settlement Procedures for the GATS

(xvi) Decision on Trade in Services and the Environment

(xvii) Decision on Negotiations on Movement of Natural Persons

(xviii) Decision on Financial Services

(xix) Decision on Negotiations on Maritime Transport Services

(xx) Decision on Negotiations on Basic Telecommunications

(xxi) Decision on Professional Services

(xxii) Decision on Accession to the Agreement on Government Procurement

(xxiv) Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes

(xxv) Understanding on Commitments in Financial Services

(xxvi) Decision on the Acceptance of and Accession to the Agreement Establishing the WTO

(xxvii) Decision on Trade and Environment

(xxviii) Decision on Organizational and Financial Consequences Following from Implementation of the Agreement Establishing the WTO

(xxix) Decision on the Establishment of the Preparatory Committee for the WTO

(2) All other provisions in the WTO Agreement which relate to:

(a) governmental assistance to economic development and the treatment of developing countries, except for paragraphs (1) to (4) of the Decision of 28 November 1979 (L/4903) on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries;

(b) the establishment or operation of specialist committees and other subsidiary institutions;

(c) signature, accession, entry into force, withdrawal, deposit and registration.

(3) All agreements, arrangements, decisions, understandings or other joint action pursuant to the provisions listed as not applicable in paragraphs (1) or (2).

(4) Trade in nuclear materials may be governed by agreements referred to in the Declarations related to this paragraph contained in the Final Act of the European Energy Charter Conference. [82]

(B) Rules Governing the Application of Provisions of the WTO Agreement.

(1) In the absence of a relevant interpretation of the WTO Agreement adopted by the Ministerial Conference or the General Council of the World Trade Organization under paragraph 2 of article IX of the WTO Agreement concerning provisions applicable under Article 29(2)(a), the Charter Conference may adopt an interpretation.

(2) Requests for waivers under Article 29(2) and (6)(b) shall be submitted to the Charter Conference, which shall follow, in carrying out these duties, the procedures of paragraphs 3 and 4 of article IX of the WTO Agreement.

(3) Waivers of obligations in force in the WTO shall be considered in force for the purposes of Article 29 while they remain in force in the WTO.

(4) The provisions of article II of the GATT 1994 which have not been disapplied shall, without prejudice to Article 29(4), (5) and (7), be modified as follows:

(i) All Energy Materials and Products listed in Annex EM II and Energy-Related Equipment listed in Annex EQ II imported from or exported to any other Contracting Party shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation or exportation, in excess of those imposed on the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7), or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing or exporting territory on the date referred to in Article 29(6), first sentence.

(ii) Nothing in article II of the GATT 1994 shall prevent any Contracting Party from imposing at any time on the importation or exportation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of article III of GATT 1994 in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

82 See Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Declarations, Joint Declaration by the Russian Federation and the European Union, p. 169.

(b) any anti-dumping or countervailing duty applied consistently with the provisions of article VI of GATT 1994;

(c) fees or other charges commensurate with the cost of services rendered.

(iii) No Contracting Party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of the standstill obligations provided for in Article 29(6) or (7).

(iv) If any Contracting Party establishes, maintains or authorises, formally or in effect, a monopoly of the importation or exportation of any Energy Material or Product listed in Annex EM II or in respect of Energy-Related Equipment listed in EQ II, such monopoly shall not operate so as to afford protection on the average in excess of the amount of protection permitted by the standstill obligation provided for in Article 29(6) or (7). The provisions of this paragraph shall not limit the use by Contracting Parties of any form of assistance to domestic producers permitted by other provisions of this Treaty.

(v) If any Contracting Party considers that a product is not receiving from another Contracting Party the treatment which the first Contracting Party believes to have been contemplated by the standstill obligation provided for in Article 29(6) or (7), it shall bring the matter directly to the attention of the other Contracting Party. If the latter agrees that the treatment contemplated was that claimed by the first Contracting Party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such Contracting Party so as to permit the treatment contemplated in this Treaty, the two Contracting Parties, together with any other Contracting Parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

(vi)(a) The specific duties and charges included in the Tariff Record relating to the Contracting Parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such Contracting Parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7). Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction;

Provided that the Conference concurs that such adjustments will not impair the value of the standstill obligation provided for in Article 29(6) or (7) or elsewhere in this Treaty, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any Contracting Party not a member of the Fund, as from the date on which such Contracting Party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV of GATT 1994.

(vii) Each Contracting Party shall notify the Secretariat of the customs duties and charges of any kind applicable on the date of the standstill referred to in Article 29(6) first sentence. The Secretariat shall keep a Tariff Record of the customs duties and charges of any kind relevant for the purpose of the standstill on customs duties and charges of any kind under Article 29(6) or (7).

(5) The Decision of 26 March 1980 on "Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions" (BISD 27S/24) shall not be applicable under Article 29(2)(a). The applicable provisions of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 shall, without prejudice to Article 29(4), (5) or (7), apply with the following modifications:

(i) In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of article II of GATT 1994, the nature and level of any "other duties or charges" levied on any Energy Materials and Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II with respect to their importation or exportation, as referred to in that provision, shall be recorded in the Tariff Record at the levels applying at the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7) respectively, against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

(ii) "Other duties or charges" shall be recorded in respect of all Energy Materials and Products listed in Annex EM II and Energy-Related Equipment listed in Annex EQ II.

(iii) It will be open to any Contracting Party to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the date of the standstill referred to in Article 29(6), first sentence, or the relevant date under Article 29(7), for the item in

question, as well as the consistency of the recorded level of any "other duty or charge" with the standstill obligation provided for by Article 29(6) or (7), for a period of one year after the entry into force of the Amendment to the trade-related provisions of this Treaty, adopted by the Charter Conference on 24 April 1998, or one year after the notification to the Secretariat of the level of customs duties and charges of any kind referred to in Article 29(6), first sentence, or Article 29(7), if that is the later.

(iv) The recording of "other duties or charges" in the Tariff Record is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by sub-paragraph (iii) above. All Contracting Parties retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.

(v) "Other duties or charges" omitted from a notification to the Secretariat shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the notification to the Secretariat.

(6) Where the WTO Agreement refers to "duties inscribed in the Schedule" or to "bound duties", there shall be substituted "the level of customs duties and charges of any kind permitted under Article 29(4) to (8)".

(7) Where the WTO Agreement specifies the date of entry into force of the WTO Agreement (or an analogous phrase) as the reference date for an action, there shall be substituted the date of entry into force of the Amendment to the trade-related provisions of this Treaty adopted by the Charter Conference on 24 April 1998.

(8) With respect to notifications required by the provisions made applicable by Article 29(2)(a):

(a) Contracting Parties which are not members of the WTO shall make their notifications to the Secretariat. The Secretariat shall circulate copies of the notifications to all Contracting Parties. Notifications to the Secretariat shall be in one of the authentic languages of this Treaty. The accompanying documents may be solely in the language of the Contracting Party;

(b) such requirements shall not apply to Contracting Parties to this Treaty which are also members of the WTO which provides for its own notification requirements.

(9) Where Article 29(2)(a) or (6)(b) applies, the Charter Conference shall carry out any applicable duties that the WTO Agreement assigned to the relevant bodies under the WTO Agreement.

(10)(a) Interpretations of the WTO Agreement adopted by the Ministerial Conference or the General Council of the WTO under paragraph 2 of article IX of the WTO Agreement insofar as they interpret provisions applicable under Article 29(2)(a) shall apply.

(b) Amendments to the WTO Agreement under article X of the WTO Agreement that are binding on all members of the WTO (other then those under paragraph 9 of article X) insofar as they amend or relate to provisions applicable under Article 29(2)(a), shall apply unless a Contracting Party requests the Charter Conference to disapply or modify such amendment. The Charter Conference shall take the decision by a three-fourths majority of the Contracting Parties and determine the date of the disapplication or modification of such amendment. A request for the disapplication or modification of such amendment may include a request that the application of the amendment be suspended pending the decision of the Charter Conference.

A request to the Charter Conference made under this paragraph shall be made within six months of the circulation of a notification from the Secretariat that the amendment has taken effect under the WTO Agreement.

(c) Interpretations, amendments, or new instruments adopted by the WTO, other than the interpretations and amendments applied under paragraphs (a) and (b) shall not apply.

ARTICLE 5

The following Annexes shall be inserted in the Annexes to the Treaty:

2. ANNEX EM II

ENERGY MATERIALS AND PRODUCTS
(In accordance with Article 1(4))

3. ANNEX EQ I

LIST OF ENERGY-RELATED EQUIPMENT
(In accordance with Article 1(4bis))

For the purpose of this Annex, 'Ex' has been included to indicate that the product description referred to does not exhaust the entire range of products within the World Customs Organization Nomenclature headings or the Harmonized System codes listed below.

Ex 39.19 Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls.

Ex 3919.10 - In rolls of a width not exceeding 20 cm
-- To be used for oil and gas pipelines and sea lines protection

Ex 73.04* Tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel.

7304.10 - Line pipe of a kind used for oil or gas pipelines
- Casing, tubing and drill pipe, of a kind used in drilling for oil or gas: [84]
7304.21 [83] - Drill pipe
7304.29 [83] - Other

Ex 73.05 Other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross-sections, the external diameter of which exceeds 406.4 mm, of iron or steel.

- Line pipe of a kind used for oil or gas pipelines:
7305.11 - Longitudinally submerged arc welded
7305.12 - Other, longitudinally welded
7305.19 - Other
7305.20 - Casing of a kind used in drilling for oil or gas

Ex 73.06* Other tubes, pipes and hollow profiles (for example, open seam or welded, riveted or similarly closed), of iron or steel.

83 Covered by 7304 20 in the 1992 version.

* Except products for use in civil aircraft.

TRADE AMENDEMENT

7306.10	-	Line pipe of a kind used for oil or gas pipelines
7306.20	-	Casing and tubing of a kind used in drilling for oil or gas

73.07 Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel.

Ex 73.08 Structures (excluding prefabricated buildings of heading No. 94.06) and parts of structures (for example, bridges, and bridge-sections, lock-gates, towers, lattice masts, roofs, roofing frame-works, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns), of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel.

7308.20	-	Towers and lattice masts
7308.40	-	Equipment for scaffolding, shuttering, propping or pitpropping
Ex 7308.90	-	Other
		-- Parts for oil and gas drilling platforms

Ex 73.09 Reservoirs, tanks, vats and similar containers for any material (other than compressed or liquefied gas), of iron or steel, of a capacity exceeding 300 l, whether or not lined or heat-insulated, but not fitted with mechanical or thermal equipment.

Ex 7309.00	--	For liquids
		-- Of a capacity exceeding 1,000,000 l, where specially designed for strategic oil reserves
		-- Heat insulated

Ex 73.11 Containers for compressed or liquefied gas, of iron or steel.

	--	Of more than 1,000 l

Ex 73.12* Stranded wire, ropes, cables, plaited bands, slings and the like, of iron or steel, not electrically insulated.

Ex 7312.10	-	Stranded wires, ropes and cables
		-- Ropes and cables coated, non-coated or zinc coated of a kind used in the energy sector

Ex 73.26 Other articles of iron or steel.

Ex 7326.90	-	Other
		-- Connectors for optical fibre cables

Ex 76.13 Aluminium containers for compressed or liquefied gas.

	--	Of more than 1,000 l

Ex 76.14 Stranded wire, cables, plaited bands and the like, of aluminium, not electrically insulated.

* Except products for use in civil aircraft.

Ex 7614.10	-	With steel core -- Of a kind used in electricity generation, transmission and distribution
Ex 7614.90	-	Other -- Of a kind used in electricity generation, transmission and distribution

Ex 78.06 Other articles of lead.

-- Containers with an anti-radiation lead covering, for the transport or storage of highly radioactive materials

Ex 81.09 Zirconium and articles thereof, including waste and scrap.

Ex 8109.90	-	Other -- Cartridges or tubes for nuclear fuel elements

Ex 82.07 Interchangeable tools for hand tools, whether or not power-operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools.

	-	Rock drilling or earth boring tools:
8207.13 [84]	-	With working part of cermets
8207.19	-	Other, including parts

Ex 83.07* Flexible tubing of base metal, with or without fittings.

-- For exclusive use in oil and gas wells

84.01 Nuclear reactors; fuel elements (cartridges), non-irradiated, for nuclear reactors; machinery and apparatus for isotopic separation.

84.02 Steam or other vapour generating boilers (other than central heating hot water boilers capable also of producing low pressure steam); super-heated water boilers.

84.03 Central heating boilers other than those of heading No. 84.02.

84.04 Auxiliary plant for use with boilers of heading No. 84.02 or 84.03 (for example, economisers, super-heaters, soot removers, gas recoverers); condensers for steam or other vapour power units.

84.05 Producer gas or water gas generators, with or without their purifiers; acetylene gas generators and similar water process gas generators, with or without their purifiers.

TRADE AMENDEMENT

84 Covered by 8207 11 and 12 in the 1992 version.

* Except products for use in civil aircraft.

Ex 84.06 Steam turbines and other vapour turbines.

- Other turbines [85]:

8406.81 - Of an output exceeding 40 MW

8406.823 - Of an output not exceeding 40 MW

8406.90 - Parts

Ex 84.08* Compression-ignition internal combustion piston engines (diesel or semi-diesel engines).

Ex 8408.90 - Other engines

-- New, of a power exceeding 50 kW

Ex 84.09 Parts suitable for use solely or principally with the engines of heading No. 84.07 or 84.08.

8409.99 - Other

84.10 Hydraulic turbines, water wheels, and regulators therefor.

84.11* Turbo-jets, turbo-propellers and other gas turbines.

84.13* Pumps for liquids, whether or not fitted with a measuring device; liquids elevators.

Ex 84.14* Air or vacuum pumps, air or other gas compressors and fans; ventilating or recycling hoods incorporating a fan, whether or not fitted with filters.

- Fans:

Ex 8414.59 - Other

-- For use in mining and power plants

8414.80 - Other

8414.90 - Parts

84.16 Furnace burners for liquid fuel, for pulverised solid fuel or for gas; mechanical stokers, including their mechanical grates, mechanical ash dischargers and similar appliances.

Ex 84.17 Industrial or laboratory furnaces and ovens, including incinerators, non-electric.

Ex 8417.80 - Other

--Exclusively waste incinerators, laboratory furnaces and ovens and uranium sintering ovens

Ex 8417.90 - Parts

-- Exclusively for waste incinerators, laboratory furnaces and ovens and uranium sintering ovens

85 Covered by 8406 19 in the 1992 version.

* Except products for use in civil aircraft.

Ex 84.18*	Refrigerators, freezers, and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading No. 84.15.	
	-	Other refrigerating or freezing equipment; heat pumps:
8418.61	-	Compression type units whose condensers are heat exchangers
8418.69	-	Other
Ex 84.19*	Machinery, plant or laboratory equipment, whether or not electrically heated, for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vapourising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.	
8419.50	-	Heat exchange units
8419.60	-	Machinery for liquefying air or other gases
	-	Other machinery, plant and equipment:
8419.89	-	Other
Ex 84.21*	Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids and gases.	
	-	Filtering or purifying machinery and apparatus for liquids:
8421.21	-	For filtering or purifying water
	-	Filtering or purifying machinery and apparatus for gases:
8421.39	-	Other
Ex 84.25*	Pulley tackle and hoists other than skip hoists; winches and capstans; jacks.	
8425.20	-	Pit-head winding gear; winches specially designed for use underground
Ex 84.26*	Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane.	
Ex 8426.20	-	Tower cranes
	--	For offshore platforms and onshore rigs
	-	Other machinery:
Ex 8426.91	-	Designed for mounting on road vehicles
	--	Lifting equipment for repairing and completion of wells

TRADE AMENDEMENT

* Except products for use in civil aircraft.

Ex 84.29 Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers.

- Mechanical shovels, excavators and shovel loaders:

Ex 8429.51 - Front-end shovel loaders

-- Loaders specially designed for underground use

Ex 84.30 Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers.

- Coal or rock cutters and tunnelling machinery:

8430.31 - Self-propelled

8430.39 - Other

- Other boring or sinking machinery:

Ex 8430.41 - Self-propelled

-- For the discovery or exploitation of deposits of oil and gas

Ex 8430.49 - Other

-- For the discovery or exploitation of deposits of oil and gas

Ex 84.31 Parts suitable for use solely or principally with the machinery of heading Nos. 84.25 to 84.30.

-- Only for machinery covered

84.71* Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.

Ex 84.74 Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand.

8474.10 - Sorting, screening, separating or washing machines

8474.20 - Crushing or grinding machines

Ex 8474.90 - Parts

-- Of cast iron or cast steel

Ex 84.79* Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter. [86]

86 Chapter 84.

* Except products for use in civil aircraft.

- Other machines and mechanical appliances:

Ex 8479.89 - Other
-- Mobile hydraulic powered mine roof support

Ex 84.81 Taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves.

8481.10 - Pressure-reducing valves
8481.20 - Valves for oleohydraulic or pneumatic transmissions
8481.40 - Safety or relief valves
8481.80 - Other appliances
8481.90 - Parts

Ex 84.83 Transmission shafts (including cam shafts and crank shafts) and cranks; bearing housings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints).

Ex 8483.40 - Gears and gearing, other than toothed wheels, chain sprockets and other transmission elements presented separately; ball or roller screws; gear boxes and other speed changers, including torque converters
-- Transmission elements exclusively for use in sucker rod pumping units in the oil and gas industry

Ex 84.84* Gaskets and similar joints of metal sheeting combined with other material or of two or more layers of metal; sets or assortments of gaskets and similar joints, dissimilar in composition, put up in pouches, envelopes or similar packings; mechanical seals.

8484.10 - Gaskets and similar joints of metal sheeting combined with other material or of two or more layers of metal
8484.20 [87] - Mechanical seals

85.01* Electric motors and generators (excluding generating sets).

85.02* Electric generating sets and rotary converters.

85.03* Parts suitable for use solely or principally with the machines of heading No. 85.01 or 85.02.

Ex 85.04* Electrical transformers, static converters (for example, rectifiers) and inductors.

- Liquid dielectric transformers:

87 Not covered by separate subheading in the 1992 version.

* Except products for use in civil aircraft.

8504.21	-	Having a power handling capacity not exceeding 650 kVA
8504.22	-	Having a power handling capacity exceeding 650 kVA but not exceeding 10,000 kVA
8504.23	-	Having a power handling capacity exceeding 10,000 kVA
	-	Other transformers:
8504.33	-	Having a power handling capacity exceeding 16 kVA but not exceeding 500 kVA
8504.34	-	Having a power handling capacity exceeding 500 kVA
8504.40	-	Static converters
8504.50	-	Other inductors
8504.90	-	Parts

Ex 85.07* Electric accumulators, including separators therefor, whether or not rectangular (including square).

--Excluding the use for non-energy sectors

85.14 Industrial or laboratory electric (including induction or dielectric) furnaces and ovens; other industrial or laboratory induction or dielectric heating equipment.

Ex 85.26* Radar apparatus, radio navigational aid apparatus and radio remote control apparatus.

8526.10	-	Radar apparatus
	-	Other:
8526.91	-	Radio navigational aid apparatus

85.31* Electric sound or visual signalling apparatus (for example bells, sirens, indicator panels, burglar or fire alarms), other than those of heading No. 85.12 or 85.30.

Ex 85.32 Electrical capacitors, fixed, variable or adjustable (pre-set).

8532.10	-	Fixed capacitors designed for use in 50/60 Hz circuits and having a reactive power handling capacity of not less than 0.5 kvar (power capacitors)

85.35 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, fuses, lightning arresters, voltage limiters, surge suppressors, plugs, junction boxes), for a voltage exceeding 1,000 volts.

* Except products for use in civil aircraft.

85.36 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 volts.

Ex 8536.10 - Fuses
--Exceeding 63 ampere

Ex 8536.20 - Automatic circuit breakers
--Exceeding 63 ampere

Ex 8536.30 - Other apparatus for protecting electrical circuits
--Exceeding 16 ampere

- Relays:

8536.41 - For a voltage not exceeding 60 V

8536.49 - Other

Ex 8536.50 - Other switches
-- For a voltage exceeding 60 V

85.37 Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading No. 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, and numerical control apparatus, other than switching apparatus of heading No. 85.17.

85.38 Parts suitable for use solely or principally with the apparatus of heading No. 85.35, 85.36 or 85.37.

Ex 85.41 Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light emitting diodes; mounted piezo-electric crystals.

Ex 8541.40 - Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light emitting diodes
-- Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels

Ex 85.44 Insulated (including enamelled or anodised) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors.

8544.60 - Other electric conductors, for a voltage exceeding 1,000 V

8544.70 - Optical fibre cables

* Except products for use in civil aircraft.

Ex 85.45 Carbon electrodes, carbon brushes, lamp carbons, battery carbons and other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes.

8545.20 - Bushes

85.46 Electrical insulators of any material.

85.47 Insulating fittings for electrical machines, appliances or equipment, being fittings wholly of insulating material apart from any minor components of metal (for example, threaded sockets) incorporated during moulding solely for purposes of assembly, other than insulators of heading No. 85.46; electrical conduit tubing and joints therefor, of base metal lined with insulating material.

Ex 87.04 Motor vehicles for the transport of goods.

- Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel):

Ex 8704.21
- g.v.w. not exceeding 5 tonnes
-- Specially designed for the transport of highly radioactive materials

Ex 8704.22
- g.v.w. exceeding 5 tonnes but not exceeding 20 tonnes
-- Specially designed for the transport of highly radioactive materials

Ex 8704.23
- g.v.w. exceeding 20 tonnes
-- Specially designed for the transport of highly radioactive materials

- Other, with spark-ignition internal combustion piston engine:

Ex 8704.31
- g.v.w. not exceeding 5 tonnes
-- Specially designed for the transport of highly radioactive materials

Ex 8704.32
- g.v.w. exceeding 5 tonnes
-- Specially designed for the transport of highly radioactive materials

Ex 87.05 Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units).

8705.20 - Mobile drilling derricks

* Except products for use in civil aircraft.

Ex 87.09	Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles.	
	- Vehicles:	
Ex 8709.11	- Electrical	
	-- Specially designed for the transport of highly radioactive materials	
Ex 8709.19	- Other	
	-- Specially designed for the transport of highly radioactive materials	
Ex 89.05	Light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function; floating docks; floating or submersible drilling or production platforms.	
8905.20	- Floating or submersible drilling or production platforms	
Ex 90.15	Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders.	
Ex 9015.80	- Other instruments and appliances	
	-- Geophysical instruments only	
9015.90	- Parts and accessories	
Ex 90.26*	Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading No. 90.14, 90.15, 90.28 or 90.32.	
	--Except for use in the water distribution industry	
90.27	Instruments and apparatus for physical or chemical analysis (for example polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.	
90.28	Gas, liquid or electricity supply or production meters, including calibrating meters therefor.	
Ex 90.29*	Revolution counters, production counters, taximeters, mileometers, pedometers and the like; speed indicators and tachometers, other than those of heading No. 90.14 or 90.15; stroboscopes.	

TRADE AMENDEMENT

* Except products for use in civil aircraft.

Ex 9029.10	-	Revolution counters, production counters, taximeters, mileometers, pedometers and the like
		-- Production counters
Ex 9029.90	-	Parts and accessories
		-- For production counters

Ex 90.30* Oscilloscopes, spectrum analysers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading No. 90.28; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionising radiations.

Ex 9030.10	-	Instruments and apparatus for measuring or detecting ionising radiations
		-- For use in the energy sector
	-	Other instruments and apparatus, for measuring or checking voltage, current, resistance or power, without a recording device:
9030.31	-	Multimeters
9030.39	-	Other
	-	Other instruments and apparatus:
Ex 9030.83 [88]	-	Other, with a recording device
		-- For use in the energy sector
Ex 9030.89	-	Other
		-- For use in the energy sector
Ex 9030.90	-	Parts and accessories
		-- For use in the energy sector

90.32* Automatic regulating or controlling instruments and apparatus.

88 Covered by 9030 81 in the 1992 version.

* Except products for use in civil aircraft.

4. ANNEX EQ II

LIST OF ENERGY-RELATED EQUIPMENT
(In accordance with Article 1(4bis))

14. ANNEX BR

LIST OF CONTRACTING PARTIES WHICH SHALL NOT INCREASE ANY CUSTOMS DUTY OR OTHER CHARGE ABOVE THE LEVEL RESULTING FROM THEIR COMMITMENTS OR ANY PROVISIONS APPLICABLE TO THEM UNDER THE WTO AGREEMENT.
(In accordance with Article 29 (7))

15. ANNEX BRQ

LIST OF CONTRACTING PARTIES WHICH SHALL NOT INCREASE ANY CUSTOMS DUTY OR OTHER CHARGE ABOVE THE LEVEL RESULTING FROM THEIR COMMITMENTS OR ANY PROVISIONS APPLICABLE TO THEM UNDER THE WTO AGREEMENT. (IN ACCORDANCE WITH ARTICLE 29 (7))

ARTICLE 6
PROVISIONAL APPLICATION

(1) Each signatory which applies the Energy Charter Treaty provisionally in accordance with Article 45(1) and each Contracting Party agrees to apply this Amendment provisionally pending its entry into force for such signatory or Contracting Party to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) Notwithstanding paragraph (1):

(i) any signatory which applies the Energy Charter Treaty provisionally or Contracting Party may deliver to the Depository within 90 days from the date of the adoption of this Amendment by the Charter Conference a declaration that it is not able to accept the provisional application of this Amendment; [89]

89 See Decisions in connection with the Adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (Annex 2 to the Final Act), n. 1, p. 205.

(ii) any signatory which does not apply the Energy Charter Treaty provisionally in accordance with Article 45(2) may deliver to the Depository not later than the date on which it becomes a Contracting Party or begins to apply the Treaty provisionally a declaration that it is not able to accept the provisional application of this Amendment.

The obligation contained in paragraph (1) shall not apply to a signatory or Contracting Party making such a declaration. Any such signatory or Contracting Party may at any time withdraw that declaration by written notification to the Depository.

(b) Neither a signatory or Contracting Party which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory or Contracting Party may claim the benefits of provisional application under paragraph (1).

(3) Any signatory or Contracting Party may terminate its provisional application of this Amendment by written notification to the Depository of its intention not to ratify, accept or approve this Amendment. Termination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depository. Any signatory which terminates its provisional application of the Energy Charter Treaty in accordance with Article 45(3)(a) shall be considered as also having terminated its provisional application of this Amendment with the same date of effect.

ARTICLE 7
STATUS OF DECISIONS

The Decisions adopted in connection with the adoption of this Amendment are an integral part of the Energy Charter Treaty.

DECISIONS IN CONNECTION WITH THE ADOPTION OF THE AMENDMENT TO THE TRADE-RELATED PROVISIONS OF THE ENERGY CHARTER TREATY

(ANNEX 2 TO THE FINAL ACT OF THE INTERNATIONAL CONFERENCE AND DECISION OF THE ENERGY CHARTER CONFERENCE)

1. A signatory which does not apply the Amendment adopted on 24 April 1998 provisionally may at the time that it takes action to apply that Amendment, whether on a definitive or a provisional basis, notify the Secretariat in writing that until it is listed in Annexes BR and BRQ, it will apply the Amendment as if all items of Energy Materials and Products and of Energy-Related Equipment continued to be listed in Annexes EM I and EQ I. [90]

   The Amendment shall apply accordingly to such a signatory.

   Any signatory may at any time withdraw the notification referred to above in writing to the Secretariat.

2. The 'Final Provisions' of the Amendment shall be based on Part VIII, in particular Article 42, of the Energy Charter Treaty so far as relevant.

90 See Chairman's Statement at the Adoption Session on 24 April 1998, p. 206.

CHAIRMAN'S STATEMENT AT THE ADOPTION SESSION ON 24 APRIL 1998 [91]

"On the issue of future listing of countries on Annexes BR and BRQ, I conclude that all delegations are aware of the long standing positions of those delegations which like Australia, Hungary and Japan have repeatedly underlined that they support legally binding tariff commitments provided their commitments under the Energy Charter Treaty reflect their commitments in the WTO. This also reflects the position of other delegations, and there is a general acceptance among delegations that they will give positive consideration to that position at the time when the decision on legally binding tariff commitments is taken."

91 Editor's note: Document CS(98) 338 CC 124, point 6, of 24 May 1998 (not published). This Statement was read out by the Chairman to the Adoption Session on 24 April 1998 and also circulated in written form. This Statement, which reflected the outcome of informal consultations, replaced a draft Declaration on the issue of listing on Annexes BR and BRQ, the text of which was consequently deleted from the text for adoption.

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CHAIRMAN'S CONCLUSION ON THE IMPLEMENTATION OF TRADE-RELATED RULES, AT THE ENERGY CHARTER CONFERENCE ON 24 APRIL 1998 [92]

The Chairman concluded with respect to the future implementation of trade-related rules that there was a consensus among delegations that the Secretariat was to be invited to develop the elements for one implementation system based on the regime in the Trade Amendment. In particular, where the Trade Amendment foresees notification requirements and procedures, including with regard to Understanding 2 to the Amendment, they would follow WTO practice, provided that duplication of notifications with the WTO did not occur. There was furthermore a consensus that in developing dispute settlement rules and procedures WTO rules of procedure and practice would be followed and the roster of panellists to be adopted by the Conference would be drawn up in accordance with Article 3 of the Amendment.

Finally, whenever necessary to maintain the principle of harmonious implementation of trade-related rules based on WTO practice, appropriate rules of procedure should include the elements necessary to achieve that aim.

92 Editor's note: Document CS (98) 338 CC 124, point 13, of 24 May 1998 (not published). The Conclusion was drawn by the Chairman to the first Energy Charter Conference on 24 April 1998. The Conference agreed without objection to this conclusion.

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CONCLUDING DOCUMENT

OF THE HAGUE CONFERENCE

ON THE

EUROPEAN ENERGY CHARTER

CONCLUDING DOCUMENT OF THE HAGUE CONFERENCE ON THE EUROPEAN ENERGY CHARTER

The representatives of Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Belorussia, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Estonia, The European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, The Interstate Economic Committee, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, Spain, Sweden, Switzerland, Tadjikistan, Turkey, Turkmenistan, Ukraine, The United Kingdom of Great Britain and Northern Ireland, The Unites States of America, Uzbekistan, Yugoslavia convened in the Hague, The Netherlands, from 16 to 17 December 1991 in order to adopt the European Energy Charter.

The Conference was opened and closed by the Minister of Economic Affairs of The Netherlands.

Her Majesty, Queen Beatrix of The Netherlands, attended the opening of the Conference.

The Prime Minister of The Netherlands and the Commissioner for Energy of the European Commission addressed the Conference.

During the Conference, contributions were received and statements made by delegates of the signatories.

Determined to give full effect to the results of the Conference, the representatives of the signatories adopted the following text for the European Energy Charter:

EUROPEAN ENERGY CHARTER

The representatives of the signatories meeting in The Hague on 16 and 17 December 1991,

Having regard to the Charter of Paris for a New Europe, signed in Paris on 21 November 1990 at the summit meeting of the Conference on Security and Co-operation in Europe (CSCE);

Having regard to the document adopted in Bonn on 11 April 1990 by the CSCE Conference on Economic Co-operation in Europe;

Having regard to the declaration of the London Economic Summit adopted on 17 July 1991;

Having regard to the report on the conclusions and recommendations of the CSCE meeting in Sofia on 3 November 1989, on the protection of the environment, as well as its follow-up;

Having regard to the Agreement establishing the European Bank for Reconstruction and Development signed in Paris on 29 May 1990;

Anxious to give formal expression to this new desire for a European-wide and global co-operation based on mutual respect and confidence;

Resolved to promote a new model for energy co-operation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination;

Aware that account must be taken of the problems of reconstruction and restructuring in the countries of Central and Eastern Europe and in the USSR and that it is desirable for the signatories to participate in joint efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in these countries;

Certain that taking advantage of the complementary features of energy sectors within Europe will benefit the world economy; persuaded that broader energy co-operation among signatories is essential for economic progress and more generally for social development and a better quality of life;

Convinced of the signatories' common interest in problems of energy supply, safety of industrial plants, particularly nuclear facilities, and environmental protection;

Willing to do more to attain the objectives of security of supply and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development;

Convinced of the essential importance of efficient energy systems in the production, conversion, transport, distribution and use of energy for security of supply and for the protection of the environment;

Recognising State sovereignty and sovereign rights over energy resources;

Assured of support from the European Community, particularly through completion of its internal energy market;

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy co-operation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter;

Recognising the role of entrepreneurs, operating within a transparent and equitable legal framework, in promoting co-operation under the Charter;

Determined to establish closer, mutually beneficial commercial relations and promote energy investments;

Convinced of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market-based trade in energy;

Aware of the need to promote technological co-operation among signatories;

Affirming that the energy policies of signatories are linked by interests common to all their countries and that they should be implemented in accordance with the principles set out below:

Affirming, finally, their desire to take the consequent action and apply the principles set out below:

HAVE ADOPTED THE FOLLOWING DECLARATION CONSTITUTING THE "EUROPEAN ENERGY CHARTER"

TITLE I
OBJECTIVES

The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.

Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co-operation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.

To this end, and in accordance with these principles, they will take action in the following fields:

1. Development of trade in energy consistent with major relevant multilateral agreements such as GATT, its related instruments, and nuclear non-proliferation obligations and undertakings, which will be achieved by means of:

   - an open and competitive market for energy products, materials, equipment and services;
   - access to energy resources, and exploration and development thereof on a commercial basis;
   - access to local and international markets;
   - removal of technical, administrative and other barriers to trade in energy and associated equipment, technologies and energy-related services;
   - modernisation, renewal and rationalisation by industry of services and installations for the production, conversion, transport, distribution and use of energy;
   - promoting the development and interconnection of energy transport infrastructure;
   - promoting best possible access to capital, particularly through appropriate existing financial institutions;

- facilitating access to transport infrastructure, for international transit purposes in accordance with the objectives of the Charter expressed in the first paragraph of this Title;
- access on commercial terms to technologies for the exploration, development and use of energy resources;

2. Co-operation in the energy field, which will entail:
   - co-ordination of energy policies, as necessary for promoting the objectives of the Charter;
   - mutual access to technical and economic data, consistent with proprietary rights;
   - formulation of stable and transparent legal frameworks creating conditions for the development of energy resources;
   - co-ordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level;
   - facilitating the exchange of technology information and know-how in the energy and environment fields, including training activities;
   - research, technological development and demonstration projects.
3. Energy efficiency and environmental protection, which will imply:
   - creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market-based instruments;
   - promotion of an energy mix designed to minimise negative environmental consequences in a cost-effective way through:
     (i) market-oriented energy prices which more fully reflect environmental costs and benefits;
     (ii) efficient and co-ordinated policy measures related to energy;
     (iii) use of new and renewable energies and clean technologies;
   - achieving and maintaining a high level of nuclear safety and ensuring effective co-operation in this field.

TITLE II
IMPLEMENTATION

In order to attain the objectives set out above, the signatories will, within the framework of State sovereignty and sovereign rights over energy resources, take co-ordinated action to achieve greater coherence of energy policies, which should be based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.

They underline that practical steps to define energy policies are necessary in order to intensify co-operation in this sector and further stress the importance of regular exchanges of views on action taken, taking full advantage of the experience of existing international organisations and institutions in this field.

The signatories recognise that commercial forms of co-operation may need to be complemented by intergovernmental co-operation, particularly in the area of energy policy formulation and analysis as well as in areas which are essential and not suitable to private capital funding.

They undertake to pursue the objectives of creating a broader European energy market and enhancing the efficient functioning of the global energy market by joint or co-ordinated action under the Charter in the following fields:

- access to and development of energy resources;
- access to markets;
- liberalisation of trade in energy;
- promotion and protection of investments;
- safety principles and guidelines;
- research, technological development, innovation and dissemination;
- energy efficiency and environmental protection;
- education and training.

In implementing this joint or co-ordinated action, they undertake to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial sources, and to facilitate co-operation between such enterprises or institutions from different countries, acting on the basis of market principles.

The signatories will ensure that the international rules on the protection of industrial, commercial and intellectual property are respected.

1. Access to and development of energy resources

   Considering that efficient development of energy resources is a sine qua non for attaining the objectives of the Charter, the signatories undertake to facilitate access to and development of resources by the interested operators. To this end, they will ensure that rules on the exploration, development and acquisition of resources are publicly available and transparent; they recognise the need to formulate such rules wherever this has not yet been done and to take all necessary measures to co-ordinate their actions in this area.

   With a view to facilitating the development and diversification of resources, the signatories undertake to avoid imposing discriminatory rules on operators, notably rules governing the ownership of resources, internal operation of companies and taxation.

2. Access to Markets

   The signatories will strongly promote access to local and international markets for energy products for the implementation of the objectives of the Charter. Such access to markets should take account of the need to facilitate the operation of market forces, and promote competition.

3. Liberalisation of trade in energy

   In order to develop and diversify trade in energy, the signatories undertake progressively to remove the barriers to such trade with each other in energy products, equipment and services in a manner consistent with the provisions of GATT, its related instruments, and nuclear non-proliferation obligations and undertakings.

   The signatories recognise that transit of energy products through their territories is essential for the liberalisation of trade in energy products. Transit should take place in economic and environmentally sound conditions.

   They stress the importance of the development of commercial international energy transmission networks and their interconnection, with particular reference to electricity and natural gas and with recognition of the relevance of long-term commercial commitments. To this end, they will ensure the compatibility of technical specifications governing the installation and operation of such networks, notably as regards the stability of electricity systems.

4. Promotion and protection of investments

In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes.

Moreover, the signatories will guarantee the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed.

They also recognise the importance of the avoidance of double taxation to foster private investment.

5. Safety principles and guidelines

Consistent with relevant major multilateral agreements, the signatories will:

- implement safety principles and guidelines, designed to achieve and/or maintain high levels of safety, in particular nuclear safety and the protection of health and the environment;
- develop such common safety principles and guidelines as are appropriate and/or agree to the mutual recognition of their safety principles and guidelines.

6. Research, technological development, innovation and dissemination

The signatories undertake to promote exchanges of technology and co-operation on their technological development and innovation activities in the fields of energy production, conversion, transport, distribution and the efficient and clean use of energy, in a manner consistent with nuclear non-proliferation obligations and undertakings.

To this end, they will encourage co-operative efforts on:

- research and development activities;
- pilot or demonstration projects;
- the application of technological innovations;

- the dissemination and exchange of know-how and information on technologies.

7. Energy efficiency and environmental protection

The signatories agree that co-operation is necessary in the field of efficient use of energy and energy-related environmental protection.

This should include:

- ensuring, in a cost-effective manner, consistency between relevant energy policies and environmental agreements and conventions;
- ensuring market-oriented price formation, including a fuller reflection of environmental costs and benefits;
- the use of transparent and equitable market-based instruments designed to achieve energy objectives and reduce environmental problems;
- the creation of framework conditions for the exchange of know-how regarding environmentally sound energy technologies and efficient use of energy;
- the creation of framework conditions for profitable investment in energy efficiency projects.

8. Education and training

The signatories, recognising industry's role in promoting vocational education and training in the energy field, undertake to co-operate in such activities, including:

- professional education;
- occupational training;
- public information in the energy efficiency field.

TITLE III
SPECIFIC AGREEMENTS

The signatories undertake to pursue the objectives and principles of the Charter and implement and broaden their co-operation as soon as possible by negotiating in good faith a Basic Agreement and Protocols.

Areas of co-operation could include:

- horizontal and organisational issues;
- energy efficiency, including environmental protection;
- prospecting, production, transportation and use of oil and oil products and modernisation of refineries;
- prospecting, production and use of natural gas, interconnection of gas networks and transmission via high-pressure gas pipelines;
- all aspects of the nuclear fuel cycle including improvements in safety in that sector;
- modernisation of power stations, interconnection of power networks and transmission of electricity via high-voltage power lines;
- all aspects of the coal cycle, including clean coal technologies;
- development of renewable energy sources;
- transfers of technology and encouragement of innovation;
- co-operation in dealing with the effects of major accidents, or of other events in the energy sector with transfrontier consequences.

The signatories will, in exceptional cases, consider transitional arrangements. They, in particular, take into account the specific circumstances facing some states of Central and Eastern Europe and the USSR as well as their need to adapt their economies to the market system, and accept the possibility of a stage-by-stage transition in those countries for the implementation of those particular provisions of the Charter, Basic Agreement and related Protocols that they are, for objective reasons, unable to implement immediately and in full.

Specific arrangements for coming into full compliance with Charter provisions as elaborated in the Basic Agreement and Protocols will be negotiated by each Party requesting transitional status, and progress towards full compliance will be subject to periodic review.

TITLE IV
FINAL PROVISIONS

The signatories request the Government of The Netherlands, President-in-office of the Council of the European Communities, to transmit to the Secretary-General of the United Nations the text of the European Energy Charter which is not eligible for registration under Article 102 of the Charter of the United Nations.

In adopting the European Energy Charter Ministers or their representatives record that the following understanding has been reached:

The representatives of the Signatories understand that in the context of the European Energy Charter, the principle of non-discrimination means Most-Favoured-Nation Treatment as a minimum standard. National Treatment may be agreed to in provisions of the Basic Agreement and/or Protocols.

The original of this Concluding Document, drawn up in English, French, German, Italian, Russian and Spanish texts, will be transmitted to the Government of the Kingdom of The Netherlands, which will retain it in its archives. Each of the Signatories will receive from the Government of the Kingdom of The Netherlands a true copy of the Concluding Document.

Done at The Hague on the seventeenth day of December in the year one thousand nine hundred and ninety-one. [93]

93 For Signatories see the Energy Charter Secretariat website (www.encharter.org).

Energy Charter Secretariat

Boulevard de la Woluwe, 56 • B-1200 Brussels • Belgium

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…RGY CHARTER SECRETARIAT
Boulevard de la Woluwe, 56
B-1200 Brussels, Belgium

Tel: +32 (0) 2 775 98 00
Fax: +32 (0) 2 775 98 01
E-mail: info@encharter.org

…w.encharter.org

EXHIBIT C

ARBITRATION INSTITUTE OF THE

STOCKHOLM CHAMBER OF COMMERCE

In the Matter of

CEF ENERGIA B.V.

Claimant

v.

THE ITALIAN REPUBLIC

Respondent

REQUEST FOR ARBITRATION

November 20, 2015

KING & SPALDING

12, cours Albert 1er
75008 Paris
France

1100 Louisiana, Suite 4000
Houston, Texas 77002
U.S.A.

ORRICK, HERRINGTON & SUTCLIFFE

Corso G. Matteotti, 10
Milan 20121
Italy

Piazza della Croce Rossa, 2
Rome 00161
Italy

Counsel for Claimants

TABLE OF CONTENTS

1. CEF Energia B.V. ("**CEF**") hereby requests the initiation of an arbitration proceeding against the Italian Republic ("**Italy**") under the Energy Charter Treaty ("**ECT**").[1]

2. CEF files this Request for Arbitration pursuant to Article 26(4)(c) of the ECT and Article 2 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

I. PARTIES TO THE DISPUTE

3. CEF is a company duly established under the laws of the Kingdom of the Netherlands.[2] Its corporate address is:

CEF Energia B.V.
Hoogoorddreef 15
1101 BA
Amsterdam
The Netherlands
Tel. +310206140055
Fax +310204422592

4. CEF is represented in this proceeding by King & Spalding and Orrick, Herrington & Sutcliffe.[3] All correspondence and communications with CEF should be directed to its counsel as follows:

KING & SPALDING

Kenneth R. Fleuriet
Amy Roebuck Frey
Cedric Soule
12, cours Albert 1er
75008 Paris
France
Tel. +33 1 73 00 39 00
Fax +33 1 73 00 39 59
Email: kfleuriet@kslaw.com
Email: afrey@kslaw.com
Email: csoule@kslaw.com

Reginald R. Smith
Kevin D. Mohr

ORRICK, HERRINGTON & SUTCLIFFE

Carlo Montella
Andrea Gentili
Daria Buonfiglio
Corso G. Matteotti, 10
Milan 20121
Italy
Tel. +39 02 4541 3800
Fax +39 02 4541 3801
Email: cmontella@orrick.com
Email: agentili@orrick.com
Email: dbuonfiglio@orrick.com

Pina Lombardi
Claudia Romano

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[1] A copy of the ECT is attached as CEF's Exhibit ("CEX-") **1**.

[2] *See* CEF Articles of Incorporation, **CEX-2**; and Excerpt from the Corporate Registry for CEF, **CEX-3**.

[3] Copies of CEF's powers of attorney to King & Spalding and Orrick, Herrington & Sutcliffe are attached as **CEX-4**.

1100 Louisiana, Suite 4000
Houston, Texas 77002
U.S.A.
Tel. +1 713 751 3200
Fax +1 713 751 3290
Email: rsmith@kslaw.com
Email: kmohr@kslaw.com

Piazza della Croce Rossa, 2
Rome 00161
Italy
Tel. +39 06 4521 3900
Fax +39 06 6819 2393
Email: plombardi@orrick.com
Email: cromano@orrick.com

5. The Respondent is the Italian Republic. The governmental authority likely to represent Italy in this proceeding is the *Avvocatura Generale dello Stato* (Attorney General's Office), which is located at the following address:

Via dei Portoghesi, 12
Rome 00186
Italy

II. BRIEF SUMMARY OF THE LEGAL DISPUTE

A. Italy's Early Attempts to Encourage Investments in the Renewable Energy Sector

6. Italy's attention to renewable energy policy dates back to 1981, when Italy developed its first comprehensive National Energy Plan, setting targets for the development of renewable energy facilities across the country. A second National Energy Plan followed in 1988, which included further measures for the development of national renewable energy sources. However, Italy only implemented the first concrete measures for the development of renewable energy sources in 1991, during its electricity sector reforms. In particular, Law No. 9 of January 9, 1991, simplified the authorization procedure for the production of energy from renewable sources. It required that Italy's regional governments develop energy plans prioritizing the production of energy from renewable sources.

7. In 1992, Italy established the first fixed feed-in tariff for renewable energy production through its CIP6/92 regulation. That regulation allowed renewable energy producers to produce electricity from renewable sources without any capacity limit and established a remuneration procedure based on kilowatt-hours of electricity produced. The CIP6/92 regulation also provided some certainty to investors because it obligated ENEL S.p.A., Italy's state-owned electricity company, to buy all electricity produced from renewable energy sources. By 1997, 16% of Italy's electricity was being produced from renewable energy sources.

8. Italy continued to encourage investments in its developing renewable energy sector by enacting Legislative Decree No. 79 on March 16, 1999. Known as the Bersani Decree, that act encouraged electricity production from renewable energy sources by prioritizing their access to the grid. The Bersani Decree also obligated generators and importers of electricity from non-renewable sources beyond a certain threshold to inject a portion of electricity from renewable sources into the grid. To satisfy that obligation, the non-renewable generators or importers could purchase a corresponding amount of renewable energy from other producers or from the GSE, or they could purchase "green certificates" from third parties.

9. The foregoing measures were relatively "soft" in that they demonstrated Italy's interest to promote investment in renewable energy, but they did not contain commitments that would induce large numbers of international investors to enter Italy's renewable energy market.

B. Italy Implemented *Conto Energia* Decrees to Induce Significant Investments in Photovoltaic Plants

10. With the turn of the century, policies to promote renewable energy like those already existing in Italy became a priority, particularly among the European Union states. On September 27, 2001, the European Parliament and the Council enacted Directive 2001/77/EC, promoting electricity produced from renewable energy sources in the internal electricity market. That directive set national targets for each member state for renewable energy production in light of the EU's stated objective of having 22.1% of total Community electricity consumption generated from renewable energy sources by 2010. Italy was expected to produce 25% of its total electricity consumption from renewable energy sources by 2010.[4]

11. Because the cost of producing electricity from renewable sources was substantially higher than the cost of producing electricity from fossil fuels, to meet its target, Italy needed to implement measures and above-market incentives that would further develop and encourage investments in its renewable energy sector. Thus, on December 29, 2003, Italy

[4] Directive 2001/77/EC was subsequently replaced by Directive 2009/28/EC, which aims to achieve a 20% share of energy from renewable sources in the Community's gross final consumption of energy by 2020. It requires that Member States report on planned or existing measures put in place to meet those targets. It also requires Member States to adopt indicative targets for the following 10 years. For Italy, the target is for 17% of overall energy consumption to come from renewable energy sources by 2020.

enacted Legislative Decree No. 387, the goal of which was to "promote a greater contribution from renewable energy sources to the production of electricity in the Italian and European markets." In broad strokes, Legislative Decree No. 387 set out measures to encourage investment in each type of renewable energy source. For example, Article 7, which addressed solar power, stated that Italy would implement incentive tariffs to encourage investments in photovoltaic facilities. Accordingly, from 2005 to 2012, Italy enacted attractive incentive schemes for photovoltaic plants known as *Conto Energia* Decrees ("***Contos***"). Through successive *Contos*, Italy guaranteed incentive tariffs to eligible photovoltaic plants that would supplement the revenues generated from the sale of electricity to the Italian national grid.[5]

12. Each *Conto* set forth a range of incentive tariffs to be granted to eligible renewable energy producers. Italy designed the regime to ensure that the producers received the incentive tariff (or premium) offered in the *Conto* in addition to the market price of electricity produced and sold to the grid. The value of the applicable tariff varied based on criteria specific to each of the *Contos*, including the size, location, and the date of connection to the grid of the photovoltaic plant under consideration. Once Italy granted a particular tariff to an eligible photovoltaic facility pursuant to the applicable provision of the *Conto* in force at the time, the facility was entitled to that tariff for 20 years. The *Contos* did not contain any provision allowing subsequent amendment of the tariff rate granted to an eligible photovoltaic facility.

13. Each *Conto* stated that the incentive tariffs it offered would remain available to photovoltaic plants until a fixed date or until the market reached a specific installed capacity or expenditure cap. Once the date, installed capacity, or expenditure cap was reached, the incentives under that particular *Conto* were no longer available to new facilities. New photovoltaic plants could benefit from the tariffs offered in a subsequent *Conto* program, provided that they met its eligibility requirements.

14. On July 28, 2005, Italy – through its Ministry of Productive Activities – enacted *Conto* I. *Conto* I granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity between 1 kW and 1,000 kW. Italy originally intended to maintain the incentive scheme under *Conto* I until installed capacity reached 100 MW; however, on

[5] This is true of the first four *Contos* relevant to this arbitration, as described herein.

February 6, 2006, the Ministry of Productive Activities enacted a decree amending *Conto* I and increasing the threshold to a maximum installed capacity of 500 MW.

15. Italy further promoted investment in renewable energy with the enactment of *Conto* II on February 19, 2007. *Conto* II granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* II applied to all eligible photovoltaic plants that were connected to the grid between April 13, 2007 and December 31, 2010, or until installed capacity reached 1,200 MW, whichever occurred first. Installed capacity reached the 1,200 MW threshold in the summer of 2010. Nevertheless, Italy extended *Conto* II to any eligible photovoltaic plant connected to the grid before June 30, 2011, provided the plant itself was built by December 31, 2010.[6]

16. Soon after the capacity target under *Conto* II was reached in the summer of 2010, on August 6, 2010, Italy enacted *Conto* III to further encourage investment in photovoltaic facilities. *Conto* III offered incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* III applied to all eligible photovoltaic plants that were connected to the grid between January 1, 2011 and December 31, 2013, or until installed capacity reached 3,000 MW, whichever occurred first.[7]

17. Italy continued to encourage investments in the photovoltaic sector by enacting *Conto* IV on May 5, 2011. *Conto* IV granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* IV applied to all eligible photovoltaic plants that entered into operation starting from June 1, 2011, until December 31, 2016. Italy replaced *Conto* IV with new legislation – *Conto* V – during the summer of 2012.[8]

18. The *Contos* proved successful in encouraging substantial investment in photovoltaic plants and rapidly increasing the installed capacity of those plants in Italy. For illustration, the production of electricity from solar energy in Italy amounted to 193 gigawatt-

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[6] *See* Law Decree No. 105/2010 of July 8, 2010, converted into law by Law No. 129 of August 13, 2010.

[7] On March 3, 2011, however, Italy enacted Legislative Decree No. 28/2011 limiting the application of *Conto* III to photovoltaic plants that were connected to the grid by May 31, 2011.

[8] *Conto* V did not apply to the facilities at issue in the present dispute.

hours (GWh) in 2008. That figure increased to 676 GWh in 2009 and to 1,906 GWh in 2010. By 2011, it had skyrocketed to 10,730 GWh.

19. For each photovoltaic plant accepted into the regime, Italy further confirmed its commitment to the incentive tariffs granted under the different *Contos* in an agreement between the *soggetto responsabile* (*i.e.*, the company or person that held the project rights to the plant) and the *Gestore dei Servizi Energetici* ("**GSE**"), the state-owned company responsible for the implementation of renewable electricity incentive programs under the direction and control of the Italian Ministry of Economy and Finance ("*convenzione per il riconoscimento delle tariffe incentivanti*" or "**GSE Agreement**").[9]

20. To enter into a GSE Agreement and thus benefit from a particular *Conto*, the *soggetto responsabile* had to file an incentive tariff request ("*richiesta di accesso agli incentivi*") with the GSE after its photovoltaic plant was connected to the grid, along with specific supporting documentation. Once the GSE confirmed that the photovoltaic plant met the necessary prerequisites to benefit from a particular *Conto*, the GSE and the *soggetto responsabile* executed the GSE Agreement, which was then published on the GSE's website. If the *soggeto responsabile*'s application to the GSE was timely and correctly filed, the incentive tariff granted under the specific *Conto* applied to the facility as from the date it was connected to the grid.

21. The GSE Agreements identified the particular *Conto* and incentive tariff granted to a specific photovoltaic plant and confirmed that the plant was entitled to receive that tariff for 20 years. The GSE Agreements did not contain any legal provision authorizing the GSE or any other Italian state entity to unilaterally amend or abrogate the incentive tariff granted thereunder.

C. CEF Invested in the Italian Photovoltaic Sector in Reliance on Italy's Incentive Programs

22. CEF specializes in investing in and operating renewable energy facilities across Europe. CEF followed Italy's development and implementation of the incentive legislation described in the preceding sections, and CEF decided to invest in the Italian photovoltaic sector as a result of those incentives. Italy's commitments under the *Conto*

[9] The rules of application that the GSE published after the enactment of *Contos* II, III, IV, and V, as well as Article 24 of Legislative Decree No. 28/2011 of March 3, 2011, all required the *soggetto responsabile* and the GSE to enter into these GSE agreements.

legislation and corresponding GSE Agreements were particularly crucial to CEF's decision to invest, in part because the substantial upfront cost of constructing and developing a photovoltaic facility is generally only recovered several years after a plant begins operating. Thus, the 20-year commitment in the *Contos* and GSE Agreements ensured the future profitability of the plants. CEF expected Italy to abide by its promises to maintain the fixed tariffs for 20 years, as well as to further promote investments in photovoltaic facilities as set forth in the legislation described above.

23. In January 2010, CEF first invested in Italy by acquiring Sunholding S.r.l. ("**Sunholding**"). Sunholding owned Megasol S.r.l., a company that held all project rights to a photovoltaic plant of approximately 13 MW located in Montalto di Castro in the Lazio region ("Megasol"). The Megasol photovoltaic plant was connected to the grid in May 2011 and received an incentive tariff of 0.346€/kWh under *Conto* II, as confirmed by a GSE Agreement dated November 2, 2011.

24. Encouraged by Italy's continued promotion of renewable energy investments with its enactment of *Conto* III, in December 2010, CEF acquired a 70% controlling stake in Phenix S.r.l., a company that held all project rights to a photovoltaic plant of approximately 24 MW located in Canino in the Lazio region ("Sugarella"). The Sugarella photovoltaic plant was connected to the grid in April 2011 and was entitled to an incentive tariff of 0.297€/kWh under *Conto* III, as confirmed by a GSE Agreement dated November 23, 2011.

25. Italy's enactment of *Conto* IV on May 5, 2011, further assured CEF that Italy remained serious about its commitments to support investments in the photovoltaic industry. Thus, in December 2011, CEF acquired Enersol S.r.l., a company that held all project rights to a multi-section photovoltaic plant of approximately 48 MW located in Canaro in the Veneto region ("Enersol"). The Enersol photovoltaic plant was partitioned in seven sections. Section 1 of the plant was connected to the grid in April 2011, and was entitled to an incentive tariff of 0.297€/kWh under *Conto* III, as confirmed by a GSE Agreement dated November 2, 2011. Sections 2 and 3 of the plant were connected to the grid in July 2011, and were entitled to an incentive tariff of 0.251€/kWh under *Conto* IV, as confirmed by two separate GSE Agreements (one per Section) dated March 2, 2012. Sections 4 to 7 of the plant were connected to the grid in August 2011, and were entitled to an incentive tariff of 0.238€/kWh under *Conto* IV, as confirmed by four separate GSE Agreements (one per

Section) dated January 11, 2012 (for Sections 5 and 7), February 6, 2012 (for Section 4), and March 2, 2012 (for Section 6).

26. In reliance on Italy's commitments to promote a thriving renewable energy sector and to maintain the incentive tariffs granted under the respective *Contos* and confirmed in the GSE agreements, CEF invested approximately € 100 million in the above-mentioned plants.

D. Italy Imposed Unexpected, Arbitrary Costs on Investors That Undermined the Incentive Schemes

27. After having induced CEF to invest in its photovoltaic sector and while continuing to benefit from the resulting increase in renewable energy investments, Italy enacted a series of measures that imposed additional, arbitrary costs on CEF's investments, in violation of the commitments Italy had made guaranteeing incentive tariffs and pricing. Those measures also created an environment of legal and regulatory uncertainty that severely depressed Italy's once-burgeoning photovoltaic market. The measures, discussed below, violate the ECT and international law and directly harmed CEF's investments.

28. On July 5, 2012, Italy's Ministry of Economic Development enacted a decree requiring all renewable energy producers benefiting from any *Conto* to pay, as of January 1, 2013, an administrative fee corresponding to € 0.0005 per kW of incentivized energy.[10] The fee, which is offset against the incentive tariffs granted under the *Contos* and guaranteed by the GSE Agreements, reduced the payments that CEF expected to receive pursuant to the *Contos* governing its facilities.

29. Furthermore, also on July 5, 2012, the *Autorità per l'energia elettrica, il gas e il sistema idrico* ("**AEEG**"), an entity responsible for regulating the electricity market, passed Resolution 281 requiring renewable energy producers to pay so-called "imbalance costs" as of January 1, 2013. The "imbalance costs" stemmed from a history of Italy requiring non-renewable energy producers to provide advance projections to the grid manager of the quantity of electricity they would deliver to the grid, in order to create predictable supply and assist the grid manager in balancing supply and demand. If a producer missed its projections, it was required to rectify the imbalance by paying certain costs based on the difference between the producer's projections and the energy it delivered.

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[10] *See Conto* V, July 5, 2012.

30. Historically, and when CEF decided to invest in the sector, Italy exempted renewable energy producers from paying "imbalance costs." Since the "imbalance costs" only applied to non-renewable energy producers, when CEF invested in its photovoltaic plants in Italy, it reasonably expected that those costs would not apply to its plants. Resolution 281, however, unexpectedly and arbitrarily extended those costs to CEF and other renewable energy producers.

31. The Italian courts later annulled Resolution 281 because it unlawfully failed to distinguish between renewable and non-renewable energy producers, as well as between different types of renewable energy producers, regarding the quantification of "imbalance costs." On October 23, 2014, in an attempt to address the deficiencies of Resolution 281, the AEEG passed Resolution 522, which again required renewable energy producers, including CEF, to pay "imbalance costs" starting from January 1, 2015. That Resolution also undermined CEF's expectation that these costs would not apply to their plants when it invested in Italy. It too violates the ECT and international law.

32. In addition to Resolutions 281 and 522, Italy enacted other legislation that imposed unexpected costs on renewable energy producers, including CEF. In 2008, Italy had enacted a windfall tax on the profits of energy companies with an annual gross income of over € 25 million, the so-called "Robin Hood" tax. The rationale behind the tax was to use the profits that oil companies and other energy groups were earning from record oil and energy prices to fund aid for low-income households that had been hard-hit by high energy and food prices. As no such windfall profits befell renewable energy producers, Italy expressly excluded renewable energy producers from the scope of the Robin Hood tax. Thus, when CEF invested in the Italian photovoltaic plants, it reasonably expected that its plants would not be subjected to the tax.

33. However, in 2011, Italy unexpectedly and arbitrarily broadened the scope of the Robin Hood tax by extending it to all energy producers, including renewable energy producers, with a gross annual income of over € 10 million and taxable income of over € 1 million.[11] In 2013, Italy again extended the scope of the Robin Hood tax by reducing the applicable income thresholds to gross annual income over € 3 million and taxable income

[11] *See* Law Decree No. 138/2011 of August 13, 2011, converted into law by Law No. 148 of September 14, 2011.

over € 300,000.[12] That measure resulted in the application of the Robin Hood tax to CEF's facilities. The Robin Hood tax directly reduced the profits and revenues that CEF reasonably expected to receive on the basis of the incentive remuneration guaranteed under the *Contos* and GSE Agreements. The tax rate was 10.5% for 2013 and 6.5% for 2014.

34. On February 9, 2015, the Italian Constitutional Court declared the Robin Hood tax unconstitutional. However, the Court also ruled that its decision would not have retroactive effect. This means that Italy will not reimburse CEF for the sums wrongfully paid under the Robin Hood tax legislation, despite its violation of the ECT and international law and despite Italy's own acknowledgement that the tax violated Italian law. On April 28, 2015, Italy confirmed by way of Circular No. 18/E that it required investors to pay all amounts purportedly owed pursuant to the Robin Hood tax for the 2014 fiscal year.

35. Italy implemented a further measure harming CEF's investments on December 19, 2013. The Italian tax authorities issued Circular No. 36/E, which changed the rules for the depreciation of capital investments in photovoltaic plants. Prior to Circular No. 36/E, photovoltaic plants were classified as movable property and subject to a depreciation rate of up to 5% per year. Circular No. 36/E, however, reclassified photovoltaic plants as immovable property for tax purposes, which reduced the applicable depreciation rate for photovoltaic plants to a maximum of 4% per year. Because a higher depreciation rate results in lower taxable income, the decrease of the applicable depreciation rate pursuant to Circular No. 36/E increased the taxable income of photovoltaic plant owners. Moreover, Italy's reclassification of photovoltaic plants as immovable property made them more likely to be subjected to the IMU (*imposta municipale propria*) and TASI (*tassa sui servizi*) taxes. Each of these measures has harmed CEF's investments by unexpectedly and arbitrarily increasing CEF's costs, and thus decreasing the revenues that CEF reasonably expected it would be receiving pursuant to Italy's guarantees under the relevant *Contos* and GSE Agreements.

36. In addition, on December 27, 2013, Italy declared a need to establish a capacity market in its electricity system and enacted Law No. 147 (the so-called *Legge di Stabilità 2014*).[13] In electricity capacity markets, electricity producers receive compensation

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[12] *See* Law Decree No. 69/2013 of June 21, 2013, converted into law by Law No. 98 of August 9, 2013.

[13] *See* Law Decree No. 147/2013 of December 27, 2013. On March 10, 2015, the AEEG issued Resolution No. 95/2015 proposing that the capacity market be implemented by 2017, with the first auctions taking place in September 2015.

for selling capacity, *i.e.*, the power that they will provide in the future. The implementation of a capacity market in Italy's electricity system is meant to ensure that the grid operator, Terna S.p.A., always has a sufficient amount of available electricity to cover demand. The *Legge di Stabilità 2014* indicated that the compensation that would be paid to electricity producers for selling their capacity on the capacity market would not result in an increase of the electricity price for end consumers. Although the manner in which this compensation will be funded remains unclear, it is likely that some costs will be borne by renewable energy producers like CEF. Any such costs would further damage CEF's investments.

37. Each of the measures described above, separately and in combination, constitutes a violation of the ECT and international law. By enacting these measures, Italy wrongfully repudiated the guarantees regarding the incentive tariffs that it had made pursuant to the *Contos* and the GSE Agreements. Italy burdened renewable energy producers, including CEF, with unexpected, arbitrary costs that significantly reduced the profits and revenues that CEF reasonably expected to receive on the basis of the incentive remuneration guaranteed under the *Contos* and GSE Agreements. As discussed below, however, these were not Italy's only breaches of the ECT.

E. Italy Wrongfully Abrogated the *Conto* Incentive Schemes

38. The foregoing retroactive alterations to the legal and economic regime governing photovoltaic plants in Italy caused significant damage to CEF's investments, principally by reducing the revenues that CEF reasonably expected when it decided to invest in Italy. Italy further violated the ECT through the enactment of Law Decree No. 91/2014 on June 24, 2014 ("**LD 91/2014**"), which was converted into law by Law No. 116 of August 11, 2014.

39. LD 91/2014 abolished (as of January 1, 2015) the incentive tariffs guaranteed for a 20-year period under the five *Contos* and the GSE Agreements for photovoltaic plants with a nominal capacity above 200 kW. LD 91/2014 replaced the incentive tariffs with new tariffs that are calculated pursuant to one of three mechanisms (Options A, B and C), each of which provides materially less compensation than the incentive tariffs guaranteed in the *Contos* and GSE Agreements. Italy instructed owners and operators of photovoltaic plants to select their preferred option by November 30, 2014. If no choice was made, Option C would automatically apply.

40. Under Option A, the new tariff is paid over twenty-four years (starting from the date when the photovoltaic plant was connected to the grid), rather than the twenty-year period guaranteed in the *Contos* and the GSE Agreements. However, Option A also reduces the tariff by a percentage that depends on when the plant began benefiting from it. For example, if the plant is entitled to twelve more years of incentive tariffs (having benefited from them for the past eight years), then the tariff is reduced by 25%. If the plant is entitled to eighteen more years of incentive tariffs (having benefited from them for the past two years), then the tariff is reduced by 18%.

41. Under Option B, the new tariff is still paid over a twenty-year period. Its amount, however, is reduced between 2015 and 2019 by a percentage that depends on when the photovoltaic plant began benefiting from the incentive tariffs. It is then increased during an equivalent number of years toward the end of the twenty-year period. Although the new increased tariff in later years superficially appears to offset the new decreased tariff in the earlier years, the changes are likely to result in a reduction of the total value of the tariff because: (i) the lower tariff applies in the early life of the projects when plants are more productive; and (ii) a delay in receiving the expected tariff will result in losses due to the time value of money.

42. Under Option C, the new tariff is still paid over a twenty-year period, but it is reduced for the duration of that period by a fixed percentage depending on the photovoltaic plant's nominal capacity. For plants with a nominal capacity higher than 900 kW, the incentive tariff is reduced by 8%.

43. Faced with those three unpalatable choices and the threat of automatically defaulting to Option C if no choice were made, CEF directed its Italian investment companies to send protest letters to the GSE regarding each of its plants. The Italian investment companies sent those letters in November 2014, noting that Italy was applying Option C to the plants over CEF's objections and in violation of its contractual and legal rights.

44. In addition to the abrogation of the incentive tariffs guaranteed under the *Contos* and the GSE Agreements – and their wholesale replacement by highly reduced tariffs pursuant to one of three options – LD 91/2014 amended the payment modalities of the tariffs. Before LD 91/2014 was enacted, the remuneration that a *soggetto responsabile* received was based on data indicating the photovoltaic plant's production and was paid at the end of every

month. Under the new law, the new tariffs are paid by monthly installments amounting to 90% of the estimated yearly average production of electricity. The payment of the remaining 10% is postponed for six to eighteen months, resulting in adverse impacts to investment cash flows.

45. LD 91/2014 also imposed additional annual "fees" on renewable energy producers that purportedly cover the GSE's expenses for management of the new tariff scheme,[14] despite the fact that the GSE Agreements do not provide for such fees. One such fee applies to any photovoltaic plant benefiting from incentive tariffs under the *Contos* and ranges from € 1.20 to € 2.20 per kW, depending on the specific plant's nominal capacity. Another fee – known as the RID fee – applies to all renewable energy sources. For solar energy producers, the RID fee ranges from € 0.60 to € 0.70 per kW, depending on the specific photovoltaic plant's nominal capacity, with a maximum cap of € 10,000 per year per plant. These new fees ostensibly replace the administrative fee that Italy introduced in 2012, referred to above.[15]

46. Italy's enactment of LD 91/2014 has severely harmed CEF's investments. Italy abrogated the incentive tariffs that it originally ensured would apply to CEF's plants for 20 years pursuant to the *Contos* and the GSE Agreements, and Italy replaced them with new, severely reduced tariffs.

F. Italy Continues to Aggravate the Dispute

47. As discussed in Section III.F, below, CEF wrote in July and October 2014 to notify Italy that the measures discussed above, which reduced the revenues and profits guaranteed to its photovoltaic plants, constituted a legal dispute for purposes of the ECT. CEF requested an opportunity to resolve the dispute amicably and requested that Italy take no further measures to aggravate the dispute. Despite those letters, Italy has continued to impose harmful measures on renewable energy producers, including CEF.

48. On May 1, 2015, the GSE published technical rules ("*regole tecniche per il mantenimento degli incentivi*") regulating the impact of certain modifications or "interventions" on operating plants and providing a general obligation to communicate those modifications or interventions to the GSE. Under these new regulations, even the most

[14] *See* Ministerial Decree of December 24, 2014, implementing Art. 25 of LD 91/2014.

[15] *See supra* ¶ 28.

routine modifications – such as a simple refurbishing to maximize efficiency– must be communicated to the GSE. Furthermore, if any type of intervention on a plant results in increased efficiency, the technical rules unlawfully purport to cap the incentives that would otherwise apply to the increased production levels. For example, if such a "modified" plant has been receiving incentivized remuneration for three or more calendar years before it is deemed to have increased efficiency and production, the cap that the GSE will impose will be equal to the maximum quantity of energy generated in any one year during the three years prior to the modification, plus 2%. If the "modified" plant has been receiving incentivized remuneration for less than three calendar years, then the cap will be calculated on the basis of estimates provided by the Italian Ministry of Economic Development.

49. The May 1, 2015, GSE rules also listed a variety of potential modifications that the GSE may or may not permit under certain conditions. Those include, for example, the relocation of a plant, a change in the connection point to the grid, and the replacement of spare parts. If an investor is found to have made modifications that the GSE deems material to the facilities' original technical characteristics, the GSE could sanction that investor, including by revoking the investor's right to incentivized tariffs and requiring the investor to return incentive tariffs previously paid by the GSE.

50. Italy's latest measure, in addition to aggravating the existing dispute with CEF, is manifestly unreasonable, arbitrary, and constitutes an additional breach of the ECT. The technical regulations threaten to harm CEF's investments in Italy by unexpectedly decreasing – and possibly eliminating – the revenues CEF reasonably expected pursuant to the Italian legislative framework, which formed the basis for its investments. The GSE's technical regulations have already triggered confusion and complaints in the market regarding their unreasonableness, arbitrariness, and lack of clarity.

51. CEF is not in a position to determine the precise impact that this measure, which is currently under review, will have on its investments, in part because the GSE suspended the effectiveness of the technical regulations on July 9, 2015. Nevertheless, CEF reserves its rights to claim for the harm caused by that measure and any other aggravating measures that Italy may take during the course of this proceeding.

* * *

52. In summary, Italy's abrogation of the incentive tariffs, combined with its past and continued imposition of arbitrary costs and unfair regulations, have severely damaged CEF's investments. CEF seeks relief through arbitration under the ECT for the harm that Italy's conduct has caused, and continues to cause, to its investments.

III. THE PARTIES HAVE AGREED TO SETTLE THIS DISPUTE THROUGH SCC ARBITRATION

53. Article 26 of the ECT grants CEF the right to submit this dispute to international arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. Article 26 states:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (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 in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).[16] ...
>
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).[17]

[16] Italy is listed under Annex ID. However, CEF has not previously submitted this dispute to the courts or administrative tribunals of Italy or in accordance with any previously agreed dispute settlement procedure. Consequently, Article 26(3)(b)(i) is irrelevant for purposes of this arbitration.

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

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce. ...

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

54. The requirements under Article 26 of the ECT may be summarized as follows: a) the dispute must concern a breach of Part III of the ECT; b) the dispute must involve a covered "investment;" c) the Respondent must be a Contracting Party to the ECT; and d) the opposing party must be a covered "investor" that is a national or company of another Contracting Party to the ECT. Each of these requirements is satisfied in the present case.

A. This is a Dispute Concerning a Breach of Part III of the ECT

55. As explained in Section II above, this dispute concerns Italy's failure to fulfill legislative, regulatory, and contractual commitments it made in relation to CEF and its investments in photovoltaic plants. The acts and omissions of Italy described above and to be developed further in the course of this proceeding constitute serious and repeated breaches of the protections accorded to CEF's investments in Italy under Part III of the ECT. Those protections include, but are not limited to, the obligations of Italy found in Articles 10 and 13 of the ECT.

56. Article 10 provides a number of guarantees and protections to CEF and its investments, including: 1) a requirement that Italy treat CEF's investments fairly and equitably; 2) a requirement that Italy grant "the most constant protection and security" to CEF's investments; 3) a prohibition against unreasonable or discriminatory measures that impair the management, maintenance, use, enjoyment, or disposal of investments; 4) a prohibition against treatment less favorable than that required by international law, including treaty obligations; and 5) a requirement to observe any obligations that Italy entered into with an investment or an investor. By way of example only, Italy treated CEF's investments unfairly and inequitably by altering, and then abrogating, the incentive schemes governing

[17] Italy is not listed under Annex IA. Consequently, CEF is entitled to assert a claim based on the last sentence of Article 10(1), the ECT's "umbrella clause," which it does.

those investments, in violation of its commitments and the clear terms of the different *Contos* and the GSE Agreements. Italy's misconduct in that respect also unlawfully impaired CEF's investments in an unreasonable or discriminatory manner and violated the obligations Italy entered into with respect to CEF's investments.

57. Additionally, Article 13 of the ECT prohibits Italy from unlawfully expropriating CEF's investments or subjecting them to measures having an equivalent effect. As CEF will demonstrate during the course of the arbitration proceeding, Italy breached Article 13 of the ECT by abrogating the rights granted to CEF's investments pursuant to *Conto* II, *Conto* III, *Conto* IV, and the GSE Agreements. Since those rights, granted by law and enshrined in contract, formed part of CEF's investments in this case, Italy's repudiation of those rights constitutes a measure tantamount to expropriation, if not a direct expropriation, under the ECT and international law.

B. The ECT Covers CEF's Investments

58. The ECT provides a broad definition of the term "investment." As stated in ECT Article 1(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.

59. Under this definition, and as discussed in Section II, above, a number of different investments of CEF have been harmed in this case, including but not limited to: (i) CEF's ownership of tangible and intangible property and property rights; (ii) CEF's ownership of shares and equity participation in Italian companies and business enterprises, as well as debt obligations; (iii) CEF's right to returns and claims to money; (iv) rights conferred to CEF by law, such as the rights to fixed incentive tariffs conferred under *Conto* II, *Conto* III, *Conto* IV; and (v) rights conferred by contracts, licenses, and permits, such as the contractual rights conferred in the GSE Agreements.

60. CEF thus owns several covered "investments" under the ECT that have been damaged by Italy.

C. Respondent is a Contracting Party to the ECT

61. Italy is a Contracting Party to the ECT. Italy signed the ECT on December 17, 1994, and ratified it on December 5, 1997. Italy deposited its instrument of ratification on December 16, 1997. The ECT entered into force for Italy on April 16, 1998.[18]

D. CEF is a Covered Investor and a National of a Contracting Party to the ECT

62. Article 1(7) of the ECT defines "investor" as "a company or other organization organized in accordance with the law applicable in that Contracting Party."

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[18] *See* excerpts from Energy Charter website, **CEX-5**. CEF notes that Italy reportedly has given notice of its intention to withdraw from the Energy Charter Treaty and that such withdrawal is scheduled to take effect in January 2016. While CEF has been unable to confirm the validity of Italy's reported withdrawal, it notes that any such withdrawal does not affect the protection of CEF's investments or the jurisdiction of the Arbitral Tribunal under the ECT. CEF further notes that the ECT remains in force for Italy for a period of twenty years.

63. CEF is a company duly established under the laws of the Kingdom of the Netherlands. The Netherlands is a Contracting Party to the ECT. It signed the ECT on December 17, 1994, and ratified it on December 11, 1997. The Netherlands deposited its instrument of ratification on December 16, 1997. The ECT entered into force for the Netherlands on April 16, 1998.[19] Thus, CEF is a covered investor and a national of a Contracting Party to the ECT.

E. The Parties Have Consented to Arbitration

64. Italy consented to arbitration under the ECT by signing and ratifying the treaty. As noted above, the ECT entered into force for Italy on April 16, 1998.

65. CEF consented to arbitrate this dispute pursuant to Article 26 of the ECT through two letters dated July 7, 2014, and October 20, 2014.[20] CEF hereby confirms its consent to arbitration under the ECT and elect to submit this dispute to the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with Article 26(4)(c) of the ECT.

F. CEF Attempted to Settle This Dispute Amicably

66. Before submitting a dispute to arbitration, Article 26 of the ECT states that disputing parties should, if possible, attempt to settle their disputes amicably. On July 7, 2014, CEF sent a letter to Italy notifying it of this dispute and offering to settle the dispute amicably. CEF sent a second letter to the same effect on October 20, 2014. Italy has not responded to CEF's offers to pursue a settlement, and no resolution of the present dispute has been achieved.

67. Article 26 of the ECT permits an Investor to submit its dispute to arbitration under the ECT if the parties have not resolved their dispute after a three month period. As more than three months have passed since CEF attempted to settle this dispute amicably with Italy, CEF is entitled to submit this Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

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[19] *See* excerpts from Energy Charter website, **CEX-6**.

[20] Letter from CEF to Italy dated July 7, 2014, **CEX-7**; and Letter from CEF to Italy dated October 20, 2014, **CEX-8**.

IV. PROCEDURAL MATTERS

68. Pursuant to Articles 12 and 13 of the SCC Arbitration Rules, and in view of the size and complexity of this case, the Arbitral Tribunal should consist of three arbitrators.

69. CEF hereby appoints Prof. Dr. Klaus Sachs, a national of Germany, as its party-appointed arbitrator for this proceeding. His contact information is:

Prof. Dr. Klaus Sachs
CMS Hasche Sigle
Nymphenburger Straße 12
80335 Munich
Germany
Tel. +49 89 23807 109
Email: klaus.sachs@cms-hs.com

70. With respect to the selection of the Chairman of the Arbitral Tribunal, in accordance with Article 13(1) of the SCC Arbitration Rules, CEF proposes that the Chairman be selected by the two party-appointed arbitrators, with agreement of the parties. If Italy fails to appoint an arbitrator or if the two party-appointed arbitrators are unable to agree upon a Chairman, the SCC Board should make the necessary appointment(s) as provided in Article 13(3) of the SCC Arbitration Rules.

71. CEF chooses English as the procedural language for the arbitration and proposes Geneva, Switzerland, as the seat of the arbitration.

72. This Request is submitted by e-mail. CEF is transferring an amount of € 2,000 corresponding to the registration fee to the Arbitration Institute and will provide confirmation of that transfer in the coming days.

V. PRELIMINARY REQUEST FOR RELIEF

73. Pursuant to Article 2(iii) of the SCC Arbitration Rules, CEF requests an award granting it the relief set forth below:

(a) a declaration that the dispute is within the jurisdiction of the ECT;

(b) a declaration that Italy has violated Part III of the ECT, including but not limited to Article 10 and Article 13, as well as international law with respect to CEF's investments;

(c) compensation to CEF for all damages it has suffered, to be developed and quantified in the course of this proceeding but likely to include, by way of example and without limitation, sums invested by CEF to acquire and develop the investments, lost profits, and consequential damages flowing from Italy's breaches;

(d) all costs of this proceeding, including CEF's attorneys' fees; and

(e) pre- and post-award compound interest until the date of Italy's final satisfaction of the award.

74. CEF reserves its right to modify, amend, or supplement its claims during the course of the arbitration proceeding.

Dated: November 20, 2015

Respectfully submitted,

KING & SPALDING

Kenneth R. Fleuriet
Amy Roebuck Frey
Cedric Soule
12, cours Albert 1er
75008 Paris
France

Reginald R. Smith
Kevin D. Mohr
1100 Louisiana, Suite 4000
Houston, Texas 77002
U.S.A.

ORRICK, HERRINGTON & SUTCLIFFE

Carlo Montella
Andrea Gentili
Daria Buonfiglio
Corso G. Matteotti, 10
Milan 20121
Italy

Pina Lombardi
Claudia Romano
Piazza della Croce Rossa, 2
Rome 00161
Italy

REQUEST FOR JUDICIAL INTERVENTION

UCS-840 (rev. 07/29/2019)

SUPREME COURT, COUNTY OF NEW YORK

Index No: _____ Date Index Issued: 08/16/2019

For Court Use Only:
IAS Entry Date
Judge Assigned
RJI Filed Date

CAPTION Enter the complete case caption. Do not use et al or et ano. If more space is needed, attach a caption rider sheet.

CEF Energia B.V.

Plaintiff(s)/Petitioner(s)

-against-

The Italian Republic

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING Check only one box and specify where indicated.

COMMERCIAL
- ○ Business Entity (includes corporations, partnerships, LLCs, LLPs, etc.)
- ○ Contract
- ○ Insurance (where insurance company is a party, except arbitration)
- ○ UCC (includes sales and negotiable instruments)
- ◉ Other Commercial (specify): Commercial - International Arbitration

*NOTE: For Commercial Division assignment requests pursuant to 22 NYCRR 202.70(d), complete and attach the **COMMERCIAL DIVISION RJI ADDENDUM (UCS-840C).***

REAL PROPERTY Specify how many properties the application includes: _____
- ○ Condemnation
- ○ Mortgage Foreclosure (specify): ○ Residential ○ Commercial
  Property Address: _____
  *NOTE: For Mortgage Foreclosure actions involving a one to four-family, owner-occupied residential property or owner-occupied condominium, complete and attach the **FORECLOSURE RJI ADDENDUM (UCS-840F).***
- ○ Tax Certiorari
- ○ Tax Foreclosure
- ○ Other Real Property (specify): _____

OTHER MATTERS
- ○ Certificate of Incorporation/Dissolution [see *NOTE* in **COMMERCIAL** section]
- ○ Emergency Medical Treatment
- ○ Habeas Corpus
- ○ Local Court Appeal
- ○ Mechanic's Lien
- ○ Name Change
- ○ Pistol Permit Revocation Hearing
- ○ Sale or Finance of Religious/Not-for-Profit Property
- ○ Other (specify): _____

MATRIMONIAL
- ○ Contested
  *NOTE: If there are children under the age of 18, complete and attach the **MATRIMONIAL RJI ADDENDUM (UCS-840M).***
  For Uncontested Matrimonial actions, use the Uncontested Divorce RJI (UD-13).

TORTS
- ○ Asbestos
- ○ Child Victims Act
- ○ Environmental (specify): _____
- ○ Medical, Dental or Podiatric Malpractice
- ○ Motor Vehicle
- ○ Products Liability (specify): _____
- ○ Other Negligence (specify): _____
- ○ Other Professional Malpractice (specify): _____
- ○ Other Tort (specify): _____

SPECIAL PROCEEDINGS
- ○ CPLR Article 75 (Arbitration) [see *NOTE* in **COMMERCIAL** section]
- ○ CPLR Article 78 (Body or Officer)
- ○ Election Law
- ○ Extreme Risk Protective Order
- ○ MHL Article 9.60 (Kendra's Law)
- ○ MHL Article 10 (Sex Offender Confinement-Initial)
- ○ MHL Article 10 (Sex Offender Confinement-Review)
- ○ MHL Article 81 (Guardianship)
- ○ Other Mental Hygiene (specify): _____
- ○ Other Special Proceeding (specify): _____

STATUS OF ACTION OR PROCEEDING Answer YES or NO for every question and enter additional information where indicated.

	YES	NO	
Has a summons and complaint or summons with notice been filed?	○	◉	If yes, date filed: _____
Has a summons and complaint or summons with notice been served?	○	◉	If yes, date served: _____
Is this action/proceeding being filed post-judgment?	○	◉	If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION Check one box only and enter additional information where indicated.

○ Infant's Compromise			
○ Extreme Risk Protective Order Application			
○ Note of Issue/Certificate of Readiness			
○ Notice of Medical, Dental or Podiatric Malpractice	Date Issue Joined:	_____	
○ Notice of Motion	Relief Requested:	_____	Return Date: _____
◉ Notice of Petition	Relief Requested:	Confirm International Arbitration Award	Return Date: 8/15/2019
○ Order to Show Cause	Relief Requested:	_____	Return Date: _____
○ Other Ex Parte Application	Relief Requested:	_____	
○ Poor Person Application			
○ Request for Preliminary Conference			
○ Residential Mortgage Foreclosure Settlement Conference			
○ Writ of Habeas Corpus			
○ Other (specify): _____			

RELATED CASES List any related actions. For Matrimonial cases, list any related criminal or Family Court cases. If none, leave blank.
If additional space is required, complete and attach the **RJI ADDENDUM (UCS-840A)**.

Case Title	Index/Case Number	Court	Judge (if assigned)	Relationship to instant case

PARTIES For parties without an attorney, check the "Un-Rep" box and enter the party's address, phone number and email in the space provided.
If additional space is required, complete and attach the **RJI ADDENDUM (UCS-840A)**.

Un-Rep	Parties List parties in same order as listed in the caption and indicate roles (e.g., plaintiff, defendant, 3rd party plaintiff, etc.)	Attorneys and Unrepresented Litigants For represented parties, provide attorney's name, firm name, address, phone and email. For unrepresented parties, provide party's address, phone and email.	Issue Joined For each defendant, indicate if issue has been joined.	Insurance Carriers For each defendant, indicate insurance carrier, if applicable.
☐	Name: CEF Energia B.V. Role(s): Petitioner	James Berger, King & Spalding LLP, 1185 Avenue of the Americas, New York, NY 10036, +1 (212) 556-2202, jberger@kslaw.com	○ YES ◉ NO	
☐	Name: The Italian Republic Role(s): Respondent	Repubblica Italiana, Avvocatura Generale dello Stato, Via dei Portoghesi n. 12, Rome, Italy, 186	○ YES ◉ NO	
☐	Name: Role(s):		○ YES ○ NO	
☐	Name: Role(s):		○ YES ○ NO	
☐	Name: Role(s):		○ YES ○ NO	
☐	Name: Role(s):		○ YES ○ NO	
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☐	Name: Role(s):		○ YES ○ NO	
☐	Name: Role(s):		○ YES ○ NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, UPON INFORMATION AND BELIEF, THERE ARE NO OTHER RELATED ACTIONS OR PROCEEDINGS, EXCEPT AS NOTED ABOVE, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION BEEN PREVIOUSLY FILED IN THIS ACTION OR PROCEEDING.

Dated: 08/16/2019

/s/ James E. Berger
Signature

2644284
Attorney Registration Number

James E. Berger
Print Name

SUPREME COURT OF THE STATE OF NEW YORK

UCS-840C
3/2011

COUNTY OF New York

CEF Energia B.V.

Plaintiff(s)/Petitioner(s)

-against-

The Italian Republic

Defendant(s)/Respondent(s)

Index No. _____

RJI No. (if any) _____

COMMERCIAL DIVISION
Request for Judicial Intervention Addendum

COMPLETE WHERE APPLICABLE [add additional pages if needed]:

Plaintiff/Petitioner's cause(s) of action [check all that apply]:

- ☐ Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g. unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g. sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices)
- ☐ Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units)
- ☐ Transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only
- ☐ Shareholder derivative actions — without consideration of the monetary threshold
- ☐ Commercial class actions — without consideration of the monetary threshold
- ☐ Business transactions involving or arising out of dealings with commercial banks and other financial institutions
- ☐ Internal affairs of business organizations
- ☐ Malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters
- ☐ Environmental insurance coverage
- ☐ Commercial insurance coverage (e.g. directors and officers, errors and omissions, and business interruption coverage)
- ☐ Dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures — without consideration of the monetary threshold
- ☒ Applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues — without consideration of the monetary threshold

Plaintiff/Petitioner's claim for compensatory damages [exclusive of punitive damages, interest, costs and counsel fees claimed]:

$ Please see attached

Plaintiff/Petitioner's claim for equitable or declaratory relief [brief description]:

Petitioner seeks to recognize arbitral award made in favor of CEF Energia B.V. against the Italian Republic. This matter involves international arbitration.

Defendant/Respondent's counterclaim(s) [brief description, including claim for monetary relief]:

I REQUEST THAT THIS CASE BE ASSIGNED TO THE COMMERCIAL DIVISION. I CERTIFY THAT THE CASE MEETS THE JURISDICTIONAL REQUIREMENTS OF THE COMMERCIAL DIVISION SET FORTH IN 22 NYCRR § 202.70(a), (b) AND (c).

Dated: 08/16/2019

/s/ James E. Berger
SIGNATURE

James E. Berger
PRINT OR TYPE NAME

FILED: NEW YORK COUNTY CLERK 08/16/2019 05:56 PM INDEX NO. 654707/2019
NYSCEF DOC. NO. 8 RECEIVED NYSCEF: 08/16/2019

COMMERCIAL DIVISION

Plaintiff/Petitioner's claim for compensatory damages [exclusive of punitive damages, interest, costs and counsel fees claimed]:

Petitioner requests that the Court enter judgment that Respondent is liable to Petitioner:

(i) in the amount of € 9,600,000.00; plus

(ii) Petitioner's reasonable costs from the Arbitration in the amount of € 1,000,000.00; plus

(iii) any applicable Value Added Tax; plus

(iv) pre- and post-award interest at a rate of LIBOR plus 2% compounded annually from January 1, 2015 until the date that judgment is entered herein; plus

(v) post-judgment interest pursuant to N.Y. C.P.L.R. § 5004 from the date that judgment is entered to the date of satisfaction.