



# Model *Inter Se* Agreement to Neutralize the Survival Clause of the Energy Charter Treaty Between the EU and Other non-EU Contracting Parties

IISD BRIEF

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### **Model *Inter Se* Agreement to Neutralize the Survival Clause of the Energy Charter Treaty Between the EU and Other non-EU Contracting Parties**

August 2024

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### **Acknowledgements**

The authors would like to thank Makane Moïse Mbengue for his extensive comments and feedback on this document. The authors would also like to thank reviewers Nathalie Bernasconi-Osterwalder, Josef Ostránský, Jonathan Bonnitcha, Güneş Ünüvar, Joshua Paine, Federica Violi, Lorenzo Cotula, Nikki Reisch, Hélionor De Anzizu, Anne Mburu, Amandine Van Den Berghe, and Eunjung Lee for their valuable inputs on the text of the Model Agreement in Part II. Moreover, the authors thank Leonardo Flach Aurvalle for supporting the development of the paper. Any errors or omissions are ours.

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# Table of Contents

<b>PART I: Introduction .....</b>	<b>1</b>
1. Advantages of This Model Agreement .....	2
2. The Modification of the ECT Complies With the Law of Treaties .....	2
a. The Modification Is Not Prohibited by the ECT – First Condition Fulfilled .....	1
b. The Modification Does Not Affect Third-Party Rights and Obligations Under the Treaty – Second Condition Fulfilled.....	2
c. The Modification Does Not Relate to a Provision, Derogation From Which Is Incompatible With the Effective Execution of the Object and Purpose of the ECT as a Whole – Third Condition Fulfilled.....	2
<b>PART II: Agreement on the <i>Inter Se</i> Modification of the Energy Charter Treaty.....</b>	<b>5</b>
<b>References .....</b>	<b>10</b>



## PART I: Introduction

The Energy Charter Treaty (ECT) is the investment treaty that has generated the highest number of investor–state arbitrations globally. It is also the investment treaty legally shielding by far the highest number of fossil fuel assets from government intervention. This includes fossil fuel production and power generation—the sectors responsible for the largest amount of greenhouse gas emissions. To meet the Paris Agreement objective of limiting warming to 1.5°C above pre-industrial levels, states will need to take unprecedented measures to phase out these activities. However, states increasingly recognize that the ECT obstructs these efforts, leading more than 10 ECT contracting parties to withdraw or announce a withdrawal. Among them are some of the world’s largest economies, including the European Union, France, Germany, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, and the United Kingdom.

However, even after the important step of withdrawing, states run the risk of being sued in arbitration. The treaty contains a so-called survival clause in Article 47(3), which provides that certain investments made prior to withdrawal will continue to benefit from the treaty’s investment provisions, including access to investor–state arbitration, for a period of 20 years. This has tremendous implications for climate mitigation efforts. For example, investors with upstream oil and gas production assets or operators of coal-fired power plants will be able to use the unusual remedy of investor–state arbitration to claim compensation for a whole range of government measures affecting their bottom line. For ECT contracting parties, overcoming this problematic legacy of the ECT is becoming a top priority. The EU has recently signed a declaration clarifying that the ECT’s investor–state arbitration provision does not apply—and never has—to intra-EU investment disputes. This declaration will be accompanied by a formal agreement to the same effect.

While these steps clarify the inapplicability of the ECT’s investor–state arbitration mechanism *within the EU*, they do not prevent legacy arbitrations between the EU and the more than 20 non-EU ECT contracting parties. This dimension will inevitably become increasingly relevant. The United Kingdom—a host to many hydrocarbon investments and home of major fossil fuel corporations—is the first non-EU state to withdraw from the treaty. Other ECT contracting states, including some significant hydrocarbon producers, may also need to consider withdrawal to meet their climate obligations. This model *inter se* agreement for the modification of the ECT proposes a legally viable and politically achievable way to neutralize legacy arbitration risks under the ECT between the EU and other non-EU ECT contracting parties.





## 1. Advantages of This Model Agreement

This model agreement is designed to facilitate the negotiation of an *inter se* agreement aimed at addressing the consequences of the survival clause.

- It is designed to be open to both current ECT contracting parties and states that have notified withdrawal or have already withdrawn from the ECT. It, therefore, adapts flexibly to the different stages of the withdrawal process of different countries.
- It is open for accession after initial entry into force, allowing states that may be withdrawing from the ECT in the future to join the initiative.
- It accounts for the fact that some investors will likely still attempt to initiate arbitration claims by containing best-effort obligations among signatory states to collaborate to prevent such claims from being filed or from succeeding.
- It does not interfere with the EU's understanding of the inapplicability of the ECT to intra-EU disputes, thereby paving the way for the EU to join the initiative.

In addition, this model agreement complies with all conditions imposed by the law of treaties, as will be examined in the following section.

## 2. The Modification of the ECT Complies With the Law of Treaties

In the law of treaties, modification [refers](#) to the “variation of certain treaty provisions only as between particular parties of a treaty, while in their relation to the other parties the original treaty provisions remain applicable.” Customary international law on modification is codified and reflected in Article 41 of the Vienna Convention on the Law of Treaties (VCLT) and, by analogy, in Article 41 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLT-IO) (Mbengue, 2011; Odendahl, 2012; Pauwelyn, 2003; Rigaux & Simon, 2011; Spanoudis & Weemaels, 2011).<sup>1</sup> Even though the VCLT-IO has not entered into force, the fact that the same wording was included in the VCLT and VCLT-IO is instructive here because the ECT is a treaty concluded between states (e.g., the United Kingdom, France) and international organizations (i.e., the EU and Euratom). These instruments, therefore, provide guidance for a modification of the Energy Charter Treaty. Importantly, the customary character of the law on treaty modification has also been confirmed by the International Court of Justice in the case of *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.<sup>2</sup>

According to Article 41(1) VCLT, “[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone” subject to certain conditions. Pursuant to Article 41(1)(a) VCLT, if a treaty expressly provides for the possibility of a modification, states can modify the treaty as per these provisions. However, the ECT does not provide for the possibility of a modification. As a result, the modification is governed

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<sup>1</sup> The following refers exclusively to the VCLT, as the VCLT-IO has not entered into force at the time of writing.

<sup>2</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] International Court of Justice Rep 7.



by Article 41(1)(b) VCLT.<sup>3</sup> While some authors argue against the possibility of an *inter se* modification of the ECT (Basedow, 2020; Beham & Prantl, 2020; Huremangić & Tropper, 2021; Kleinheisterkamp, 2009; Morgandi & Bartels, 2023; Tietje, 2022; Tropper, 2022a), the modification proposed here fully complies with public international law and the conditions set under Article 41(1)(b) VCLT. The following sections explain why this is the case.

## a. The Modification Is Not Prohibited by the ECT – First Condition Fulfilled

Article 41(1)(b) VCLT provides that “the modification in question” must not be “prohibited by the treaty.” This first condition is fulfilled. It is likely that this article requires prohibition to be stated expressly (Villiger, 2009, p. 534),<sup>4</sup> and the drafters of the ECT chose not to expressly prohibit modification.

Even if an implied prohibition were sufficient for an attempted modification to fall afoul of Article 41(1)(b) VCLT, nothing in the ECT can be interpreted as such, as to do so would not be aligned with the ordinary meaning of the treaty terms. While there is an article in the ECT that deals with the relationship to other agreements (Article 16 ECT), this is a conflict rule and does not deal with modification. Distinguishing conflict of law clauses from provisions on modification is also in line with the VCLT, which contains a conflict rule in Article 30 dealing with the application of successive treaties and clearly indicates that the rule applies without prejudice to modification provisions.<sup>5</sup> In any event, Article 16 ECT only covers investment protection (Part III) and dispute resolution (Part V), not the survival clause in Part IV (Article 47(3) ECT).

In conclusion, the ECT neither expressly nor impliedly prohibits a modification aimed at neutralizing the survival clause among some of its current and former contracting parties. The first condition in Article 41(1)(b) VCLT is therefore fulfilled.

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<sup>3</sup> The ECT provides for amendments in Article 42 ECT. This procedure must be distinguished from modification, since it merely imposes conditions related to the number of states supporting alteration, whereas modification is concerned with the fulfilment of additional criteria related to the content of such alteration.

<sup>4</sup> Potestà (2022) observes that “[a]n early version of the ILC Draft of 1964 contained the terms ‘expressly or impliedly prohibited.’” However, the proposed language was met with criticisms from the ILC members. For instance, Verdross, supported by Rosenne, considered that “the words ‘expressly or impliedly’ in paragraph 1(b)(iii) should be deleted, for a prohibition could hardly be implied” (*Yearbook of the ILC* (United Nations, 1964a, p. 272, paras. 80–81, 83). In the same vein, Lachs advocated for the deletion of paragraph 1(b)(iii) on the ground that “the provision of paragraphs 1(b)(i) and 1(b)(ii) already covered the cases of implied prohibition arising from the substance or object of the treaty or of the rights set forth therein” (United Nations, 1964b, Vol. I, p. 273, para. 93). As a result, the 1966 Draft eliminated the distinction and simply required that the modification in question “is not prohibited by the treaty.”

<sup>5</sup> Article 30(5) VCLT.



## **b. The Modification Does Not Affect Third-Party Rights and Obligations Under the Treaty – Second Condition Fulfilled**

Article 41(1)(b)(i) VCLT, moreover, requires that the modification “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.” The modification proposed in this model agreement fulfills this condition. Legal doctrine suggests that the relevant test is whether the treaty is integral, interdependent, or reciprocal in nature (Odendahl, 2012, para 18). A multilateral treaty is reciprocal if it provides “for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually” (Fitzmaurice, 1958, para. 2). This must be distinguished from interdependent or integral treaty undertakings that create obligations *erga omnes*.<sup>6</sup>

It is clear from the ECT’s *travaux préparatoires* that the treaty was adopted as a “package deal” consisting of a bundle of reciprocal bilateral relations (Doré, 1996, p. 151).<sup>7</sup> The added value of this approach was that states could only join the ECT as a whole (i.e., “take it or leave it”), not to create *erga omnes* obligations. The rights and obligations in the ECT are, therefore, reciprocal in nature. The model agreement proposed here does not affect the rights and obligations of non-modifying third states and their investors. Investors of non-modifying states will still benefit from access to investor–state arbitration as per the terms of the treaty.

For these reasons, the proposed modification equally fulfills the second condition in Article 41(1)(b)(i) VCLT.

## **c. The Modification Does Not Relate to a Provision, Derogation From Which Is Incompatible With the Effective Execution of the Object and Purpose of the ECT as a Whole – Third Condition Fulfilled**

Article 41(1)(b)(ii) VCLT imposes a third condition. Modification must not “relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.” This condition is equally satisfied here.

Some consider this condition to be substantially similar to the previous condition (Pauwelyn, 2003, p. 436; Sadat-Akhavii, 2003; Vidigal, 2013). According to this reading, where an *inter se* agreement alters only bilateral and reciprocal relations, it is permissible. Only a derogation from interdependent rather than reciprocal and bilateral obligations would fail the test, for example, where a modification “radically changes the position of every other party.”<sup>8</sup> The

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<sup>6</sup> Examples of treaties that are of interdependent or integral legal nature include human rights treaties that safeguard higher values transcending state interests and protect individuals irrespective of their nationality, disarmament treaties or treaties of neutralization. Investment treaties such as the ECT, on the contrary, impose strict nationality criteria and are aimed at fostering bilateral economic and investment relations between states.

<sup>7</sup> The International Court of Justice also drew a distinction between fundamental human rights obligation operating *erga omnes* and the law on diplomatic protection of foreign investors, which does not have *erga omnes* character in ICJ, *Barcelona Traction, Light and Power Company, Judgment*, I.C.J. Reports 1970, §33 ff.

<sup>8</sup> Article 60(2)(c) VCLT; see also Article 42(b)(ii) of the ILC Draft Articles on State Responsibility (2001).



ECT consists of a bundle of bilateral relations, and the alteration of these relations among some contracting parties does not affect the rights of non-modifying third states.

Moreover, even if the condition in Article 41(1)(b)(ii) VCLT were to be construed as wholly distinct from the one in subparagraph i, the “object and purpose” of the relevant provisions would have to be interpreted in line with the treaty’s own definition of its object and purpose. The object and purpose can typically be found in the preamble of a treaty and in provisions that focus on the treaty’s object and purpose as a whole. No abstractable principle on the object and purpose of the ECT can be derived from one or another specific investment provision of the ECT. Besides the investment provisions, the ECT also broadly covers the trade and transit of energy materials, state-to-state dispute resolution, and the promotion of energy efficiency. None of these other areas would be affected by the proposed modification.

The object and purpose of the ECT are plainly described in the preamble and Title I of the ECT clearly denominated “Objectives.” In the preamble, the ECT contracting parties are

[r]ecalling 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

[r]ecognising 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.

In Title I, the signatories also unequivocally reassert that they are “desirous of sustainable energy development” and to enhance energy security and efficiency “in a manner which would be socially acceptable, economically viable, and environmentally sound.” Furthermore, the signatories are

[r]ecognising the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting **all its relevant international obligations**, and in a spirit of political and economic cooperation, they decide to promote the development of **efficient, stable and transparent energy markets** at regional and global levels based on the principle of non-discrimination and market-oriented price formation, **taking into account environmental concerns** and the role of energy in each country’s national development. [emphasis added]

First, an *inter se* modification as proposed in this model agreement would not only not derogate but even pursue the purpose and object of the treaty that are expressed in the preamble and Title I. It would permit states to comply with the United Nations Framework Convention on Climate Change and give a concrete expression to the growing sense of urgency of environmental protection emphasized in the preamble. It would also be a step that strives toward the treaty’s objective as defined in Title I. Only policies that avert catastrophic climate change can be considered “socially acceptable, economically viable, and environmentally sound.”





Moreover, the proposed modification would also respect the “relevant international obligations” of states mentioned in the preamble. Indeed, to comply with Article 2(1)(c) of the Paris Agreement, states must “make finance flows consistent with a pathway towards low greenhouse gas emissions.” By removing access to investor–state arbitration for fossil fuel investors, states prevent awards of compensation to such investors and thereby comply with this article. Under this reading, the proposed modification would also not derogate from a provision in a way that is incompatible with the ECT’s object and purpose.

Finally, it is important to distinguish the ECT clearly from human rights treaties that confer irrevocable rights to individuals and may, therefore, not be modified *inter se* to remove those rights. The ECT, on the contrary, does not have a comparable individual rights dimension. As one author observes, “[h]uman rights obligations are importantly different from investment law both in structure and teleology, multilateralism of obligations contrasting with the bilateral(izable) and reciprocal obligations in international economic law” (Paparinskis, 2014, p. 80). Similarly, other authors consider that human rights treaties are based on universal principles, whereas “international investment law is founded on reciprocity and consent” (Voon et al., 2014, p. 458). In contrast to human rights treaties, Article 47(1) ECT expressly allows its contracting states to withdraw. As opposed to the former category of treaty, even if one were to consider the ECT to create direct as opposed to derivative individual rights, it is evident that such rights are not irrevocable.

For these reasons, the modification proposed in this model agreement does not concern a provision, derogation from which would be incompatible with the effective execution of the object and purpose of the ECT. The third condition in Article 41(1)(b)(ii) VCLT is equally fulfilled.



## PART II: Agreement on the *Inter Se* Modification of the Energy Charter Treaty

*The Contracting Parties to this Agreement,*

HAVING in mind the Energy Charter Treaty, signed at Lisbon on 17 December 1994, as it may be amended from time to time,

RECALLING the rules of customary international law as codified and reflected in the Vienna Convention on the Law of Treaties (VCLT), and in particular Article 41 of the VCLT,

AFFIRMING that the Contracting Parties hereby agree to modify a multilateral treaty between certain of its parties only,

ACKNOWLEDGING that the Energy Charter Treaty does not expressly provide for such modification,

RECALLING that the provisions of the Energy Charter Treaty are of a reciprocal legal nature,

CONSIDERING that this Agreement only concerns the reciprocal relationships between certain Contracting Parties and, by extension, the investors from those Contracting Parties, and that as a result, this Agreement does not affect the enjoyment by the other contracting parties of the Energy Charter Treaty of their rights under that Treaty or the performance of their obligations,

MINDFUL of the fact that this Agreement is compatible with the effective execution of the Energy Charter Treaty's object and purpose,

RECALLING that the Contracting Parties have notified the Energy Charter Secretariat and other contracting parties of the Energy Charter Treaty of their intention to conclude this Agreement and of the modification for which it provides,

CONSIDERING, in addition, that after entry into force of this Agreement, no new arbitration proceedings between, on the one hand, an investor of one Contracting Party and, on the other hand, another Contracting Party on the basis of the Energy Charter Treaty shall be registered where either the respondent or the home jurisdiction of the investor, or both, have withdrawn from the Energy Charter Treaty,



HAVE AGREED AS FOLLOWS:

## **Article 1**

### *Definitions*

For the purpose of this Agreement, the following definitions apply:

1. “Energy Charter Treaty” means the Energy Charter Treaty, signed at Lisbon on 17 December 1994, as it may be amended from time to time;
2. “Contracting Party” means a state, regional economic integration organisation, or international organisation, which has consented to be bound by this Agreement and for which this Agreement is in force;
3. “Relevant Arbitration Proceeding” means any proceeding before an arbitral tribunal with reference to Article 26 of the Energy Charter Treaty to resolve a dispute between, on the one hand, an investor of one Contracting Party and, on the other hand, another Contracting Party, except if
  - a. both of these Contracting Parties are member states of the EU,
  - b. both of these Contracting Parties are member states of Euratom,
  - c. one of these Contracting Parties is a member state of the EU and the other Contracting Party is a member state of Euratom,
  - d. one of these Contracting Parties is a member state of the EU and the other Contracting Party is the EU, or
  - e. one of these Contracting Parties is a member state of the EU and the other Contracting Party is Euratom.

## **Article 2**

### *Inter Se Modification*

1. As between the Contracting Parties, Article 47, paragraph 3 of the Energy Charter Treaty, as provided below, shall be deleted:

“(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.”

For greater certainty, Article 26 of the Energy Charter Treaty, pertaining to the resolution of disputes between an investor and a contracting party of the Energy Charter Treaty, therefore, does not apply to disputes between, on the one hand, an investor of one Contracting Party and, on the other hand, another Contracting Party, where either the respondent or the home jurisdiction of the investor, or both, have withdrawn from the Energy Charter Treaty.



For greater certainty, Article 16 of the Energy Charter Treaty, pertaining to the relationship of the Energy Charter Treaty with other international agreements whose terms concern the subject matter of Part III or V of the Energy Charter Treaty, does not apply to investors or investments as defined in Article 1, paragraphs 6 and 7 of the Energy Charter Treaty, where either the respondent or the home jurisdiction of the investor, or both, have withdrawn from the Energy Charter Treaty.

2. Paragraph 1 of this Article constitutes a modification within the meaning of Article 41 of the VCLT.
3. Relevant Arbitration Proceedings that have commenced at the time of entry into force of this Agreement for these Contracting Parties shall not be affected by this Agreement.

For the purpose of this paragraph, a Relevant Arbitration Proceeding shall be deemed to have commenced when an investor of one Contracting Party has notified another Contracting Party of its consent in accordance with Article 26, paragraph 4 of the Energy Charter Treaty.

4. The Contracting Parties that are concerned by such proceedings that have commenced, whether as respondent or as home jurisdiction of an investor, shall bring the existence of this Agreement to the attention of the arbitral tribunal and the claimant in question. The disputing parties in such proceedings that have commenced should endeavour to solve their dispute in consideration of this Agreement in good faith.
5. For greater certainty, this Agreement is without prejudice to the “Declaration on the Legal Consequences of the Judgment of the Court of Justice in Komstroy and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings” made by the representatives of the governments of the member states and of the European Union on 26 June 2024 and published on 28 June 2024 and the agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and 26 of their member states signed on [DATE].

### **Article 3**

#### *Cooperation Related to Arbitral Proceedings*

1. Where a notice of arbitration is nevertheless delivered for Relevant Arbitration Proceedings after the entry into force of this Agreement, or where such proceedings are nevertheless registered, and where either the respondent or the home jurisdiction of the investor, or both, have withdrawn from the Energy Charter Treaty, the Contracting Parties that are concerned by those proceedings, whether as respondent or as home jurisdiction, shall cooperate with one another to ensure, by all available means, including non-disputing party interventions, that the existence of this Agreement is brought to the attention of the arbitral tribunal in question, allowing the appropriate conclusion to be drawn that such proceedings lack legal basis and that any award issued thereunder is unenforceable.



2. The Contracting Parties will endeavour to ensure
  - a. the duty of arbitral institutions not to register any such arbitral proceedings in the future in line with their respective powers under
    - i. Article 36, paragraph 3 of the ICSID Convention,
    - ii. Rule 7, paragraph 1 of the ICSID Additional Facility Arbitration Rules, or
    - iii. Article 12 of the SCC Arbitration Rules;
  - b. the duty of arbitral tribunals to immediately discontinue any such arbitral proceedings and to declare that they lack a legal basis; and
  - c. the unenforceability of any awards rendered in such arbitral proceedings.

## **Article 4**

### *Signature*

This Agreement shall be open for signature at [PLACE] from [DATE] to [DATE] for any state, regional economic integration organisation, or international organisation that is a contracting party of the Energy Charter Treaty or to which the Energy Charter Treaty still applies in part, based on Article 47, paragraph 3 of the Energy Charter Treaty.

## **Article 5**

### *Ratification, Approval, or Acceptance*

This Agreement shall be subject to ratification, approval, or acceptance.

The Contracting Parties shall deposit their instruments of ratification, approval, or acceptance with the Depositary as defined in Article 9.

## **Article 6**

### *Accession*

This Agreement shall be open for accession, from the date on which the Agreement is closed for signature, by states, regional economic integration organisations, or international organisations that are a contracting party of the Energy Charter Treaty or to which the Energy Charter Treaty still applies in part, based on Article 47, paragraph 3 of the Energy Charter Treaty, provided that the acceding state, regional economic integration organisation, or international organisation, and the Contracting Parties of this Agreement have notified the Energy Charter Secretariat and the other contracting parties of the Energy Charter Treaty of their intention to accede to this Agreement and of the modification for which it provides.

The instruments of accession shall be deposited with the Depositary.

## **Article 7**

### *Entry Into Force*





1. This Agreement shall enter into force on the date on which the Depositary receives the second instrument of ratification, approval, or acceptance.
2. For each Contracting Party which ratifies, accepts, or approves it or accedes thereto after its entry into force in accordance with paragraph 1, this Agreement shall enter into force on the date of deposit by such Contracting Party of its instrument of ratification, approval, or acceptance.

## **Article 8**

### *Reservations*

The Contracting Parties shall not make reservations to this Agreement.

## **Article 9**

### *Depositary*

1. The Secretary-General of the United Nations shall act as Depositary of this Agreement.
2. The Secretary-General of the United Nations shall notify the Contracting Parties of:
  - a. the deposit of any instrument of ratification, acceptance or approval in accordance with Article 5;
  - b. the deposit of any instrument of accession in accordance with Article 6;
  - c. the date of entry into force of this Agreement in accordance with Article 7, paragraph 1; and
  - d. the date of entry into force of this Agreement for each Contracting Party in accordance with Article 7, paragraph 2.
3. This Agreement shall be registered by the Depositary with the United Nations Secretariat, in accordance with Article 102 of the Charter of the United Nations, following its entry into force.

Done at [NAME OF CITY, NAME OF COUNTRY] on [DATE]



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Published by the International Institute for Sustainable Development

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