

# Energy Transit in the Caucasus: A Legal Analysis

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This article provides an analysis of the commonalities and regional specificities of the intergovernmental agreements (IGAs) and Host Government agreements (HGAs) setting up the Baku-Tbilisi-Ceyhan (BTC) Pipeline and the South Caucasus Pipeline. The paper also assesses the IGA for the Nabucco Pipeline project. It provides a careful examination of the links between the agreements comprising these three pipeline projects and the Energy Charter Model Agreements on Cross-border Pipelines in conjunction with the provisions of the Energy Charter draft Transit Protocol. This article attempts to answer the following questions: To what extent can common principles and regional specificities be derived from the agreements in question? How do the agreements relate to the Energy Charter Model Agreements and the Energy Charter draft Transit Protocol? What recommendations can be made in view of the possible agreement on common principles or rules on Transit and Cross-border energy flows in the Energy Charter context?



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*The Nabucco, BTC and South Caucasus pipelines: Commonalities and regional specificities*

*The BTC, South Caucasus and Nabucco Pipeline IGAs*

This section analyses the extent to which the IGAs relating to the BTC, South Caucasus and Nabucco Pipeline projects contain regional specificities and common principles.

While the BTC and Nabucco Pipeline projects are each comprised of a single IGA, the South Caucasus Pipeline project is made up of two separate IGAs.<sup>1</sup> The agreements in question all have a number of features in common, as well as elements that set them apart. It is those differences that make it possible for each agreement to address regional issues and distinct, project-specific concerns that the parties may have. At the same time, it is through their common principles that the agreements remain loyal to core principles related to cross-border transit of natural resources.<sup>2</sup>

To begin with, there are a number of common principles that derive from the IGAs in question. All three agreements are committed to fundamental values set forth by the Protocol and the Model IGA, such as the facilitation of effective cooperation through the inclusion of clauses that ensure and safeguard the agreements' neutrality, as well as the potential for equal benefits for all parties involved. In addition, all the agreements contain clauses on taxes and fair treatment in relation to tariffs and any benefits to which the parties are entitled. The commitment to ensuring that proper environmental safeguards are in place – common to the Model and the Protocol – is shared by all agreements except the Nabucco IGA. All three agreements are committed to the fundamental values (with the exception of the Nabucco IGA when it comes to environmental protection) enunciated by the Protocol and the Model IGA. These principles include a commitment to the protection of the environment and the facilitation of effective cooperation through the inclusion of clauses, ensuring the agreements' neutrality and equal benefits for all parties involved.

In addition to these shared principles, the agreements also exhibit a number of regional specificities. The content of each agreement

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<sup>1</sup> The South Caucasus Pipeline project is made up of two IGAs, that between Azerbaijan and Turkey, and that between Azerbaijan and Georgia.

<sup>2</sup> On the conservation of natural resources, see Leal-Arcas, R. and Abu Gosh, E. (2013) 'The Conservation of Exhaustible Natural Resources in the GATT and WTO: Implications for the Conservation of Oil Resources,' *The Journal of World Investment and Trade*, 14(3), pp. 480-531.

is affected by such political and geographical specificities, and a careful analysis of this provides a useful insight into the values, concerns and peculiarities of the states involved. While all the agreements seem to follow a similar structure and demonstrate a commitment to certain mutual principles, the Nabucco IGA, for example, demonstrates a specific desire to keep all parties free from any binding obligations to finance the project.<sup>3</sup> Each agreement's preamble, in turn, expresses the reasons for the cooperation between the parties as well as certain regional concerns shared by the parties. While all the preambles state their commitment to the expansion and diversification of supply, the Nabucco IGA goes beyond that, expressing a specific concern related to the energy-security situation of the countries involved, a natural consequence in the aftermath of the 2008 Russian-Georgian war and the Russian-Ukrainian gas crisis.<sup>4</sup> Given the precarious energy-security situation in Europe following these events, the state parties to the agreement exhibit a desire to diversify their supply, and this regional specificity becomes apparent through the preamble, which explicitly addresses these regional concerns.

In addition, the state parties to the Nabucco IGA demonstrate a desire to establish an international company in order to facilitate cooperation between the parties, as well as to encourage the promotion, development, financial construction, and operation of the Nabucco Pipeline project. This does not feature in any of the other agreements, and is representative of a situation where regional elements have clearly contributed to the drafting of the agreement. One of the main regional elements that distinguishes the Nabucco Pipeline project from other projects for the transport of oil and gas is the parties' evident desire to develop a project that avoids the direct involvement of any states or companies that export natural gas, and which usually control the corresponding pipelines.<sup>5</sup> Since the Nabucco Pipeline project was meant to be a purely commercial project, open to any exporter and importer of natural gas,<sup>6</sup> it is natural to assume that the decision to create an international company may have been influenced by the parties' wish to

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<sup>3</sup> Article 3.2 of the Nabucco IGA, which states that 'Nothing in the Agreement obliges the States Parties to finance the Nabucco Project or to accept financial liabilities in regard to the Nabucco Project.'

<sup>4</sup> This refers to the Russia-Ukraine gas crisis in 2005-2006, which came about as a result of disagreements between the two states on the price of gas.

<sup>5</sup> See Grigoriadis, I. (2010) "The Nabucco Project: Implications for the EU Strategic Energy Review," Available at: <http://www.eliamep.gr/wp-content/uploads/2010/03/TGAE2010-I.Grigoriadis.pdf> (Accessed: 01 August 2016).

<sup>6</sup> Ibid.

maintain the project's neutrality and detachment from any affiliations with specific states or companies.

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Through a careful textual analysis of the agreements, it becomes apparent that many of the regional specificities in the agreements actually flow from their common principles. Thus it is through the common principles between the agreements - such as the dedication to fair taxation and non-discriminatory treatment, among others - that one can observe the subtle regional specificities that make each one unique. An analysis of the clause on taxation and tariffs -common to all but the IGA between Azerbaijan and Turkey – illustrates this argument.<sup>7</sup> Even though all the agreements are dedicated to harmonious taxation and fair treatment, the taxation arrangements are different, clearly influenced by regional elements such as domestic tax laws and political relationships between the parties.

Another example of regional specificities flowing from common principles is the clause on dispute resolution, found in all the IGAs.<sup>8</sup> While all three IGAs contain similar provisions committing to resolution through diplomatic channels, as well as the submission of any unresolved disputes to an ad hoc tribunal in accordance with Article 27(3) of the Energy Charter Treaty,<sup>9</sup> the Nabucco IGA goes further, including a more detailed clause on dispute resolution that is heavily influenced by regional specificities. Article 13 of the Nabucco IGA includes additional information on the resolution of disputes, which takes into account the potential effect of European Union law on the multilateral agreement, given that the Nabucco IGA was concluded between four EU states and a non-EU state.

### *The BTC and South Caucasus Pipeline project HGAs*

This section will analyze the HGAs relating to the BTC and South Caucasus pipeline projects with a view to examining the various common principles and regional specificities present in the agreements.

The BTC and South Caucasus Pipeline project HGAs consist of

<sup>7</sup> Article V of the BTC IGA; Article 11 of the Nabucco IGA; and Article V of the Georgia-Azerbaijan IGA.

<sup>8</sup> Article VIII of the BTC IGA; Article VIII of the South Caucasus IGA; Article 5 of the IGA between Azerbaijan and Turkey; and Article 13 of the Nabucco IGA.

<sup>9</sup> The commitment to resolve disputes through diplomatic measures as well as the submission of unresolved disputes to an *ad hoc tribunal* are in line with the draft *transit Protocol and the Model IGA*.

various common and regionally distinct elements. As is the case with the IGAs, the HGAs are equally committed to certain mutual values and principles, such as the assumption of neutrality, the need for fair and non-discriminatory treatment and taxation in relation to all activities relating to the project, as well as the general need to ensure effective cooperation between the parties within a framework that permits the parties to benefit equally from the operations of the project.

All the agreements contain specific clauses aimed at facilitating project-specific negotiations and reducing the cost and time of project implementation within a transparent framework that envisages close cooperation between the states involved and various investors. After a thorough analysis of the HGAs in question, one can detect certain common principles deriving from a number of clauses that are found in all agreements. To begin with, all the HGAs contain clauses on government guarantees and warranties, which set out all the representations and undertakings made by the governments on their duties and obligations in relation to project activities. These are closely linked to similar clauses on liability and indemnities, found in all the agreements, and represent a desire to hold the states and investors accountable for their actions.

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Another common principle that can be derived from the HGAs in question is the dedication to security and safety. Given the nature of transit operations, a commitment to proper safety measures is common to all HGAs, examined in this section. The nature of transit operations also has wider implications in regard to environmental protection, a concern that is exhibited through the common-to-all-agreements clause on environmental standards. Among others, the agreements in question contain a variety of common clauses such as a clause on effective dispute resolution, and a *force majeure* clause.

Despite the various common principles that can be derived from the BTC and South Caucasus HGAs, their content is also deeply influenced by a number of regional elements such as geographical, legal and political features. An example of such influences can be observed in the HGA between the Baku-Tbilisi-Ceyhan Pipeline Company and the Government of Georgia.<sup>10</sup> The content of the agreement has been heavily influenced by the desire to

<sup>10</sup> The HGA on the Provision of Security Equipment, Facilities and Operations Funding for the Baku-Tbilisi-Ceyhan Pipeline Project.

ensure that the concerns regarding the sensitivity of the Borjomi zone in Georgia are adequately addressed. This desire seems to have shaped the content of the agreement in relation to environmental issues, which feature more prominently in this agreement than they do in any of the others. Special regard is thus given to the issue of security in the Borjomi zone and safety in relation to environmental standards.<sup>11</sup> This is only natural, given that the very purpose of the agreement is the provision of security equipment, facilities and operational funding for the project.

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In addition, the various clauses dealing with the warranties and representations of the government, as well as those relating to consents and covenants, demonstrate to various degrees both common principles and regional specificities. An example of a clause influenced by regional principles would be the clause on consents and covenants of the government in the Georgia HGA,<sup>12</sup> which envisages a 'Change in Law' once Georgia becomes an official EU candidate.<sup>13</sup> This clause illustrates how certain regional specificities are featured in the HGAs in question.

Another such example is found in the seemingly identical Article 7,<sup>14</sup> which is common to all HGAs relating to the South Caucasus and BTC Pipeline projects. While Article 7 appears to be drafted in an identical manner in all the HGAs, a more careful textual analysis reveals subtle differences that have clearly been influenced by regional specificities, such as legal factors unique to each region. Article 7.2(vii)(5) of both Azerbaijan HGAs (i.e., HGAs relating to the South Caucasus and BTC Pipeline projects) appears to focus specifically on a particular piece of legislation, the Land Code of Azerbaijan Republic, which seems to set out specific rules on the acquisition of Non State Land for the purposes of the project. While the other HGAs also deal with the acquisition of Non State Land in the same Article, there is no reference to a specific national law, and the provision is couched in more general terms, perhaps allowing for more flexibility.

What is more, upon a thorough examination of the clauses relating to taxes and tariff rates in the agreements, it becomes evident that these have also been influenced by regional elements, such

<sup>11</sup> Article 1 of the HGA between the Baku-Tbilisi-Ceyhan pipeline company and the Government of Georgia.

<sup>12</sup> Article 7 of the Georgia HGA.

<sup>13</sup> Article 7(1)(x) of the Georgia HGA.

<sup>14</sup> Article 7 on Certain Covenants and Consents of the Government in the Azerbaijan, Georgia and Turkey HGAs.

as legal factors. Their content differs from agreement to agreement, and each agreement makes reference to specific domestic tax laws. All the HGAs in question contain specific clauses relating to profit and income tax. Even though these clauses have similar wording and content, there exist certain differences that have clearly been influenced by the different national laws on income and profit tax. Specifically, the percentage of tax imposed on the income in each case differs, depending on national legislation.<sup>15</sup> This is further evidenced by the annexes to each agreement, which reveal clear differences in the way tariffs and taxes are applied within the context of each agreement.

To conclude section 2, the IGAs and HGAs making up the BTC, South Caucasus and Nabucco Pipeline agreements contain a number of common principles and regional specificities. All the agreements demonstrate commitment to the principles of equality in treatment, especially in relation to taxation and the imposition of tariffs, proper security measures, and a general desire to ensure effective cooperation between the parties. At the same time, the agreements reveal a number of regional specificities, such as the desire to improve or maintain certain political relationships, to diversify the supply of natural resources, the resolution of specific regional conflicts and energy issues, as well as the desire to impose fair tariffs through domestic legal systems. Although regional specificities can be derived to an extent from these agreements, it appears that what defines them more is their sound commitment to common principles.

### *Links to the model agreements and the draft transit protocol*

The aim of the Model IGA and Model HGA is to facilitate the efficient realization of prospective cross-border pipeline systems. In addition, the Protocol aims to establish common principles and rules that will underpin prospective agreements on transit. The Model Agreements represent core principles and essential features that need to be present in an agreement on transit, such as the assumption of neutrality, the inclusion of relevant clauses that aim to maximize the optimal benefit for all parties involved, the notion of non-discrimination and fair taxation, fair labor standards and clauses relating to safety and environmental protec-

<sup>15</sup> For example, the Georgia HGA relating to the BTC Pipeline project imposes a 30% profit tax on individual MEP Participants, as Article 8.2(i) demonstrates, while the Azerbaijan HGA relating to the same project imposes a fixed rate of 27%, as seen in its Article 8.2(iii). The same can be seen in the HGAs relating to the South Caucasus project, as the profit tax imposed on the participants to the Georgia HGA is set at 25%, while the Azerbaijan HGA sets it at 27%. These differences are owed to specific national regulations on taxation and tariffs, and they affect the content of the agreements.

tion, as well as the issue of conflicting interests and obligations. The Model HGA goes beyond that, by adding clauses in relation to various governmental obligations, investor duties, liability, termination, environmental standards, and a variety of regional issues relevant to the implementation of the project in each specific territory. In conjunction with the principles put forth within the Protocol, such as a commitment to fair taxation, non-discrimination and cooperation between the parties, the Model Agreements help to flesh out a body of principles that will form the basis for future agreements on transit. This section analyzes how the Nabucco, BTC, and South Caucasus agreements relate to the Model Agreements and the Protocol with a view to the common features present therein.

### *The South Caucasus Pipeline project agreements*

The South Caucasus Pipeline project is made up of four agreements: the IGA between Georgia and Azerbaijan (Georgia-Azerbaijan IGA), the IGA between Azerbaijan and Turkey (Azerbaijan-Turkey IGA), the HGA between the Government of Azerbaijan and various investors, and the HGA between the Government of Georgia and various investors.

*Georgia-Azerbaijan IGA:* The Georgia-Azerbaijan IGA relates closely to both the Protocol and the Model IGA in a number of ways, as explained below.

Even though the Georgia-Azerbaijan IGA contains an article on mutual representations and warranties - a feature that is not present in the Model IGA (but is present in the Model HGA) - its content is nevertheless closely linked to the principles and values enunciated by both the Protocol and the Model IGA.<sup>16</sup> In line with core principles found in the Protocol and the Model IGA,<sup>17</sup> the Georgia-Azerbaijan IGA demonstrates an equal commitment to the non-interruption of the project, aimed at ensuring the smooth operation of the project in a manner that is not prejudicial to any of the parties. In addition, the Georgia-Azerbaijan IGA also reflects the desire of the parties to ensure that their cooperation will not be clouded by discriminatory treatment of any kind,<sup>18</sup> a core commitment that should form part of any IGA, according to the Protocol and the Model IGA.<sup>19</sup>

<sup>16</sup> Article II of the Georgia-Azerbaijan IGA.

<sup>17</sup> Article 9 of the Model IGA and Articles 2 and 16 of the Protocol.

<sup>18</sup> Article II(4)(xiv) of the Georgia-Azerbaijan IGA.

<sup>19</sup> Article 14 of the Model IGA and Articles 2 and 10 of the Protocol.

Moreover, the equally important issue of conflict with international and/or domestic law obligations is also addressed in Article II(6) of Georgia-Azerbaijan IGA, as a warranty on behalf of each party that it has no other obligations under domestic or international laws that prevent it from carrying out its obligations under the Georgia-Azerbaijan IGA. According to the Protocol and the Model IGA, as mentioned above, a clause dealing with the link between the agreement and any other agreements or obligations under either domestic or international law is an essential feature of every IGA. The Georgia-Azerbaijan IGA demonstrates a clear commitment to this principle by adopting the exact same wording of the clause found in the Model IGA.

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When it comes to security and environmental protection, which feature so prominently in most IGAs, as well as in the Model IGA and the Protocol, the Georgia-Azerbaijan IGA demonstrates the parties' commitment to these issues through Articles III and IV. Although Articles V and VIII do not mention the Model IGA or the Protocol explicitly, they demonstrate a connection between the Georgia-Azerbaijan IGA, the Model Agreement and the Protocol in that they deal with common issues such as the issue of fair and transparent taxation which, according to the Protocol and the Model IGA, is an essential feature of successful IGAs, as well as the matter of dispute resolution in the event of a disagreement.

The Georgia-Azerbaijan IGA does not blindly mirror the Model IGA or the Protocol, as it contains certain specific elements that set it apart. Content-wise, the Agreement follows the spirit of the Model and the Protocol, and has, as evidenced above, adopted a number of clauses that are similar or identical to key clauses found in the Model IGA, and exhibits a commitment to the core values set forth by the Protocol. Specifically, Article II of the Georgia-Azerbaijan IGA, which deals with representations and warranties (an article not found in the Model IGA, but in the Model HGA), contains a few specific elements that distinguish it from the Model and the Protocol. For example, Article II(4)(ii) demonstrates a commitment to the creation of favorable conditions for the construction, ownership and operation of the project, by making specific reference to terrorism and armed conflict. The Model and the Protocol do not contain any clauses that specifically and explicitly state a commitment to the ongoing operation of the project in cases of armed conflict or terrorism, perhaps

because it would not usually be expected to encourage the continued operation of such projects in times of conflict. However, in areas where conflict is more prevalent, it may be useful to include an explicit warranty in order to reassure the various parties. In addition, Article II(8) states unequivocally that ‘the Project is not, and shall not be regulated as a public utility’. Article II(8) is a novelty, as nothing similar is found in the Model IGA or the Protocol, at least not in the same explicit wording.

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*Azerbaijan-Turkey IGA:* The Azerbaijan-Turkey IGA is a very short agreement, which appears at first glance to not have much in common with the Protocol or the Model IGA. This is mainly because the core issues discussed above do not seem to feature as strongly in this agreement. However, following a closer analysis, one can safely conclude that the Azerbaijan-Turkey IGA demonstrates a commitment to some of the core principles in the following ways:

(a) The preamble of the Azerbaijan-Turkey IGA sets out the commitments of the parties to cooperation, and presents an assumption of neutrality in that it calls for collaboration in a timely manner and under satisfactory conditions for both parties. This closely relates to one of the core principles of the Protocol, which envisions that parties will draft their agreements in such a way that the provisions and their effects will be beneficial to all parties involved.

(b) In Article 5, the Azerbaijan-Turkey IGA demonstrates in particular a commitment to the issue of effective dispute resolution in line with both Article 21 of the Protocol and Article 19 of the Model IGA, which envisage the effective resolution of disputes through diplomatic means followed by the submission of the issue to an *ad hoc* tribunal, in accordance with the provisions of the ECT.

*Georgia and Azerbaijan HGAs:* The South Caucasus Pipeline project is made up of two HGAs: one between Georgia and the

investors and another between Azerbaijan and the investors. The two agreements demonstrate close links to the Protocol and the Model HGA in a number of ways.

To begin with, both agreements include a clause on authority in order to set out the legal basis upon which the parties have entered into the agreement.<sup>20</sup> The Model HGA proposes the inclusion of such an article, which is in line with the Georgia and Azerbaijan HGAs.<sup>21</sup> Moreover, both HGAs also contain clauses on the grant of rights, concerning the necessary rights and privileges in order to implement and carry out the project.<sup>22</sup> This is in line with the text of the Model HGA, which contains a similar clause.<sup>23</sup>

Both HGAs contain clauses on government warranties and guarantees, as well as consents and covenants of the government.<sup>24</sup> The content of these clauses aims to provide a guarantee in relation to the undertakings made by the government and various investors in order to ensure that they will be held legally responsible for any representations made in relation to the operation of the project. The Model HGA does this through Articles 9 and 10, which deal specifically with the undertakings made by the government and individual investors. Articles 5 and 6 of the two HGAs are also in line with fundamental principles deriving from the text of the Protocol,<sup>25</sup> as well as the Model HGA, as they contain a number of common principles and clauses, such as a clause found in Article 5 of both HGAs. This article reflects the parties' commitment to the principle of non-interruption of transit,<sup>26</sup> a principle that features strongly in the Protocol.<sup>27</sup> Similarly, Article 6 of both HGAs, which deals with representations and warranties, is consistent with the Model HGA, as the same exact article is also found in the text of the Model HGA, setting forth the host government's representations and warranties.<sup>28</sup>

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The Model HGA advocates fair taxation and non-discriminatory treatment in dealings relating to the project, as does the Protocol

<sup>20</sup> Article 2 of both the Georgia and Azerbaijan HGA deals with authority.

<sup>21</sup> Article 3 of the Model HGA.

<sup>22</sup> Article 4 of both the Georgia and Azerbaijan HGAs.

<sup>23</sup> Article 6 of the Model HGA.

<sup>24</sup> Articles 5-7 of the Georgia and Azerbaijan HGAs.

<sup>25</sup> Specifically the objectives of the Protocol, found in Article 2.

<sup>26</sup> Article 5.2(i) of both the Azerbaijan and Georgia HGAs.

<sup>27</sup> Article 16 of the Protocol.

<sup>28</sup> Article 9 of the Model HGA.

through Articles 2 and 10.<sup>29</sup> The two HGAs contain a clause on taxes, aimed at creating a harmonized tax system in line with domestic and international obligations.<sup>30</sup> The purpose of the taxation clauses is to ensure that all parties to the agreement are treated fairly in relation to the imposition of taxes and tariffs, and this is a core principle found in the Protocol, and supported by the text of the Model HGA.<sup>31</sup>

Issues such as the limitation of liability and compensation, which are found in Articles 32-33 in the Model HGA, are also dealt with by the Georgia and Azerbaijan HGAs.<sup>32</sup>

The Protocol advocates an effective dispute resolution mechanism, as found in Article 2(1)(f). This is also an essential feature of the Model HGA, which includes an entire clause on the resolution of potential disputes.<sup>33</sup> The Model HGA suggests arbitration as a dispute resolution mechanism, and this is also reflected in both HGAs.<sup>34</sup> As per the choice of law clause, which is an essential feature of the Model HGA,<sup>35</sup> both the Georgia and Azerbaijan HGAs contain one, which designates the law of England as the governing law of the agreement. The choice of law clause reflects a commitment to core principles, such as the dedication to effective dispute resolution, as its function is to ensure that the parties are clear on which law will govern any potential disputes. This is aimed at avoiding disagreements over which law governs the determination of disputed issues, which could serve to further complicate and even impede the effective resolution of such matters.

Furthermore, the HGAs in question also contain clauses on security and a *force majeure* clause, as envisaged by the both the Protocol and the Model HGA. The commitment to environmental protection also features prominently in both agreements, which is again in line with the Protocol and the Model HGA.

The various features of the two HGAs demonstrate close links to the Protocol and the Model HGA; however, it appears that some important features, such as a clause on labor standards, have not been included.

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<sup>29</sup> Article 26 of the Model HGA.

<sup>30</sup> Article 8 of the Georgia and Azerbaijan HGAs.

<sup>31</sup> Articles 2 and 10 of the Protocol.

<sup>32</sup> Articles 9 and 10 of the Georgia and Azerbaijan HGAs.

<sup>33</sup> Article 43.

<sup>34</sup> Article 17 of the Georgia and Azerbaijan HGAs.

<sup>35</sup> Article 45 of the Model HGA.

*Nabucco Pipeline IGA*: Like the Georgia-Azerbaijan IGA for the South Caucasus Pipeline project, the Nabucco Pipeline Intergovernmental Agreement (Nabucco IGA) between the Austria, Bulgaria, Hungary, Romania and Turkey contains distinct and specific elements that set it apart from the Model IGA when it comes to structure, while, at the same time, demonstrating a solid commitment to the principles and values of the Model IGA and the Protocol.

Article 3 of the Nabucco IGA demonstrates a commitment to the parties' obligations under international and domestic laws and regulations, which is in line with both the Model IGA's and the Protocol's commitment to ensuring that future agreements on transit will not be hindered by any international or domestic obligations. Article 3 of the Nabucco IGA also reflects a desire to promote effective cooperation between the parties, by laying the groundwork for collaboration that is free from discrimination and focused on encouraging harmonious taxation.<sup>36</sup> The commitment to non-discrimination and fair taxation, which so prominently features in both the Protocol and the Model IGA, is further demonstrated through Articles 4, 7 and 11 of the Nabucco IGA. In addition, Article 7.2 and 7.3 also reflect the parties' desire to prevent any potential interruptions of the operations of the project, and to ensure that the transportation of natural resources will be unimpeded throughout the duration of the project. This commitment is of course in line with the core principles of the Protocol and the Model IGA.<sup>37</sup>

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In line with both the Protocol and the Model IGA, the Nabucco IGA also contains an article on the effective resolution of potential disputes,<sup>38</sup> which is an essential feature of IGAs, according to the provisions of the Protocol and the Model IGA.

The Nabucco IGA does not contain core clauses, such as a clause on environmental protection and security or a *force majeure* clause, both which appear to be fundamental features of the Model IGA and supported by the principles of the Protocol. However, the Nabucco IGA nevertheless closely relates to both instruments, as it demonstrates a sound commitment to common principles.

<sup>36</sup> Article 3.4 of the Nabucco IGA.

<sup>37</sup> Article 9 of the Model IGA and Article 2 of the Protocol.

<sup>38</sup> Articles 12 and 13 of the Nabucco IGA.

*BTC Pipeline agreements*

The Baku-Tbilisi-Ceyhan (BTC) Pipeline project is made up of six agreements in total: an IGA between the state parties, three HGAs entered into by each state and the investor consortium, a Turnkey Agreement between Botas Petroleum Pipeline Corporation and the investor consortium, and an Agreement between the BTC Pipeline Company and Georgia. These will be analyzed in turn below. This section also explores the ways in which the Turnkey Agreement and the Agreement between the BTC Pipeline Company and Georgia relate to the Model and the Protocol. Even though these two agreements in question are not HGAs and, therefore, their comparison to the Model IGA and the Protocol is irrelevant for the purposes of answering the question above, they form part of the legal regime establishing the BTC Pipeline project. In that regard, an analysis of the links to the Model and the Protocol is still relevant.

*BTC IGA:* The BTC IGA, like the Nabucco IGA, deviates to some extent from the Protocol and the Model IGA. Nonetheless, one can safely say that its content relates significantly to both the Protocol and the Model IGA in the following ways.<sup>39</sup>

To begin with, the commitment to non-discriminatory treatment in relation to the investors and the parties to the project agreement, apparent in the Protocol and the Model IGA, is also very prevalent in the BTC IGA.<sup>40</sup> The BTC IGA demonstrates this commitment in its preamble, in contrast to the Model IGA, which deals with the issue in a separate article. In any event, even though the commitment to non-discrimination is phrased and structured in a different way, the BTC IGA still relates closely to both the Model IGA and the Protocol, as the content of the BTC IGA demonstrates a commitment to this issue.

The BTC IGA exhibits a commitment to the effective, fair, and non-discriminatory regulation of taxation and tariffs, by dedicating an entire article to this matter.<sup>41</sup> This is in line with both the Protocol and the Model IGA, in which this issue is quite prevalent, demonstrating its importance in relation to agreements for the transit of natural resources.<sup>42</sup>

<sup>39</sup> Agreement among the Azerbaijan Republic, Georgia and the Republic of Turkey Relating to the Transportation of Petroleum Via the Territories of The Azerbaijan Republic, Georgia and The Republic of Turkey Through the Maku/Tbilisi-Ceyhan Main Export Pipeline (BTC IGA).

<sup>40</sup> Articles 2 and 5 of the Protocol and Articles 7 and 14 of the Model IGA.

<sup>41</sup> Article V of the BTC IGA.

<sup>42</sup> Article 13 of the Model IGA, and Articles 2 and 10 of the Protocol

The BTC IGA also contains a separate article on mutual representations and warranties and covenants,<sup>43</sup> which demonstrates a solid guarantee of commitment to the principles of non-interruption of transit,<sup>44</sup> the granting of specific land rights to encourage the proper operation of the project,<sup>45</sup> and a clear commitment to facilitating cooperation by doing everything in a state's power to avoid various delays and encumbrances.<sup>46</sup> These are elements found in both the Model IGA and the Protocol and, despite the apparent differences in structure and wording, the BTC IGA is in line with the spirit of the Protocol and the Model IGA.

When it comes to issues of security and environmental standards, the BTC IGA, unlike the Nabucco IGA, is in line with the spirit and content of the Model IGA and the Protocol, both of which appear dedicated to environmental protection, as well as the safety and security of project employee.<sup>47</sup> The BTC IGA's Articles III and IV demonstrate a commitment to these principles, by referring them to the HGAs, as they advocate the security of the project and the maintenance of safety and environmental standards, topics that are not addressed or mentioned in the Nabucco IGA.

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Both the Protocol and the Model IGA encourage state parties to draft their agreements in a way that enables the parties to address issues of potential conflict in relation to states' obligations under the agreement in question, and under domestic and international law.<sup>48</sup> The BTC IGA is loyal to that principle by adding sub-clauses to Article II in order to address the issue of potential conflict.<sup>49</sup> While the Model IGA and the Protocol seem to afford the parties a greater degree of flexibility by re-establishing that nothing in the current agreement will prevent them from carrying out their obligations under domestic and international law, the BTC IGA takes a different approach to this issue. Still in line with the principles deriving from the Model IGA and the

43 Article II of the BTC IGA.

44 Article II(iii) of the BTC IGA.

45 Article II(iv) of the BTC IGA.

46 Article II(vi) of the BTC IGA.

47 Articles 10 and 12 of the Model IGA demonstrate a commitment to safety, security and the maintenance of environmental standards, as well as Article 7 of the Protocol.

48 Article 3 of the Model IGA and Protocol, page 4, where it is stated that: 'It is understood that nothing in this Protocol 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.'

49 Articles II(6) and (7) of the BTC IGA.

Protocol, the BTC IGA states that the state parties undertake that by entering into this agreement, they have no domestic or international obligations that could prevent them from carrying out their duties and obligations under the agreement. The BTC IGA seems to take a different approach to that advocated by the Protocol and the content of the Model IGA, which affords the parties greater flexibility in this respect.

*BTC HGAs:* The BTC HGAs relating to Azerbaijan, Georgia and Turkey (BTC HGAs) form part of the legal regime of the BTC Pipeline project, and have been entered into by and between each state party and various project investors. Upon a thorough examination of the agreements in question, it becomes apparent that their content closely relates to both the Protocol and the Model HGA in a number of ways.

*An identical commitment, albeit phrased differently, is found in Article 2 of all three agreements in question, and is aimed at facilitating the beginning of a fruitful relationship between the parties, as it establishes the core legal basis upon which any further dealings will be conducted.*

The structure and contents of the Azerbaijan, Georgia and Turkey HGAs are almost identical and appear to follow the spirit of the Protocol, as well as the general structure and principles of the Model HGA. First and foremost, the Model HGA leads with an article that guarantees the legal authority of all parties to the agreement to enter into such agreement.<sup>50</sup> An identical commitment, albeit phrased differently, is found in Article 2 of all three agreements in question, and is aimed at facilitating the beginning of a fruitful relationship between the parties, as it establishes the core legal basis upon which any further dealings will be conducted.

The Model HGA, like the Model IGA, contains an article that deals with the link between the agreement in question and any other agreements and obligations that the parties may have under domestic or international law.<sup>51</sup> There is no specific article dealing with potential conflict of domestic and international obligations of the parties to the HGAs in question, but the issue is addressed by the article relating to representations and warranties found in all three agreements.<sup>52</sup>

The agreements in question contain clauses relating to representations and warranties made by the host government and the in-

<sup>50</sup> Article 3 of the Model HGA.

<sup>51</sup> Article 4(2) of the Model HGA.

<sup>52</sup> Article 6.3(iii) of all three HGAs represents an undertaking that the agreement in question will not lead to conflict of obligations arising under any other laws or regulations.

vestors.<sup>53</sup> This is also a feature of the Model HGA,<sup>54</sup> designed to encourage parties to draft their legal obligations in separate and concise articles that deal with various representations and warranties made on behalf of the parties.<sup>55</sup> Additionally, the BTC HGAs also contain an article on government guarantees, which includes an undertaking by the State Authorities not to interrupt or impede the freedom of transit,<sup>56</sup> an essential feature of both the Model and the Protocol.<sup>57</sup>

Another way in which the BTC HGAs relate closely to the Protocol and the Model HGA is through the apparent commitment to harmonious taxation, which is a core principle set forth by the Model HGA. The principle of harmonious taxation is closely linked to the principle of non-discriminatory treatment, another important element of the Protocol, also found in both the Model HGA and the Model IGA. The BTC HGAs demonstrate commitment to these principles through Article 8 of each agreement, which deals in considerable length with the issue of taxation and the process of imposing taxes on different parties to the agreement, as well as external parties and organizations.

*Another way in which the BTC HGAs relate closely to the Protocol and the Model HGA is through the apparent commitment to harmonious taxation, which is a core principle set forth by the Model HGA.*

Issues such as the protection of the environment and the commitment to security and safety in relation to the project as a whole are important principles found in the Protocol and the Model HGA.<sup>58</sup> The BTC HGAs demonstrate a commitment to environmental protection and security by paying special attention to the social impact of the project.<sup>59</sup> Despite the BTC HGAs' apparent commitment to these concerns, there is an apparent failure to deal with an important issue: while the Model HGA envisages a clause on the protection and maintenance of labor standards, the content of the BTC HGAs fails to address this highly important matter.<sup>60</sup>

Finally, the content of the BTC HGAs demonstrates an overall commitment to the core principles enunciated by both the Pro-

<sup>53</sup> Article 6 of all three HGAs deals with representations and warranties on behalf of the host government.

<sup>54</sup> Article 9 of the Model HGA.

<sup>55</sup> Article 10 of the Model HGA.

<sup>56</sup> Article 5.2(ii) of all three HGAs.

<sup>57</sup> Article 2(a) of the Protocol; Article 5 of the Model HGA.

<sup>58</sup> Articles 2, 7 and 12 of the Protocol and Articles 16 and 24 of the Model HGA.

<sup>59</sup> Articles 11 and 12 of the BTC agreements.

<sup>60</sup> Article 18 of the Model HGA.

TOCOL and the Model HGA, such as the need for cooperation between the state parties and individual investors, the importance of establishing an efficient dispute resolution mechanism, the significance of harmonious taxation and non-discrimination, the protection of the environment, and other important matters that form the body of such agreements.

*Turnkey Agreement between Botas and the Investor Consortium:* The Turnkey Agreement follows a different structure from that of the Azerbaijan, Georgia and Turkey HGAs, but nevertheless relates closely to the principles deriving from the Protocol and the Model HGA. The core clauses found in the Model HGA that deal with governmental obligations, investor duties, liability, termination and environmental standards are found in a similar manner in the Turnkey Agreement. However, they do not relate to governmental obligations as such, but to the obligations of the parties, and form a large section of the body of the Turnkey Agreement. To begin with, Articles 3, 6 and 11 of the Agreement deal in great detail with the rights and obligations of the parties involved, resulting in something similar to what is envisaged by Articles 9 and 10 of the Model HGA.

When it comes to more specific project-related matters, issues of insurance and liability are dealt with by Articles 15 and 25.6 in a manner similar to the Model HGA, which deals with insurance and liability in Articles 12 and 32-34 in considerable detail. As envisaged by the Model HGA, the Turnkey Agreement also contains a *force majeure* clause,<sup>61</sup> and a commitment to indemnity and the effective resolution of disputes in case of disagreement and where legal proceedings may be initiated.<sup>62</sup> The clauses above represent crucial features of every host-government agreement HGA, as envisioned by the Model HGA.

*Commitment to core principles such as the notion of non-discriminatory treatment in relation to project operations, as well as the facilitation of effective co-operation form the basis of this agreement, which is in line with the core principles of the draft Transit Protocol.*

Finally, it is safe to say that important principles found in the draft Transit Protocol and the content of the Model Agreement are upheld by the Turnkey Agreement, as it contains a clause on conflicting provisions,<sup>63</sup> choice of law,<sup>64</sup> and taxation,<sup>65</sup> all similar to the ones found in the Model Agreement, as well as other HGAs on transit.

61 Article 12 of the Turnkey Agreement.

62 Article 14 of the Turnkey Agreement.

63 Article 25.13 of the Turnkey Agreement.

64 Article 25.9 of the Turnkey Agreement.

65 Article 23 of the Turnkey Agreement.

Commitment to core principles such as the notion of non-discriminatory treatment in relation to project operations, as well as the facilitation of effective co-operation form the basis of this agreement, which is in line with the core principles of the draft Transit Protocol.

*BTC agreement between the BTC Pipeline Company and Georgia:* The Agreement between the BTC Pipeline Company and the Government of Georgia on the Provision of Security Equipment, Facilities and Operations Funding for the BTC Pipeline Project (BTC Agreement between the BTC Pipeline Company and Georgia) is a more exclusive agreement; hence, it is also significantly shorter.<sup>66</sup> Despite the fact that the BTC Agreement between the BTC Pipeline Company and Georgia leads with a ‘Preliminary Statement’ as opposed to a ‘Preamble’ as envisaged by the Model HGA, the content of the Preliminary Statement and its purpose are in line with both the Model HGA and the Protocol in more ways than it would initially appear. The Preliminary Statement serves the same purpose as a preamble would, had the Agreement been drawn up in concurrence with the Model HGA. The Preliminary Statement thus demonstrates the commitment of the parties to co-operate and the main reasons for the agreement in question, which serves as an introduction, as envisaged by the Model HGA.

In line with the core principles of the draft Transit Protocol and the Model HGA, the BTC-Georgia Agreement expresses a commitment to security,<sup>67</sup> the protection of the environment,<sup>68</sup> and a commitment to preventing any conflicts between obligations and duties that may arise under the Agreement and any obligations that may arise under international law.<sup>69</sup>

Articles 1-4 of the BTC Agreement between the BTC Pipeline Company and Georgia deal mostly with regional specificities relevant to the project in question. This is in line with the core principles enunciated by the Model HGA, as it envisages some flexibility in relation to the content of the agreements, allowing room for, and even encouraging the parties to include, regional

66 “Agreement between the Baku-Tbilisi-Ceyhan Pipeline Company and the government of Georgia on the provision of security equipment, facilities and operations funding for the Baku-Tbilisi-Ceyhan Pipeline Project.” Available at: <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/Georgia%20BTC%20Security%20Provision%20Protocol%20EN.pdf> (Accessed: 02 August 2016).

67 See Preliminary Statement.

68 See Preliminary Statement.

69 See Preliminary Statement, which also lists some international agreements the parties are members to.

particularities.<sup>70</sup>

As in the case of the Model HGA, the BTC Agreement between the BTC Pipeline Company and Georgia contains a clause on the regulation of taxes, a clause that is found in all agreements analyzed in this paper so far, as well as the Model HGA. To conclude, as is the case in the other agreements, the BTC Agreement between the BTC Pipeline Company and Georgia also demonstrates an equal commitment to facilitating effective cooperation by ensuring that the respective liabilities of the parties are outlined in the text.<sup>71</sup> In addition, the commitment to effective dispute resolution, a core feature of the Model HGA and a significant principle set forth in the Protocol, is outlined by Article 11 of the Agreement.

*These agreements retain close links to the Protocol and the Model Agreements in that they all exhibit a commitment to principles such as fair treatment in relation to tariffs and taxation, the protection of the environment, the assumption of neutrality, the commitment to non-interruption and technical cooperation between the parties, a dedication to safety and security and a general commitment to act in the best interest of all parties involved.*

To conclude this second section of the paper, after a thorough analysis of the various IGAs and HGAs comprising the Nabucco, BTC and South Caucasus Pipeline projects, it is apparent that they share common features with the Model Agreements as well as the Protocol, in that their content closely relates to core principles and features found in the aforementioned instruments. These agreements retain close links to the Protocol and the Model Agreements in that they all exhibit a commitment to principles such as fair treatment in relation to tariffs and taxation, the protection of the environment, the assumption of neutrality, the commitment to non-interruption and technical cooperation between the parties, a dedication to safety and security and a general commitment to act in the best interest of all parties involved. These principles form the core of both the Protocol and the Model Agreements, and even though each agreement is characterized by a blend of regional elements and project-specific particularities, their content demonstrates a clear trend towards a more unified and harmonized approach to the drafting of such agreements in the future.

<sup>70</sup> The following is found in the introductory note of the Model IGA and HGA, 2<sup>nd</sup> ed., page 4: 'Each Model represents a template and thus serves only as a guideline. Whether or not these Models will be used either in full or in part depends entirely upon the agreement of the parties who are in the process of negotiating a prospective agreement.'

<sup>71</sup> Article 9 of the BTC Agreement between the BTC Pipeline Company and Georgia.

### *Recommendations*

In view of the possible agreement on common principles or rules on transit and cross-border energy flows, the following recommendations can be made in the context of the Energy Charter:

*More detailed provisions on environmental safety:* As already established, the majority of the agreements analyzed in this paper contain clauses relating to the protection of the environment. Some of them, however, fail to address this issue and this can be highly problematic, given the nature of transit operations and the implications of such work in relation to the environment. The Nabucco IGA, for example, fails to address the issue of environmental protection; the parties have completely omitted to add a clause dealing with this matter. The establishment of proper environmental standards is an essential feature of any IGA and HGA, according to the Protocol and the Model Agreements. Despite its significance, however, not all agreements have included a provision on this subject, and those that have fail to deal with it in sufficient detail and to the necessary degree.

Robust environmental standards and encouragement to respect and value the environment are essential elements of any agreement on transit. This paper suggests that more detailed and clearer provisions on environmental safety should be encouraged for future agreements on transit. The clearer and more detailed the provisions on environmental protection, the likelier that state parties will consider them and take them seriously. This will also reduce the excessive flexibility that is afforded to state parties in relation to their obligation to comply with these provisions, thus compelling them to be more environmentally aware and sensitive.

*More detailed provisions on labor standards:* Provisions on labor standards do not feature explicitly in the Protocol and the Model Agreements, but do fall within the ambit of the Protocol's core principles. Some of the agreements contain provisions on labor standards and health and safety precautions, which serve to make the issue more pressing, and demonstrate a commitment to the rights of individual employees.<sup>72</sup> In addition, the Turnkey Agreement contains a clause on providing accident insurance for workers.<sup>73</sup> This is an important clause, as it recognizes the individual human being in agreements that deal predominantly with large

<sup>72</sup> Article 3.5 of the Turnkey Agreement.

<sup>73</sup> Article 15.5 of the Turnkey Agreement.

corporations and investors, which often tend to disregard the human component. It is thus essential to ensure the inclusion of such clauses be in future agreements. We recommend that greater effort be made towards the incorporation of additional clauses into the Model Agreements, dealing specifically with labor standards. In addition, the Protocol could contain a specific article on the importance of proper labor standards and the implications of failing to uphold them.