ARTICLE 7

TRANSIT[1]

Cătălin Gabriel Stănescu

(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 cooperate 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).[2]

(5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to (a) permit the construction or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply. Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows

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1 See Final Act of the European Energy Charter Conference, Declarations, n. 3. with respect to Art 7, p. 31.

2 See Art 32(1), p. 79 and Annex T, pp. 113 and 122.

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 summarising 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.

COMMENTARY

'(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.'

7.01 By '**transit**', one understands the transport of certain goods from one country to another, through at least a third country.[3] While most of the definitions of ECT are provided for in Article 1, Article 7 contains its own definition of transit and it specifically covers the **transit of energy materials and products**[4] such as uranium, coal, natural gas, petroleum, electricity, fuel wood, or wood charcoal.

7.02 The definition provided by Article 7, Paragraph 10 is two-fold. One the one hand,[5] 'transit' means carriage through, to or from port facilities of an area of a Contracting Party, of energy materials and products, either originating in the area of another state or destined for the area of a third state, in cases where the other state or the third state are a Contracting Party to the ECT. On the other hand,[6] it also means the carriage through the Area of a Contracting Party of Energy Materials and Products

3 The Energy Charter Treaty. A Reader's Guide (Guide to ECT), p. 29, available online at: https://is.muni.cz/el/1422/jaro2017/MVV2368K/um/ECT_Guide_ENG.pdf, last accessed on 04.04.2018.

4 According to Art 1, Para 4 of the ECT, Energy Materials and Products means the items included in Annexes EM I and EM II to the ECT.

5 Art 7, Para 10, letter (a), point (i) of the ECT.

6 Art 7, Para 10, letter (a), point (ii) of the ECT.

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[7] and record their decision by a joint entry in Annex N.[8] Thus, in order to qualify as transit under the ECT and trigger its provisions, it suffices that the transit state and either the producing or the destination states are Contracting Parties. In other words, although transit regularly involves a triadic relationship, the ECT is satisfied with two parties being members, as long as the transit state is one of them.

7.03 Paragraph 1 of Article 7 establishes an obligation to facilitate transit in a non-discriminatory manner, notwithstanding if discrimination would arise from origin, destination, ownership, price or taxation of energy. In doing so, Article 7 is consistent with the provisions of Article 10, Paragraph 1, establishing the principle of non-discrimination with respect to accessing energy resources and markets,[9] but also with those of Article V of GATT,[10] which governed matters related to freedom of transit of energy until the entry into force of the ECT.[11] It must be mentioned here that the ECT builds upon and broadens the provisions of GATT, by explicitly covering grid-bound energy transport and its enforceability.[12] This ensured that states that were not part of any international transit agreement, had, through the ECT, access to a set of rules suited to protect their interests and were accepted by the parties of the treaty.

7.04 Another aim of Article 7, Para 1 of the ECT was to provide a balance between sovereign interests of states and the need for security and stability of transit.[13]

7.05 With respect to 'transit', one should note that although Article 7 already represented the most elaborate set of multilateral rules concerning energy transit, the parties to the ECT felt that further strengthening and elaboration of said rules was needed.[14] To this end, the Energy Charter Conference decided in 1999 to launch negotiations on

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7 Such a decision can be reversed according to the final provisions of Art 7, Para 10, letter (a), point (ii), which state that:

> 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.

8 Annex N contains a List of Contracting Parties Requiring at least three Separate Areas to be Involved in a Transit. So far the parties that made such requirements are Canada and the US.

9 According to Art 10, Para 1 of the ECT: '[s]uch 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'.

10 Art V of GATT and the Interpretative Note Ad Art V are available online at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art5_e.pdf last accessed on 04.04.2018.

11 Guide to ECT, p. 29. According to the guide, the provisions of GATT became unable to deal with energy transit, due to the increased complexity of transit transactions, especially with respect to service fees and transit routes. Thus, rules that are more elaborate were needed to ensure transit on reasonable terms.

12 Ibid., p. 30.

13 Ibid.

14 Ibid., p. 31.

a Transit Protocol to the ECT.[15] Negotiations were suspended in 2003[16] but resumed in 2007.[17] A mandate to restart negotiations on the remaining open issues of the draft Protocol on Transit was granted by the Energy Charter Conference to the Trade and Transit Group in 2009,[18] but if failed to deliver and it was subsequently repealed in 2011.[19] In addition to the attempts to adopt and implement a Transit Protocol, the Contracting Parties have also engaged in the development of non-legally binding instrument related to transit, to serve as guidelines in negotiating individual projects involving transit.[20] Therefore, a number of Intergovernmental and Host Government Model Agreements concerning cross-border oil and gas transit projects have been drawn up.[21]

'(2) Contracting Parties shall encourage relevant entities to cooperate 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.'**

7.06 Paragraph 2 of Article 7 also establishes a commitment of Contracting Parties to cooperate with respect to Energy Transport Facilities, either by modernising and interconnecting the existing ones, or by constructing, operating and developing new ones. Since the wording of the ECT does not distinguish between internal and cross-border facilities, this commitment should be read to cover both. One purpose, specifically mentioned by the ECT, is to mitigate potential effects of interruptions in supply

15 See Decision CCDEC 199914 regarding the Mandate for negotiations on a Multilateral Transit Framework, available online at: https://energycharter.org/what-we-do/conference-decisions/documents/all/, last accessed on 04.04.2018. For details concerning the Draft Charter Protocol see: Rafael Leal Arcas – Energy Transit Activities: Collection of Intergovernmental Agreements of Oil and Gas Transit Pipelines and Commentary, published by the Energy Charter Secretariat, 2015, pp. 12–13, available online at: https://energycharter.org/fileadmin/DocumentsMedia/Thematic/Energy_Transit_Activities_2015_en.pdf, last accessed on 04.04.2018.

16 See Decision CCDEC 200307 – Conclusion of negotiations on and Adoption of the Energy Charter Protocol on Transit, available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200307.pdf, last accessed on 04.04.2018.

17 Decision CCDEC 200708 regarding Next Steps in Relation to the Draft Transit Protocol, available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200708.pdf, last accessed on 04.04.2018.

18 Decision CCDEC 200906 – Mandate for the Negotiation of the Remaining Open Issues of the draft Protocol on Transit, available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200906.pdf, last accessed on 04.04.2018.

19 See Decision CCDEC 201106 – Decision on the Draft Transit Protocol, available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201106.pdf, last accessed on 04.04.2018.

20 Guide to ECT, p. 32.

21 See, e.g., Model Agreements for Cross Border Pipelines, for Cross-Border Electricity projects, available online in both English and Russian at: https://energycharter.org/what-we-do/trade-and-transit/model-agreements/, last accessed on 04.04.2018.

of energy materials and products and to increase the level of interconnection, the two being in a symbiotic relationship. However, the mention of this purpose is not limited and cannot be understood in the sense that the commitments of the Contracting Parties regarding Energy Transfer Facilities cannot pursue other objectives.

7.07 Since Paragraph 1 established the principle of non-discrimination with respect to measures meant to facilitate transit of energy materials and products, it follows that any activity listed in Paragraph 2 must observe the principle as well. Therefore, countries may not refuse transit, the construction of a new pipeline, the increase of network capacity or interconnection *solely* on the basis of origin, destination of ownership of the energy material or product.[22] Nevertheless, the ECT does not exclude a right of refusal on legitimate grounds[23] and in good faith, given the chosen wording of Paragraph 2 and the subsequent fourth, fifth and ninth Paragraph to Article 7. States are, thus, bound to 'encourage collaboration', but not to ensure it.

7.08 The definition of 'Energy Transport Facilities' is provided in Article 7, Para 10, letter (b) of the ECT and covers fixed energy infrastructure: (a) high-pressure gas transmission pipelines; (b) high-voltage electricity transmission grids; (c) crude oil transmission pipelines; (d) coal slurry pipelines; (e) oil product pipelines and (f) other fixed facilities meant for handling energy materials and products, one notable example being port facilities.[24]

> '**(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.**'

7.09 Paragraph 3 of Article 7 of ECT is a natural continuation and application of the principle of non-discrimination set out in Paragraph 1 of Article 7 of ECT (and Art V of GATT). It establishes an obligation for Contracting Parties not to implement any provisions with regard to transport or use of energy transport facilities that would treat energy materials and products that are in transit less favourably than similar materials of products that are exported from or imported into their own areas. The obligation stems from the wording of Paragraph 3: '**shall treat […] in no less favourable a manner**'. Nevertheless, since the wording of Paragraph 3 refers strictly to '**provisions**', the prohibition of discrimination encompassed by it appears to cover only discriminatory

22 Guide to ECT, p. 30.

23 See Art 7, Para 4 of the ECT and its reference to the obligation to refrain from establishing obstacles to new capacities being established, other than legal barriers that do not contravene to the principle of non-discrimination or Art 7, Para 5, establishing a right of refusal of transit, based on safety or efficiency concerns.

24 Guide to ECT, p. 30.

treatments that would arise from different legal regimes applicable to energy materials and products or legal regimes governing the use of energy transportation facility. In other words, Contracting Parties are generally precluded from establishing individual exceptions to the principle of non-discrimination established in Paragraph 1 of Article 7, although different regimes may arise from specific situations, where other existing international agreements state otherwise.

7.10 The provisions of Paragraph 3 should also be read as giving more power to the recommendations set out in Paragraph 2, as any discriminatory or different legal regimes applicable to energy materials and products that are destined to own use or exports, and, those that are in transit respectively, would go against 'cooperation'. Similarly, any restrictions or different regimes in accessing or using transport facilities destined for energy materials and products would violate the obligation to mitigate the danger of interruptions or to facilitate interconnections between Contracting Parties.

7.11 The obligation not to discriminate by establishing different legal regimes between transiting materials or products or between users of transport facilities for energy may also be read to establish a National Treatment (NT) for energy materials and products that are transiting the territory of a Contracting Party. According to Paragraph 3 NT is granted in respect of all laws, regulations and requirements affecting transiting goods or the usage of transport facilities: '[…] **its (the Contracting Party's) provisions related to transport […] or the use […] shall treat Energy Materials and Products in transit in no less favourable a manner than […] such materials and products originating in or destined for its own Area**'.

7.12 The presence of NT with respect to transiting goods or usage of transport facilities for energy products or materials has its origin in international trade law, notwithstanding whether it was established at multilateral level (i.e., Article III of GATT or WTO) or at bilateral level (i.e., via BITs). It is also reaffirmed by the ECT in Part III dedicated to Investment Promotion and Protection, where it is established that '[e]ach Contracting Party shall endeavour to accord to Investors of other Contracting parties, as regards the Making of Investments in its Area […]'[25] a '[…] treatment […] which is no less favourable than that which it accords to its own investors […]'.[26]

7.13 A question that arises is that of the relationship between Article 7, Para 1 and 3 of the ECT and Article 10, Para 2 and 3 of the ECT with respect to the application of the Most-Favoured-Nation Treatment (MFNT) to transiting goods. It is clear that the ECT considers matters related to transit and matters related to investments as two different things, although inter-related, as the former is provided for in Part II of the

25 Art 10, Para 2 of ECT.
26 Art 10, Para 3 of ECT.

ECT – Commerce, and the latter is covered by Part III – Investment Promotion and Protection. Another reason, for which the two should be analysed independently, is the fact that the drafter have chosen to refer in both cases to the application of NT, to avoid any misunderstandings.

7.14 At first glance, it would appear that in the absence of a specific provision in Article 7, similar to the one in Article 10, Paragraph 3 ('[t]reatment … no less favourable than that which it accords … to Investors of any other Contracting Party, or any third state, whichever is the most favourable'), the MFNT will not apply to transiting goods. However, such interpretation should be nuanced. The final statement of Article 7, Paragraph 3 of the ECT states that the NT must apply to transiting energy materials and products or to the use of transport facilities '**unless an existing international agreement provides otherwise**'. Although this statement establishes an exemption from the application of the NT, the exemption may refer to either a lower or a higher standard than the NT. Thus, there is no obstacle in the application of the MFNT to transiting goods, where an existing international agreement provides so.

7.15 Regarding the final statement of Paragraph 3 of Article 7, by which the drafters established a potential exemption from the principle of non-discrimination and the NT regarding transiting energy goods or the usage of transport facilities, attention should be given to the choice of wording. The drafters referred to exemptions established by '**existing**' international agreements (in consonance to the Vienna Convention),[27] and not international agreements in general (current or future). Thus, the text allows for exemptions *already* (emphasis added) established via international agreements, but in doing so, it precludes Contracting Parties imposing such exemptions, by resorting to future international agreements. In conclusion, the exemptions from the application of the non-discriminatory principle and the NT with respect to transit, are to be read and understood as limitative and prohibited in the future.

> '**(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).**'

7.16 Paragraph 4 of Article 7 further qualifies to the provisions of Paragraph 1 regarding the principle of non-discrimination. These provisions are applicable in cases where transit of energy goods is not possible on '**commercial terms**', by '**means of Energy Transport Facilities**'.

27 Art 30 of Vienna Convention on the Law of Treaties, available online at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, last accessed on 04.04.2018.

7.17 With regard to the meaning of '**commercial terms**', the ECT provides no definition thereof. Thus, one may adopt a general and broad understanding encompassing any commercial terms applicable to a particular agreement or the terms and conditions used by an energy company[28] regarding transit by means of transport facilities of energy. However, given the fact that the ECT is a multilateral international treaty and part of the international trade law framework, one may also consider a more specific, narrower meaning, by referring to International Commercial Terms, such as the INCOTERMS developed by the ICC and used worldwide by both shippers and governments, to avoid uncertainty and misunderstandings.

7.18 The reference to transit by means of Energy Transfer Facilities is meant to limit the scope of Paragraph 4 to the transportation of energy materials and products via fixed infrastructure – such as oil and gas pipelines, transmission grids, or port facilities. Thus, any other type of transportation of energy materials and products would escape the coverage of Paragraph 4.

7.19 It follows that in cases where an agreement on commercial terms applicable to transport via fixed energy networks is not possible, Contracting Parties are under a negative obligation ('**shall not place**') – to refrain from frustrating the establishment of new capacities.[29] In the context of transit, although the drafters have not specifically said so, 'new capacities' need to be understood as new *transit* capacities, in the form of new *fixed infrastructure* that would ensure transportation of energy goods.

7.20 The general negative obligation of refraining from placing obstacles in the way of new capacities being established is nuanced by the final statement of Paragraph 4, which provides an exemption from the aforementioned obligation where the applicable legislation is consistent with Paragraph 1, meaning it is not discriminatory and those of Paragraph 9, which provide that Contracting Parties cannot be obliged to take any measures with regard to a type of transport facility they do not have. Nevertheless, Contracting Parties that would seek to oppose the construction of new capacities, would need to demonstrate that the new capacities would endanger the security or efficiency of their energy systems, including security of supply[30] to avoid arbitrariness.

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28 See for instance the statement of the Energy Charter Secretary General on the Russia-Belarus energy negotiations with regard to natural gas supply and transit, 8.01.2007, available online at: https://energycharter.org/media/news/article/energy-charter-secretary-general-on-the-russia-belarus-energy-negotiations/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=24314eae8fe8c96b5a5ca129812547a5, last accessed on 04.04.2018.

> Gazprom's intention to move to new *commercial terms* for gas deliveries to neighbouring states has been clear for some time" stating the need for a swift settlement of negotiations "in order to avoid the risk of interruptions to energy supply through Belarus into other European markets (emphasis added).

29 Guide to ECT, p. 30.

30 See Art 7, Para 5 of ECT.

The ECT also acknowledges the fact given the states' sovereign rights, national legislation may override the treaty's provisions, in area such as environmental protection, land use, safety or technical standards.[31]

'(5) **A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to (a) permit the construction or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply. Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties.'**

7.21 The provisions of Article 7, Paragraph 5 are addressed exclusively to transit states that are also Contracting Parties of the ECT and provide them with the possibility to block any development works concerning their Energy Transport Facilities as defined in Paragraph 10, letter b) of the same treaty article.

7.22 As mentioned before[32] this provision acknowledges the sovereign rights of any Contracting Party both over their fixed energy infrastructure and over their right to regulate, by national law, any aspect concerning environmental protection, land use, safety or technical standards.

7.23 Given the sovereign rights of Contracting Parties, the latter can be forced neither to allow works or changes to their fixed energy infrastructure, nor to allow additional transit through their infrastructure. However, the exercise of this sovereign right cannot be arbitrary. The wording of Paragraph 5 establishes a requirement that the Contracting Parties demonstrates to other parties affected by the exercise of the transit state's sovereign right that such developments of the infrastructure or additional transport through the existing infrastructure would '**endanger the security or efficiency of its energy systems, including the security of supply**'. The ECT is silent on what those dangers might be, which means that the assessment of the potential arbitrariness of a refusal under Paragraph 5 should be conducted on a case-by-case basis, taking into account all relevant circumstances.

7.24 Among the causes for refusal of construction or modification of fixed energy infrastructure, one could envision environmental concerns, issues with land use, expropriations, the safety of communities, disruption caused in energy transit or supply due

31 See Understanding 8 with respect to Art 7(4) of the ECT, according to the Final Act of the European Energy Charter Conference, available online at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/1994_Final_Act.pdf, last accessed on 04.04.2018. See also Guide to ECT, p. 30.

32 See *supra* para 7.20.

to the length or complexity of works, societal opposition. With respect to causes for refusal of allowing additional or new transit via the existing energy infrastructure, the most plausible reason appears to be the one stemming from the capacity of the infrastructure, as any excess could lead to failures in the energy flow or even endanger the physical integrity of the system, thus affecting the security of supply.

7.25 The final statement of Paragraph 5, creates a link to the following two paragraphs of Article 7 (both of them covering matters related or arising from transit disputes), and establishes an obligation for transit states to ensure a stable flow of energy goods to, from or between other Contracting Parties.

7.26 The obligation established in Paragraph 5 is a reaffirmation of the obligation set out in Paragraph 2, letter c) regarding mitigation of the effects of interruptions in the supply of energy materials and products. Nevertheless, while the provision of Paragraph 2 establishes a *general* obligation for Contracting Parties to encourage cooperation of relevant entities to mitigate the effects of interruptions in supply, the one encompassed in Paragraph 5 is more *specific*. Paragraph 5 obliges Contracting Parties to secure established flows of energy materials and products, in cases where no permit for additional constructions or transit through the existing fixed infrastructure was granted, or where a transit related dispute has occurred. In other words, the sovereign right to decline modifications or additions either to the existing infrastructure or to the existing transit, cannot cause any detrimental effects to the security of the established flow.

7.27 The final statement could also be read to mean that where new constructions or modifications of fixed energy facilities have been permitted, Contracting Parties have an obligation to ensure that the established flows of energy goods are secured, by resorting to other means of transportation, where possible.

> '(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.'**

7.28 Paragraph 6 of Article 7 establishes a clear obligation for transiting states, parties to the ECT, to refrain from interrupting or reducing the existing flow of energy goods, either directly or indirectly (via third parties under its control or jurisdiction). The reference to third party's: '**entity subject to its control […] or […] subject to its jurisdiction**' covers both state-owned and private entities, thus encompassing all entities that might be able to disrupt the flow of energy materials and products, whether under the

direct control of the state or solely under its jurisdiction. Paragraph 6, thus, precludes states from hiding behind the corporate veil or behind private owners.

7.29 From the wording of Paragraph 6, it appears that the obligation to refrain from disruptions of energy flow is limited in scope, on the one hand, to situations arising from transit-related disputes and, in time, on the other hand, prior to the conclusion of the dispute resolution procedure. These limitations, however, cannot be read in absolute terms that would allow, *per a contrario*, a Contracting Party to disrupt transit of energy goods outside the mentioned situations. What Paragraph 6 is trying to ensure is that transit states, parties to the ECT, will not use the energy flow as a political or commercial weapon. In other words, that they will not disrupt the transportation of energy material and products through their area in order to pressure other Contracting Parties or entities from other Contracting Parties with regard to the transit-related dispute. Nevertheless, the specific ban of using the disruption of energy flow as a pressuring mechanism, cannot be read in the sense that such practices are allowed outside the dispute related framework either.

7.30 The fact that interruptions or reductions in the flow of energy materials and products are only deemed valid in exceptional situations is evident from the wording of the last statement of Paragraph 6. It refers either to a specific provision thereof in the contract or agreement governing transit, or to the specific decision of the conciliators appointed to settle the transit dispute. Nevertheless, from the two exceptions mentioned, the former appears to be problematic, as nothing precludes the parties to include clauses that would allow for self-help mechanisms enabling parties to resort to distortions in the existing energy flow.

'(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 summarising 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.'

7.31 Paragraph 7 of Article 7 provides the procedural rules for a conciliation mechanism designed to deal with transit related disputes. However, this mechanism can be used only following '**the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed**' between the parties to the dispute, which are also Contracting Parties to the ECT, or between any entity referred to in Paragraph 6[33] and an entity of another Contracting Party that is party to the dispute. In other words, parties can resort to the conciliation mechanism only after they have made use of the regular dispute resolution mechanisms, such as litigation, commercial arbitration or investor-state arbitration, whichever of them was referred to in the agreement between the parties in dispute.

7.32 The ECT obliged the Conference Charter to adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.[34] Therefore, the provisions of Article 7, Paragraph 7 were developed and completed by The Rules Concerning the Conduct of Conciliation of Transit Disputes under Article 7 of the Energy Charter Treaty (The Conciliation Rules)[35] and by a Commentary to the Rules Concerning the Conduct of Conciliation of Transit Disputes (The Official Commentary).[36]

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33 Entities either controlled or within the jurisdiction of a Contracting Party. See *supra* para 7.28.

34 Art 7, Para 7, letter f) of ECT.

35 The Rules Concerning the Conduct of Conciliation of Transit Disputes under Article 7 of the Energy Charter Treaty (The Conciliation Rules) were adopted in 1998 (Decision CCDEC 199811, available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC199811.pdf, last visited 04.04.2018) and were subsequently amended in 2002 (Decision CCDEC 200216, available online at https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC200216.pdf, last visited on 02.01.2018) and 2015 (Decision CCDEC 201511 available online at: https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2015/CCDEC201511.pdf, last visited 04.04.2018).

36 The Conciliation Rules were deemed ambiguous and uncertain, for which reason it was considered that the conciliation mechanism has not been properly used. As a result an Official Commentary was adopted as of 2016, available online at https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201607.pdf, last visited on 02.01.2018.

7.33 The procedure[37] (Art 7, Para 7 of ECT corroborated with Rules Concerning the Conduct of Conciliation of Transit Disputes) states that a **Contracting Party** may refer a dispute to **the Secretary General by a notification**, **summarizing the matters in dispute**, provided that all relevant contractual or other dispute resolution remedies previously agreed between the parties to the dispute have been exhausted.[38] **The Secretary General will notify all Contracting Parties of any such referral**.[39]

7.34 Within **30 days of receipt** of the said notification, the Secretary General, in consultation with the parties in dispute and all other Contracting Parties concerned,[40] shall either appoint a conciliator[41] or 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)–(d) and those procedures have not resulted in a resolution to the dispute.[42] By leaving to the Secretary General's discretion to decide whether to appoint or not a conciliator, the ECT ensures that the dispute over the same transit issue is referred to conciliation only once.[43]

7.35 With respect to the appointment, the Secretary General must ensure that the conciliator has or is likely to have the confidence of the parties, is independent and impartial and has expertise and experience relevant to the issue in dispute, is not in any conflict of interest, will respect the confidentiality requirements and will conduct proceedings in a manner which ensures the integrity and reputation of the procedure.[44] Any breach of the aforementioned obligations may result in disqualification of the conciliator, at the Secretary General's sole discretion.[45] In order to fulfil its obligations regarding the appointment, the Secretary General is to maintain a list of qualified conciliators that will facilitate and accelerate its task of nominating a suitable conciliator.[46]

37 For more details see Kim Talus (Ed), *Research Handbook On International Energy Law* (Edward Elgar, 1st ed.:Cheltenham, UK; Northampton, MA, USA, 2014), pp. 614–17.

38 Rule 1(1) of the Conciliation Rules.

39 Rule 1(3) and (4) of the Conciliation Rules.

40 Rule 2(1) of the Conciliation Rules. The requirement for prior consultation was requested by Norway, to diminish the Secretary General's sole discretion in appointing the conciliator. However, due to the silence of the Treaty's provisions, the form of consultation and its appropriateness is left with the Secretary General. See Paragraph 72 of the Commentary.

41 According to Art 7(7)(a) of the ECT the conciliator 'shall have experience in the matters subject to the 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'.

42 In other words, if the first conciliation attempt failed, the Secretary General cannot deny the failure and must acknowledge it. See: Talus, *supra* note 37, p. 615.

43 Rule 2(7) of the Conciliation Rules. See also Para 33 of the Commentary.

44 Rule 2(1) of the Conciliation Rules. See also Para 73 of the Commentary.

45 Rule 4 of the Conciliation Rules. See also Para 87 of the Commentary.

46 Rule 2(2) of the Conciliation Rules. See also Para 78 of the Commentary.

7.36 The Secretary General retains an important part during the proceedings as well, in case the conciliator is disqualified,[47] resigns,[48] dies or, in the Secretary's opinion, becomes incapacitated, unable or fails to perform its duties or by providing administrative or technical assistance. In such cases, the procedure is suspended, and the Secretary General will appoint a new conciliator.[49]

7.37 The conciliator is empowered to conduct the proceedings however he/she deems fit, provided the Conciliation Rules are observed, as well as the principles of impartiality, equity and justice.[50] According to the ECT, the conciliator should seek an agreement of the parties to the dispute within 90 days of his appointment.[51] Proposals for agreements may also come from the parties themselves.[52] Where such an agreement cannot be reached within the timeframe, the conciliator recommends a solution or a procedure thereof.[53] More importantly, the conciliator will decide on interim tariffs and other terms and conditions applicable to transit from a specific date and until the final resolution of the dispute[54] as well as on all matters related to the costs of the proceedings.[55] The conciliator may also recommend the interruption or the reduction of energy flow.[56]

7.38 Throughout the procedure the Contracting Parties must observe or ensure that the entities under their control or jurisdiction cooperate in good faith with the conciliator and comply with any procedural orders throughout the proceedings, or with any interim decisions taken by the conciliator for 12 months or until resolution of the dispute, depending on which comes earlier.[57]

7.39 When an agreement is reached, the conciliator must inform the Secretary General in writing so that it can notify all Contracting Parties[58] and, where the parties allow it, inform the public thereof.[59] The Secretary General acts as public notary or depositary of the recommendation and decision and will keep a copy of it at the archives of the

47 Rule 4(1) of the Conciliation Rules.
48 Rule 3(1) of the Conciliation Rules.
49 Rule 3(2) and (4) corroborated with Rule 4(1) and (4) of the Conciliation Rules.
50 Details regarding the conduct of conciliation proceedings are contained in Rules 5–8 and 10–11 of the Conciliation Rules.
51 Art 7, Para 7, letter c) of the ECT.
52 Rules 10 and 11 of the Conciliation Rules.
53 Art 7, Para 7, letter c) of the ECT corroborated with Rule 12 of the Conciliation Rules.
54 Art 7, Para 7, letter c) of the ECT.
55 Rule 15 of the Conciliation Rules.
56 Art 7, Para 6 of the ECT. See *supra* para 7.30.
57 Art 7, Para 7, letter d) of ECT corroborated with Rule 9 of the Conciliation Rules.
58 Rule 12(2) of the Conciliation Rules. See also Para 116 of the Commentary.
59 Rule 12(3) of the Conciliation Rules.

Secretariat.[60] Matters related to the costs of proceedings will also be handled through the Secretary General.[61]

'(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.'

7.40 The provisions of Paragraph 8 give expression to the principle of non-retroactive effect of the ECT[62] and those regarding application of successive treaties relating to the same subject matter, contained in the Vienna Convention.[63] Thus, on the one hand, the drafters specifically state that the provisions of the ECT do not constitute a *lex specialis* with respect to other existing international agreements or customary law regarding transit of energy goods ('**nothing…shall derogate**'). On the other hand, the express reference to '***existing* agreements**' is meant to underline that the ECT cannot be used as a basis to change agreements or customs already in place.

7.41 Within the auspices of this Paragraph 8, one should also refer to the Declaration of the European Communities and their Member States, Austria, Norway, Sweden and Finland, according to which 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. In this regard, the said Contracting Parties have further declared that in their opinion 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.[64]

'(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).'

7.42 Paragraph 9 must be understood also in relation to the sovereign rights of Contracting Parties, already touched upon in the commentaries of Paragraphs 4 and 5. Thus, provided the measure is not justified by discriminatory grounds, Contracting Parties

60 Rule 13(2) (a) of the Conciliation Rules. See also Para 119 of the Commentary.

61 Rule 16 of the Conciliation Rules. See also Para 138 of the Commentary.

62 See the provisions of Art 28 of the Vienna Convention on the Law of Treaties, stating that:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

63 See provisions of Art 30 of the Vienna Convention on the Law of Treaties.

64 See Declaration 3 of the Final Act of the European Energy Charter Conference, available online at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/1994_Final_Act.pdf, last accessed on: 04.04.2018.

that do not have a certain type of fixed energy infrastructure as defined in Paragraph 10 of Article 7, cannot be obliged to take any measure to establish that type of infrastructure. This means that a state lacking, for instance, a high-pressure gas transmission pipeline cannot be forced into building one, provided its lack of consent regarding construction is not discriminatory under the provisions of Paragraph 1 of Article 7.