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The Legal Framework of International Transit Activities in the Energy Sector

Thomas Plakas

SCHOOL OF HUMANITIES, SOCIAL SCIENCES & ECONOMICS

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Student Name: Thomas Plakas
SID: 1108190006
Supervisor: Prof. Theodore C. Panagos

I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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ABSTRACT

This dissertation provides a comprehensive review of the legislative regime of transit process in the Energy sector. In the beginning, the meaning of the term “transit” is clarified, while the historical background of the developing process since the early 20th century is thoroughly expounded. The paper is divided into three chapters.

The first chapter deals with the transit regime under the Energy Charter Treaty. The chapter begins with the ECT definition and its targets of establishment, while a reference to the scope of Transit Protocol is also presented. Afterwards, an extensive interpretation and analysis of the Article 7 of the Treaty is taking place.

The second chapter is dedicated to the provisions of The General Agreement on Tariffs and Trade regarding transit, after a display of its features and scope of coverage has been remarked. Article V of the GATT is also examined with due diligence.

In the final chapter the study analyzes the relationship between the ECT Article 7 and GATT Article V and aims to weigh the respective advantages and disadvantages of the one against the other. The study concludes by highlighting the superiority of ECT transit regime against GATT, in terms of Energy, despite specific textual deficiencies and by emphasizing the need of the adoption of a coherent regulatory sectoral agreement on energy transit.

Key words: Energy Transit, ECT, GATT

Thomas Plakas

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PREFACE

When I attended the class of Energy Law, Business, Regulation and Policy, I knew that it would be the greatest opportunity to enter into a thriving domain which is still under constant build-up. I have been always keen on the legal aspect of the transactions and trading. Due to the progressive development of the energy sector and the gradually increasing energy dependency, cross-border and cross-regional transportation of energy resources is being put under the microscope. Thus, I am extremely interested in having a chance to broaden theoretically my knowledge in the field, which I am going to exert practically in the near future.

In this study, I am striving to discover the meaning of the term “Transit” and to illuminate the legal frameworks defining it. I will endeavor to point out any possible important legal issues and deficiencies coming out of them and I hope to bring up all the important information in order for the reader to be able to attend and understand.

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1. INTRODUCTION

1.1 Meaning of the word “Transit”

“Transit” as a term, could be described in general as the “passage or carriage of people or goods from one place to another”¹. If we replace “from one place to another” with the terms “through a specific territory”, that wouldn’t make any difference in the meaning². In such manner, transit is nothing but a transfer of something or someone from point A to point B.

Nevertheless, within the scope of international law, the term “transit” entails a quality of political depth and is interpreted in a narrower sense, which is a transfer of something or someone by crossing the frontiers of at least two states. For instance, the Convention on Freedom of Transit, concluded by the League of Nations in the year 1921, provides the following definition: “Persons (...) and goods (...) shall be considered to be in transit across territory of one of the Contracting States, when the passage across such territory (...) is only a part of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit occurs”³. The General Agreement on Tariffs and Trade (hereinafter GATT) stipulates a quite much similar provision regarding transit. Thus, transit under international law involves a connection with the sovereignty of at least one State’s territory, which is called “transit state”. And this is exactly what

¹Brown, L, ed, *The New Shorter Oxford English Dictionary on Historical Principles*, 4th ed, Vol 2 (1993), p. 3370.

²Burchard, F V, and Eckert, L, “*Natural Gas and EU Energy Law*”, (1995), p. 61.

³Roggenkamp, M M, “*Transit of Networkbound Energy: the European Experience*”, in Walde, T W, ed, *supra* note 2, p. 495-515 (498).

renders it essential. The transit state can permit the transit process as a result of its own interests, yet it can also opt for either disallowing or restricting any transport over its territory or even disturb an already authorized transit⁴. Transit as a way of transfer from a place to another can be carried out by assorted means of transportation, namely for instance: aircrafts, trains, wires, ships, and foremost, in terms of energy, pipelines.

1.2 Historical Background

Neither energy transit nor conventions addressing it are new phenomena. The initial conventions referring to “freedom of transit” were signed during the second decade of 20th century. The majority of transit linkages were arranged and regulated ad hoc⁵. During the last decades, energy transit has been developed into a crucial part of the transactions process. Not only has the load expanded, but its thriving significance is attributed to its strategic nature. The emersion of new sovereign states, forming borders among other newly established states, oftentimes land-locked, as well as of energy producers, suppliers and markets, combined with an unforeseen expansion in energy demand, rendered grid-bound transit a critical matter worldwide.

⁴In 1955, Pakistan blockaded the transshipment of Afghan goods to and from the sea. See 7 U.N. GAOR, “*Conference on the Law of the Sea*” (11th mtg.), U.N. Doc. A/Conf. 13/43 (1958) p. 29.

A similar action was maintained against Nepal by India in 1970. See Sarup, “*Transit Trade of Land-Locked Nepal*”, (1972) p. 21 - and against Zambia by Rhodesia in 1965, see R.L. Sklar, “*Corporate Power in an African State: The Political Impact of Multinational Mining Corporations*”, (1975) p. 145.

⁵ “*Energy Transit, The Multilateral Challenge*”, G8 Energy Ministerial Meeting Moscow, (1 April 1998), p. 6.

Initially, transit has mainly been conducted under contracts between the involved parties, with certain international transit agreements providing a moderate, general framework. Such contracts are commercial arrangements between market participants, either private or state owned entities, and they are underpinned by agreements or treaties between the participating states or by international law principles.

Over time several challenges have arisen in the energy sector internationally. Apart from a broad trend for restructuring and favoring market contestants to assume a more active role, there was observed a remarkable ongoing dependence on imported energy due to large-scale consuming areas as well as the emersion of new producers in the aforementioned newly established and quite often land-locked states⁶. As a result, more and more loads of energy started to cross borders, originated from the upstream countries towards the consuming ones.

In spite of its significance, there is limited national legislation settling transit. Absent any solid transit frameworks, these domestic regulations accompanied by the terms of contracts and commercial practices, have ruled the former transit transactions. In view of surging energy market liberalization there was a rising need for a joint, legitimate transit regime.

As mentioned, transit by its nature entails transnational collaboration. Multilateral treaties have attempted previously to install some main rules for the acceptable practices of transit carriers. There are presented underneath specific agreements regarding transit processes, with most significant

⁶Tandon, "*Land-Locked Countries of Africa*" (Z. Cervenka ed. 1973), p. 90.

figment of this historical development to be nowadays the Energy Charter Treaty (hereinafter ECT).

1.3 The Barcelona Convention and the Statute on Freedom of Transit

The Barcelona Statute on Freedom of Transit constituted the first multilateral agreement on transit⁷. After World War I terminated, the League of Nations asked international community to entrench “Freedom of Transit” so as to safeguard cross-border transactions. Thus, the *First General Conference on Communication and Transit* ratified the Barcelona Convention on April 20th, 1921⁸. The purpose was to secure free transit with respect to persons, goods, vessels over the involved states territory. It also stipulated that parties should promote transit on “convenient routes”, on condition that it does not endanger public health and security as well. A non-discrimination provision encompassed, so as the transit states to abstain from distinctions, although they were allowed to put in for reasonable charges in a non-discriminatory way. Despite the fact that the Barcelona Conference constituted an important first step towards the consolidation of right of transit in international level, there were notable deficiencies regarding land-locked States⁹.

⁷United Nations Conference on Trade and Development, “*Right of Access of Land-locked States to and from the Sea and Freedom of Transit, Legislative history of part X, Article 124 to 132 of the United Nations Convention on the Law of the Sea*”. (New York: United Nations, 1987) p. 5.

⁸ Uprety, Kishor. “*From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States’ Rights to Trade through Access to the Sea – A Retrospective Review*”. Singapore Journal of International & Comparative Law, (2003), p. 206.

⁹ A. Mpazi Sinjela, “*Freedom Of Transit and the Right of Access for Land-Locked States: The Evolution Of Principle And Law*”, p. 36.

1.4 The Convention on the Transmission in Transit of Electric Power

The *Second Barcelona Conference on Communications and Transit* signed The Convention on the Transmission in Transit of Electric Power on December 9th, 1923, taking effect on July 26th, 1926. Contrary to Barcelona Convention, it did not rely upon the principle of freedom of transit. Its initial purpose was to establish a commonly accepted regime in terms of electricity transactions, however ended up obligating States to proceed to transit negotiations. Pursuant to the Convention, electricity can be deemed to be in transit process when it passes over the territory of a contracting party by conductors created for the exact aim without being entirely or partially generated, used or converted within it. However, this approach has limited substantial meaning today due to the extraordinary technological growth¹⁰.

1.5 The General Agreement on Tariffs and Trade (1947)

By the end of World War II, the General Agreement on Tariffs and Trade (hereinafter GATT) incurred in order to diminish tariffs and other setbacks concerning international trading. The agreement restated the main principle of the Barcelona Convention, namely “freedom of transit”, yet it did not include any reference to the case of land-locked nation states.

Energy transactions are not particularly stipulated in GATT. Although the Havana Charter had proposed a layout of quantitative management of primary commodities imports and exports, these proposals were not

¹⁰Roggenkamp, Martha M. “*Transit of Network-bound Energy: the European Experience*”, p. 504.

encompassed into the final Agreement. The primary reason was the fact that very little energy producing states participated in the consultations¹¹.

1.6 Importance of Transit

Energy consumption rests upon primary energy resources which are basically dispersed erratically throughout the world. Energy resources, particularly oil and natural gas, keep the engine of current economy operating, while cross-border transactions consist the basic gear of this multi-functional process. The truth is, energy trading is soaring up and the significance of energy transit could not be disregarded.

Energy transit process has been commonly addressed under the extensive investor protection mechanisms governed by the bilateral investment treaties (BITs) and certain multilateral agreements, such as investment promotion agreements among others. Nevertheless, energy transit matters are complicated, dealing with transport facilities crossing over the territory of numerous nation states involved.

As explained, till “recently” there was a lack of a legal framework regulating energy transit affairs. Nevertheless, all the above-mentioned legislative approaches paved the way for forthcoming transit issues by establishing essential principles¹². It was this colossal need that led transit provisions to

¹¹Selivanova Julia, “*The WTO and Energy; WTO Rules and Agreements of Relevance to the Energy Sector*”, (2007), p. 11.

¹²Rafael Leal-Arcas and Mariya Peykova, *Energy Transit Activities: Collection of Intergovernmental Agreements on oil and gas transit pipelines and commentary*, p. 8.

be incorporated into the Energy Charter Treaty, intended to set up an exhaustive regime addressing transit affairs.

CHAPTER I: THE ENERGY CHARTER TREATY (ECT)

1.1 Definition of the ECT

The ECT is the offspring of the “Energy Charter process”¹³, which entails a compound of instruments: the European Energy Charter, the ECT, the Protocol on Energy Efficiency and Related Environmental Aspects (PEEERA), the Amendment to the Trade-Related Provisions of the ECT and the draft Transit Protocol.

The Energy Charter Treaty is an exceptional international legal instrument for the advocacy and the advancement of cross-border energy collaboration. It was signed in December 1994 and entered into legal force on April 16, 1998. Having fallen into a relative inactivity for some years, the Treaty is considered nowadays as an eminently significant tool in terms of the promotion and the protection of investment, trade and also transit in the energy sector¹⁴. Up to date it is signed by 56 members, including the EU and EURATOM.

¹³ *Newsletter from the Energy Charter*, spring 2004, no 18, p. 8.

¹⁴ Edited by Katia Yannaca-Small: “*Arbitration Under International Investment Agreements, A Guide to the Key Issues*”, Chapter 2, *The Energy Charter Treaty*, Emmanuel Gaillard and Mark McNeill p. 37.

1.2 The Transit Protocol

The ECT's constituency considered that the general principles of free movement of transit required greater amplification. Thus, the concept of a particular Protocol expanding Article 7 of the Treaty came up soon after the consultations of 1994 ECT. There was a joint opinion that common provisions regarding transit would have to express a wider harmony between the interests of producers, consumers and transit states. The primary purpose was to form a solid framework for the assurance of uninterrupted energy flow passing through operating and potential transit infrastructures. By the year 2003, the drafting and consultation process had been successfully completed and the contracting parties had settled on almost the totality of the provisions of the Draft Transit Protocol¹⁵.

It shall be mentioned that the plurality of the current transit provisions of the ECT stipulate a wide range of energy carriers, as crude oil, oil derivatives, natural gas, coal, nuclear power among others, while the Transit Protocol range was rather more focused on crude oil and oil derivatives, natural gas and electric power.

Nevertheless, Russia which has now withdrawn from the Treaty, claimed that the existing network user, whose contract has expired, shall be provided with a first capability to accept the contractual terms proposed (by the network operator) for any such new request for that available capacity (which is the

¹⁵ The text of the draft Energy Charter Protocol on Transit is available at www.encharter.org.

so-called right of first refusal¹⁶). The EU argued that this condition would induce serious obstacles to market's competition. In addition, the EU insisted that the Protocol should not be implemented in regard to transit within the Union, provided that a REIO clause was about to be included in the Draft Transit Protocol¹⁷. The EU's viewpoint was contested by Russia, which was at that time and remains up to date the Union's primary energy supplier, due to the fact that it was implied that Russia would have to be harmonized with internal EU provisions on gas transportation and hence confront rigorous competition for access to energy infrastructure. Finally, the two parties were also quarrelling about tariff calculation and issues of long-term capacity booking. The discussions were thereby adjourned till 2009 and when recommenced, an adapted version of the Draft Transit Protocol was exposed in 2010. Nevertheless, very soon -and despite the earlier Russian withdrawals- the consultations were terminated again.

2 Existing provisions of the Treaty – Interpretation & Analysis

The Energy Charter Treaty stipulates transit in Article 7, which lies in the second Part of the Treaty addressing “commerce” (Articles 3 - 9). As long as the importance of transit for the international energy markets has been already pointed out, it stands to reason that Article 7 sets an essential and critical issue.

¹⁶Ernesto Bonafe and Gökçe Mete, *“Escalated interactions between EU energy law and the Energy Charter Treaty”*, p. 179.

¹⁷Andrei Konoplyanik and Thomas Walde, *“Energy Charter Treaty and Its Role in International Energy”*, (2006), supra note 28, p. 543.

2.1 Art. 7 § 10 (Transit meaning under ECT)

In Article 7(10) transit is defined under ECT. The definition provided relies upon typical definitions regarding transit in pre-existing international agreements, although some particularities shall be pointed out. First of all, not the totality of the countries involved in transit process must be signatories to the ECT. Apart from the transit state, either the state of origin or the state of destination shall be a member, but not both of them. Nevertheless, it is obvious that an involved party which is not signatory member of the ECT is not able to proceed with further dispute settlement mechanisms provided by the Treaty, in case a conflict arises. Moreover, it is highlighted that transit can also exist where only two countries are taking part in the process¹⁸. For instance, a gas pipeline's beginning is located in Azerbaijan and then goes into Armenia before backtracking again to Azerbaijan. Other similar cases would be Ukrainian pipelines intersecting Moldova's territory and Russian pipelines crossing Ukraine respectively. In such cases, ECT Article 7 is totally applicable given that no signatory member selected the possibility provided in Article 7 (10 a) (ii) to restrict the general notion of transit; only Canada and the USA (due to Alaska) are listed in Annex N, neither of which has signed the Treaty. Also, it shall be mentioned that Article 7 stipulates the carriage through "the Area" of a Contracting Party. The term "Area" is defined under Article 1(10), involving maritime zones over which a nation state exerts its sovereign rights in accordance with the international law of the sea.

2.2 Art. 7 § 1

¹⁸Sergei Vinogradov, "*Cross-Border Oil and Gas Pipelines Legal and Regulatory Regimes*", AIPN Study, Centre for Energy, Petroleum & Mineral Law & Policy, University of Dundee, (2001), p. 40.

Article 7(1) of the ECT stipulates that the contracting parties shall take the appropriate measures in order to enable Transit of Energy Materials and Products with due regard to the principle of Freedom of Transit.

According to Lothar Ehring & Yulia Selivanova, Article 7(1) settles the freedom of transit, the non-discrimination principle as regards origin, destination or ownership and the right to non-obtrusive transit. The fundamental principle of “Freedom of Transit” involves satisfying the international community’s necessity of continuous, uninterrupted energy supply with all due respect to the inalienable right of the nation states to safeguard their own interests. At this point let it be noted that when transit infrastructures are new or in the form of additional structures, the transit state gains profits from transit fees, taxes and energy supply in the process¹⁹.

However, according to other commentaries concerning Article 7(1), this provision shall not be considered to recognize “Freedom of Transit”, because it just restates the constraint of discriminatory measures in respect of origin, destination or ownership and also means of transport, as set out in GATT Article V²⁰. This way, Article 7(1) appears to be a positive extension (i.e: “to facilitate transit”) of the primary constraints placed under GATT (V) where the provisions do not term any positive obligations.

Furthermore, it shall be highlighted that the ECT does not stipulate any obligation of mandatory third party access to energy transport facilities, nor

¹⁹Thomas Wälde and Andreas Gunst, *“International Energy Trade and Access to Energy Networks”*, (2002), Journal of World Trade, p. 213.

²⁰Anatole Boute, *“The good neighbourliness principle in EU external energy relations: the case of energy transit”*, p. 13.

any such obligation stemmed from the consultations of the Draft Transit Protocol.

Also, the Treaty shall not infringe the existing international law provisions regulating submarine pipelines and cables. There is no provision in the Treaty setting elaborately the access to energy transport facilities, except for the general provision of Art. 7(1) regarding state assistance in the transit process. More specifically, the article indicates that “Each Contracting Party shall take necessary measures to facilitate the Transit of Energy Materials and Products ... without imposing any unreasonable delays, restrictions or charges”. In a way, access to energy transport facilities could be one of the factors facilitating transit²¹. If any unreasonable denial of beginning negotiations on access to infrastructures could be deemed as imposing an unreasonable restriction, Article 7(1) could then operate as indirectly obligating the involved parties not to refuse negotiations concerning the access.

2.3 Art. 7 § 2

Article 7(2) shall be referred only for the sake of thoroughness, as requires the involved parties to “encourage relevant entities to collaborate” chiefly in upgrading energy transport facilities, limiting this way the potential impacts deriving from interruptions in energy supply and also assisting the interconnection of transport facilities²². However, taking a careful look into

²¹Karl Petter Waern, *“Transit Provisions of the Energy Charter Treaty and the Energy Charter Protocol on Transit”*, p. 180

²²Rainer Liesen, *“Transit Under the 1994 Energy Charter Treaty”*, p. 64.

the legally binding language of the Treaty (“shall encourage”), this provision is interpreted more as a prompting in terms of the general sense of international collaboration and implies far-reaching affairs way beyond transit.

2.4 Art. 7 § 3

Under the scope of Article 7(3), each contracting party shall apply the transit process in a non-discriminatory way. Particularly, energy products and materials have to be treated in a manner that it is no less favorable than the treatment of products that are destined for the party’s Area. Nevertheless, subparagraph 3 indicates that in case international agreements provide a potential discriminatory treatment, only then such treatment is permitted. Thus, in case an international agreement deals with transit in a more favorable manner, the discrimination is excusable²³.

There is a noteworthy variance of literature opinions in terms of the interpretation of Article 7(3) regarding the extent of the non-discrimination principle. Specifically, some academics, including Cameron, claim that Article 7(3) establishes both national treatment and most-favored nation commitments²⁴. Although Article 7 does not explicitly foresees most-favored nation (MFN) treatment, this can plausibly ensue from the obligation of discriminatory actions between ECT contracting parties. It could be also countered that the reference to “freedom of transit” and the close connection

²³Rafael Leal-Arcas, *“Commentary on the Energy Charter Treaty”*, Commentary by Cătălin Gabriel Stănescu, p.97-102.

²⁴Danae Azaria, *“Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade”*, p. 581.

of this principle with the GATT Article V provision, ultimately attaches an MFN status to ECT Article 7, which is mainly the stance of EU states.

On the contrary, the Russian approach on the latter negotiations of Article 10 of the draft Transit Protocol states that no national treatment obligation lies in Article 7(3) of the Treaty. In other words, the energy products and materials treatment in transit process shall be compared to the treatment of imports and exports, however not to the treatment of domestic traffic²⁵.

Therefore, this provision indicates the national treatment standard in separate types of transportation, namely transit, imports, exports and, up to this point, questionably in domestic transport. Numerous Contracting Parties of the Treaty, following the aforementioned controversy between EU states and Russia, try to explicate Article 7(3) in a different way, by dwelling upon the interpretation of the terms “originating in or destined for its own Area” and more specifically of the word “or”. Shall it be read disjunctively (either one or the other, but not both in any case) or conjunctively (one, or the other or even both). In the former case the comparable standard is set by the treatment of imports or exports²⁶. In the latter case the comparable standard entails both imports and exports, as well as domestic transport.

As mentioned, there is no any outright obligation in Article 7(3) to establish unequivocally the domestic traffic inclusion into the comparable standard for

²⁵Edited by Yulia Selivanova, *“Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter”*, see Lothar Ehring on Chapter 2 “Energy Transit”.

²⁶T Shtilkind, *“Energy Charter Treaty: a Critical Russian Perspective”* (2005) 3(1) *Oil, Gas and Energy Law Intelligence*.

the aims of Article 7(3). However, a thorough linguistic approach of the word “or” could shed some light on this ambiguous matter.

Particularly, the terms used “originating in” and “destined for” entail a specific signification when incorporated into international agreements and this signification creates a logical sense of referring to transboundary transfer of products. There is adequate contextual precedent implying that “originating in” and “destined for” are being opted as a proxy for sake of terminology in other international agreements and so these particular terms enlighten the intended aim of the sentence “originating in or destined for ... its own Area”. This way, it would be plausible to point out that the broader sense of the Treaty appears to imply that the apt interpretation of Article 7(3) shall not be considered to relate to purely domestic traffic.

2.5 Art. 7 § 4

Article 7(4) is of key relevance to capacity establishment right under the ECT. It stipulates that in case transit cannot be accomplished on commercial terms by means of energy transport facilities (such as pipelines, cables etc.), the transit state must not place barriers in the way of new capacity being established. This requirement is extremely significant in terms of the facilitating transit under the scope of Article 7(1), because in default of a mandatory third-party access right, the installation of a transit pipeline, for instance, within the territory of a transit state, would rely explicitly upon the

discretion of the transit state, that would subvert the credibility of the fundamental principle of freedom of transit set by the Treaty²⁷.

Nevertheless, this provision has particularities. In the first place, the second part of Article 7(4) defines that the obligation not to put barriers is placed under the provisions of the applicable national legislation, which although has to be accordant to the Article 7(1). If read as a whole, Articles 7(4) and 7(1), render clear that the right of a transit state to legislate within the scope of Article 7(4) is not limitless and has to involve measures complying with the above-mentioned objectives. On this point, the Understanding IV.8 with respect to Article 7(4) elucidates that the applicable legislation shall include provisions in terms of the environmental protection, land use, safety, or technical standards. These regulated sections cited in the Understanding affirm that the legislative acts of the transit state should only set legitimate targets. Although, the term “include” in the Understanding implies that the list of such targets is not exhaustive.

Finally, the obligation not to impede the installation of new capacity has to be completely separated from the obligation to allow investment. The latter is set by the Treaty in a rather soft manner²⁸. Article 10(2) - (“Promotion, Protection and Treatment of Investments”) - includes only a best-endeavor commitment of signatory Members to present to other Members investors,

²⁷Vitaliy Pogoretsky, *“Freedom of Transit and Access to Gas Pipeline Networks under WTO Law”*, Cambridge International Trade and Economic Law, p. 276-278.

²⁸Thomas Wälde, *“International Investment under the 1994 Energy Charter Treaty”* in T.W ed, *“The Energy Charter Treaty: An East – West Gateway for Investment and Trade”*, (1996), p. 277-283.

either national treatment or most-favored nation treatment, depending on which is the most favorable.

2.6 Art. 7 § 5

Article 7(5) includes a few notable restrictions. Transit services can be refused when considered to jeopardize security of supply, security or efficiency of the energy systems. Actually, under common circumstances all of the aforementioned matters are entitled to compensation by relevant pricing schemes and thus, do not form a financial argument for denying transit²⁹. If only new or supplementary transit leads in inability to compensate imperilment, the objection of transit is legitimate.

Menaces to energy security could potentially constitute the socio-political turbulences in energy producing states, the appropriation of energy supplies, claims to energy sources, offensive actions against supply infrastructures, terrorism, as well as natural disasters and catastrophic events.

2.7 Art. 7 § 6

Article 7(6) defines that a signatory party, through whose Area Energy Materials and Products transit is being conducted, must not, in the event of conflict over any issue deriving from that Transit, interrupt or limit, permit any entity subject to its control to interrupt or limit, or require any entity subject to

²⁹Smeers Y & P . Nihoul, “*Energy Transit Principles in the Context of the Energy Charter Treaty*”, Report to the European Commission, (1996), *supra* note 27, p. 31.

its jurisdiction to interrupt or limit the current flow of Energy Materials and Products. This provision has been characterized as “most important”³⁰ and “most operationally relevant”³¹ and has been deemed to be of “self-evident”³² magnitude.

Luckily for the above purposes, Article 7 of the Treaty sets the case of conflicts over issues deriving from transit, for instance tariffs, charges and other conditions of transit. Not interrupting or reducing transit is the primary doctrine of ECT in terms of transit disputes.

In view of the tremendous potential socio-economic repercussions of disrupting or restricting transit flow, forbidding the interruption or reduction of transboundary energy flows could be deemed as a manner to avoid causing damage to importing states and promoting good neighborliness in the energy sector³³. In addition, this obligation “shields” the economic interests of producing states, which can be severely affected in the event of being deterred from supplying the energy already produced.

Apart from the constraint of the interruption – reduction of transboundary energy flow, another component fostering the good neighborliness aiming of the ECT, is actually the procedural process provided in terms of the resolution of disputes. In accordance with the conciliation and collaboration

³⁰K. Baragona, “*Transit Rights under the Energy Charter Treaty*”, paper presented to The Legal and Business Implications of the European Energy Charter Treaty Conference, London (1995), p 6.

³¹Craig S. Bamberger, “*An Overview of the Energy Charter Treaty*”, in T. Walde, TW ed, *supra* note 2, p. 7.

³²Fatouros, “*Energy Transit and Investment in the Energy Charter Treaty*”, in Greek Journal of International Law, (1996). p. 200.

³³Anatole Boute, “*The good neighbourliness principle in EU external energy relations: the case of energy transit*”, p.14.

doctrines underpinning good neighborliness, the ECT indicates a conciliation procedure to govern the conflicts specific to energy transit.

Nevertheless, it shall be examined if this hopeful spirit is leant upon the actual legal hypostasis of the provision or if it is only an outcome of wishful thinking. To start with, Article 7(6) does not deter an interruption or reduction in energy flow by the country of departure. For instance, if Russia stops its fuel deliveries for Germany due to withholding actions of transit state (namely Ukraine, Belarus or Poland³⁴), it is not Russia infringing the obligation of Article 7(6), but the transit state. Thus, Germany would not be able to raise a claim against Russia for the issue under the provisions of the ECT, however Russia might be penalized for breaching sale contractual conditions.

Moreover, by highlighting that a transit country must not in case of a conflict over any issue arising from that transit disrupt or restrict the energy flow, the obligation coming up is quite narrow, because it does not cover explicitly disputes over transit tariffs, which have proved to be very frequent among Former Soviet Union states over the years. In cases of conflicts over any other issue than transit itself, transit states shall not defy their obligation by disrupting fuel delivery³⁵. This interpretation leans on the exact wordage of Article 7(6) and, thus, could not be outplaced by the general aim of the ECT to protect the security of energy supply. Also, it is noteworthy that in case of

³⁴See, eg, the newspaper reports in *Leipziger Volkszeitung*, 9 January 1997 (“*Russian gas did not pass the Polish-German border*”) and *Izvestija*, 17 January 1997 (“*The Slavic brothers have stolen Russian natural gas meant for Germany*”).

³⁵Fatouros, “*Energy Transit and Investment in the Energy Charter Treaty*”, in *Greek Journal of International Law*, (1996), supra note 32.

disputes over transit matters, the transit state cannot contend that it was a conflict other than the transit dispute, which resulted in the disruption or restriction of energy flow.

Ultimately, Article 7(6) does not fully guarantee the avoidance of potential interruptions or reductions of energy transit. This is due to the problematic provision permitting the disruption where this is particularly stipulated in a contract or another agreement. Generally, transit agreements include a clause regarding the conditions under which the flows could be lawfully interrupted, although the majority of the agreements do not stipulate the processes when tariffs are not being paid. If interruption or reduction is not regulated under the transit agreement, then and only then is Article 7(6) of real significance.

2.8 Art. 7 § 7

Article 7(7) is the only provision explicitly regulating disputes in terms of transit. As it specifically quotes disputes touched upon Paragraph 6, namely conflicts over existing transit, there is an issue which needs further investigation, that is to say what about the obligations coming out of the rest of the Article 7. The response to this issue is very significant in case an eligible transit state denies a transit request or invokes unacceptable

conditions³⁶. In such cases, Articles 26 and 27 ECT addressing dispute settlement would probably be applicable³⁷.

In conflicts over transit issues as propounded in Article 7(6), the dispute settlement procedure placed under Article 7(7) begins with a notification to the Secretary-General of the Charter Conference Secretariat by an involved party to the conflict [Article 7(7) (a)]. After that, the Secretary-General considers carefully should the parties have proceeded all proper contractual or other dispute settlement steps agreed between them or between any entity mentioned in Paragraph 6 and an entity of another contracting party [Article 7 (7)]. Provided that the ECT requires only “contractual” and “agreed” steps, the conciliation procedure can be chosen without attempting to resolve the dispute in front of national courts and under the scope of domestic legislation³⁸. Afterwards, the Secretary-General summons the signatories of the notification [Article 7 (7) (a)] giving the other members involved in the conflict the possibility to participate in the procedure. In coordination with all concerned parties, the Secretary-General appoints a conciliator within 30 days [Article 7 (7 b)]. Subsequently, the conciliator attempts to reach an agreement either on the conflict or on continuation of the procedure. In case an agreement is made, the parties are bound by it.

³⁶Edited by Graham Coop, *“Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty”*, see Colin M. Brown, Chapter 12, p. 285-295.

³⁷Edited by Yulia Selivanova, *“Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter”*, see Lothar Ehring “Energy Transit”, (n 6) p. 94.

³⁸Although the wording of this provision is clear, Walde, T W, *ibid*, seems to doubt such a consequent interpretation, but suggests that “access to national courts - if not specifically agreed – should not delay the conciliation procedure”.

Although, in the event that the consultations are not prosperous within 90 days, the conciliator suggests a resolution and shall set interim tariffs and other terms and conditions to be kept to transit [Article 7 (7c)]. The involved parties are bound to this interim decision for a period of 12 months, unless an earlier resolution of the conflict comes up [Article 7 (7c-d)]. After the completion of 12 months and whether an agreement has not been concluded by then, the transit country is able to interrupt or limit the energy flow concerning transit, without being considered to infringe its obligation deriving from Article 7(6). In addition, the involved parties are entitled to initiate either Article's 27 arbitration procedure or conciliation procedure. In the latter event, although, the Secretary-General might choose not to appoint a conciliator [Article 7 (7e)]. There is not an enforcement provision as regards the conciliation interim decision, hence all the contracting parties of the ECT involved in the dispute, shall supervise that the entities under their control or jurisdiction comply with any interim decision [Article 7 (7d)].

At this point, it would be useful to indicate some further remarks on Article 7(7). As mentioned above, transit is essential in terms of the energy supply worldwide. A disruption in the transit flow could put in total risk various industries of domestic economies. Thus, it is more than practical for the ECT to stipulate a mechanism of settlement of conflicts arising over transit. Nevertheless, an obligation that is not accompanied by a relevant enforcing mechanism, is ultimately just a pronouncement of purpose, perhaps putting a little political pressure on the party in breach. At least, the procedure set by Article 7(7) is fast enough compared to the arbitration mechanism provided in Article 27, while it also offers the possibility for the members to

reach a solution in friendly terms as regards any kind of usual challenges arising from transit process, as a disagreement about tariffs³⁹.

Nonetheless, Article 7(7) stipulates that it is applicable itself only after the involved to the conflict parties having exhausted all proper contractual or other dispute resolution steps pre-agreed between them. In this regard, transit agreements usually include a dispute resolution mechanism, making Article 7(7) not the primary mean of settling disputes, but rather an opportunity for the disappointed party to appeal for a favorable decision. Therefore, what happens when the contractual arbitration mechanism has resulted in a final and binding award is vague. Did the contracting parties of the ECT agree to have such an award displaced by the decision issued in regards of the conciliation mechanism provided by the Treaty? The response could possibly be “yes” by falling back to the *lex posterior* principle, provided that they are acting in accordance with ECT Article 7(8) defining explicitly that nothing in Article 7 shall deviate from any rights and obligations deriving from international law not excepting bilateral agreements.

As a result, it gets clear that the Article’s 7(7) conciliation is rather intended as a “cooling off mechanism”⁴⁰ when the former arbitration procedure does not result in a partially or jointly satisfying resolution. Should a conciliation of Article 7 leads into an agreement, the conditions agreed would distinctly displace the pre-existing arbitral award. But, as mentioned, in case the desirable agreement has not been reached, the conciliator suggests a

³⁹Rainer Liesen, *“Transit Under the 1994 Energy Charter Treaty”*, p. 68-70.

⁴⁰K. Baragona, *“Transit Rights under the Energy Charter Treaty”*, paper presented to The Legal and Business Implications of the European Energy Charter Treaty Conference, London (1995), *supra* note 39, p 6.

resolution setting at the same time interim tariffs and other terms and conditions, which have to be upheld for a period of 12 months to the greatest extent. However, this period could possibly result into even greater controversies, on the assumption that the prior arbitral award is more advantageous for one or even more parties compared to the subsequent conciliator's interim decision. Thus, to refrain from such controversies and quarrels, the appointed conciliator is strongly exhorted to be aware of the award before concluding with a decision and the rest of the terms and conditions pursuant to Article 7 (7c). The interim decision shall operate as a sufficient mean for abstaining from transit disruptions and restrictions, in order not to be deprived of its "cooling" quality. On the whole, the specified procedure for transit conflicts appears to be meaningless except for the events that no bilateral agreement is on or when there is an agreement, though it does not stipulate a dispute settlement mechanism partially or entirely.

Ultimately, the dispute settlement procedure provided under Article 7(7) could be deemed as a feeble instrument. At the end of the day it is not actually a settlement procedure, but it forms a consultation tool under the guidance of an impartial person, leading into an agreement or even worse an unsolvable matter. Unluckily, the ECT creators mitigated the range of transit settlement making it an appendix to prior bilateral agreements, despite the necessity of drastic provisions regarding transit conflicts as already explained.

2.9 Art. 7 § 8

As mentioned, Article 7(8) defines that nothing in Article 7 shall deviate from a signatory's party rights and obligations deriving from international law and existent multilateral agreements. Therefore, ECT Article 7 must not derogate from GATT Article V.

However, how could "derogation" from GATT be defined? Taking into consideration the exact wording of paragraph 8, it can be remarked that not only excludes the implementation of a provision that "would loosen" GATT context, but it does also exclude a provision that could formulate an even more rigid transit framework entailing as a result an even more intense intrusiveness in terms of state sovereignty.

2.10 Art. 7 § 9

Paragraph 9 stipulates that Article 7 must not be interpreted as to obligate a signatory party not having a specific type of Energy Transport Facility for transit purposes to apply any measure deriving from the provisions of this Article, with respect to that type of Energy Transport Facilities. Nevertheless, such signatory party is obligated to meet the requirements of paragraph 4. Hence, this provision's aim is to consist a "reminder" for what has previously been annotated thoroughly in terms of the non-negotiable obligation not to place barriers in the way of new capacity being installed.

CHAPTER II: THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), ARTICLE V

1.1 Historical background, features and scope of coverage

The General Agreement on Tariffs and Trade (GATT) constituted the legal regime for international transactions in goods between January 1948 and January 1st, 1995, when the World Trade Organization (hereinafter WTO), an intergovernmental organization that is concerned with the regulation of international trade, officially commenced under the Marrakesh Agreement marking the termination of the 8-year-long Uruguay Round. The 1947 GATT was incorporated amended as GATT 1994 into the WTO cadre. The structural idea of GATT rests upon the most-favored-nation (MFN) treatment and the principle of non-discrimination⁴¹. GATT addresses trading in goods and consists one of the WTO poles along with the General Agreement on Trade in Services (GATS) and also the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

It is common ground that the WTO Agreements and specifically the GATT were not expressly formed to regulate energy issues per se, but the provisions are still considered applicable in terms of energy trading⁴².

⁴¹Heiskanen, *“The Regulatory Philosophy of International Trade Law”*, (2004), p. 38.

⁴²Marceau Gabrielle, *“The WTO in the Emerging Energy Governance Debate”* and Joost Pauwelyn *“Global Challenges at the Intersection of Trade, Energy and the Environment”*, (2010), p. 25.

Although, a few academics insist that energy does not appertain to GATT rules, either due to the fact that this was not the drafters' willingness⁴³ or due to energy's strategic significance, the prevailing opinion is that energy does fall under the scope of GATT not excepting Article V⁴⁴. Energy goods are not particularly included or excluded from GATT and there is WTO jurisprudence as regards petroleum⁴⁵. As long as energy resources and products are deemed as goods, GATT Article V is indeed applicable.

Jackson and other commentators censure GATT Article V as establishing a vague framework and thus sparking off various interpretations⁴⁶. Bamberger states that it consists one of the most ineffective GATT provisions⁴⁷. Certain WTO parties have concluded that GATT Article V is not precise and thus, the conditions of transit process have to be regularly fixed bilaterally. More specifically, the complications lie over the definition of "traffic in transit", the standards of access and the treatment of "traffic in transit".

The following analysis is chiefly going to rest its remarks upon a textual review of Article V and the sole panel report dealt with this issue⁴⁸.

⁴³K. Aidelojie and Z. Makuch, *"Multilateral Organisations, Fossil Fuel and Energy Law and Policy: The Tower of Babel Re-visited"*, (2008), p. 227 - 230.

⁴⁴M. G. Desta, *"The GATT/WTO System and International Trade in Petroleum: an Overview"*, (2003), p. 385 - 398.

⁴⁵*United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996.

⁴⁶J. H. Jackson, *"World Trade and the Law of GATT: a Legal Analysis of the General Agreement on Tariffs and Trade"* (Indianapolis: Bobbs-Merrill, 1969), p. 510–511.

⁴⁷C. Bamberger, *"Adjudicatory Aspects of Transit Dispute Conciliation under the Energy Charter Treaty"*, (2006), p. 11.

⁴⁸Report of the Panel, *"Colombia – Indicative Prices And Restrictions On Ports Of Entry"*, World Trade Organization, WT/DS366/R 27 April 2009.

1.2 Art. V § 1

Article V addresses the issue of “traffic in transit”, which includes, according to Paragraph 1, the carriage of goods by means of transport over the area a WTO Member, under the condition that this passage is only a part of a complete journey starting and being terminated beyond the borders of the transit State. Also, this Article covers transit between two points of the same country when crossing through another country⁴⁹. It is notable that the provision includes both goods and their means of transport, so not only goods are considered to be under transit in the transit States territory, but the ships and the trucks conveying them as well. Let it be mentioned that Article V does not enumerate the relevant means of transportation, thus it might also include network-bound infrastructures, which are considered as a primary mean of transport in terms of oil and gas.

Furthermore, Article V is legally binding within the area of the relevant WTO Member in the events the traffic in transit is from or to another WTO Member, thus, a minimum of two among the involved parties are required to be WTO Members. In other words, the transit state must in any case be a WTO Member and at least one of the rest participating states (origin and destination states) shall be a WTO Member. Hence, Article V cannot be implemented when energy goods are transferred via a state that is not WTO Member. Such instances are commonly coming up within the energy trade practice, when for example oil or gas is transferred from Central Asia towards Western Europe via non-WTO Members as Kazakhstan, Azerbaijan, Russia,

⁴⁹J. H. Jackson, *“World Trade and the Law of GATT: a Legal Analysis of the General Agreement on Tariffs and Trade”* (Indianapolis: Bobbs-Merrill, 1969), p. 508.

Tajikistan, Belarus, and Uzbekistan. Therefore, the freedom of transit is a remarkably critical matter in the accession procedure of these States to the WTO.

1.3 Art. V § 2

Paragraph 2 stipulates that there should be freedom of transit across the area of the transit country *via* the most convenient routes for international transit and for traffic in transit to or from the territory of other involved parties. The Panel in Colombia-Port of Entry mentioned that Paragraph 2 shall be interpreted in conjunction Paragraph 1 addressing “traffic in transit”⁵⁰.

Moreover, the Panel stated that although the term “freedom” is not stipulated in the GATT, it signifies the “unrestricted use of something” pursuant to its customary meaning⁵¹. By that means, freedom of transit entails unrestricted access *via* the most convenient routes for the carriage of goods in this transboundary journey.

Also, a WTO Member is not necessarily obliged to ensure the transportation on any or all possible routes within its area, but only on the specific ones that are deemed as most convenient for the passage⁵². Nonetheless, due to the fact that there is not any precise clarification on terms “most convenient routes”, time and cost of transport are considered key factors. On this regard,

⁵⁰Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted on 27 April 2009, paragraph 7.396.

⁵¹*The New Oxford Dictionary of English*. 2nd Ed. Oxford: Clarendon Press, (2001), <http://oxforddictionaries.com/definition/freedom>

⁵²Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted on 27 April 2009, paragraph 7.401.

customs authorities of transit States must not unreasonably impose charges and extra fees and must not apply formalities or other regulations on goods crossing through their territory directed towards foreign destination⁵³.

The second part of the paragraph stipulates that there should not be any distinctions - amongst others- on the vessels flags, the origin, the departure, the entry, the exit or the destination, or on any condition with regard to the ownership of goods, of vessels or other means of transport. Pursuant to the Panel the most-favored-nation treatment has to be extended to traffic in transit as stipulated in Paragraph 1, even if it is not expressly mentioned⁵⁴. Also, this most-favored-nation clause calls for goods from all WTO Members to be guaranteed an equal access and same terms when attempting international transit. Lastly, it is notable that this provision refers to the ownership of goods and means of transportation too, apart from their origin and nationality respectively.

1.4 Art. V § 3

Under Article V (3) all unnecessary delays and restrictions are forbidden, so as all custom duties, transit duties or any extra charges as regard transit process, with the exception of charges for transfer and for administrative expenditure derived from transit or cost of services provided.

⁵³Abbott , M. *“Seizure of Generic Pharmaceuticals in Transit Based on Allegations of Patent Infringement: A Threat to International Trade, Development and Public Welfare”*, (2009), p. 45-46.

⁵⁴Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted on 27 April 2009, paragraph 7.397.

According to the provision, transit States may order that traffic in transit shall be entered at the proper custom house. Also, even if goods under transit do not enter to the stream of domestic commerce, transit States are able to hold a transit entry-exit record.

1.5 Art. V § 4

Nevertheless, there are certain regulations and charges on traffic in transit that can potentially be imposed by the transit State, under the circumstance that these are considered reasonable regarding the terms of the traffic. Specifically, as noted, these regulations and charges need to be in accordance with administrative expenditure derived from transit or with the cost of services provided. Therefore, there are two types of lawful charges, namely transportation fees and administrative expenditure⁵⁵.

It is to remark that “charges” under Paragraph 3 address to taxes on transit processes, while “charges” under Paragraph 4 address to expenses for transport by the state owned infrastructure, as well as administrative fees.

It shall also be observed that both “necessity” and “reasonableness” are terms of a very broad sense, so each case needs to be examined ad hoc. Thus, it is commonplace that this ambiguity, although it promotes flexibility depending on the different terms of each case, it also enhances the

⁵⁵WTO Secretariat, Council for Trade in Goods. *Article V of GATT 1994 - Scope and Application*, G/C/W/408 (10 September 2002), p. 8.

possibility of emergence of conflicts, delays, inconsistent approaches and it forms a backdrop that could be reviewed as “judicial activism”.⁵⁶

1.6 Art. V § 5

According to GATT Article V (5), most-favored-nation standard refers only to discriminatory treatment concerning charges, regulations and formalities in terms of transit. Hence, it does not provide protection in case of discriminatory deeds such as discrepant treatments as regard infrastructure access⁵⁷.

Also, in accordance with the Interpretative Ad Note of Article V (5) the MFN standard is in effect to “like products”. Specifically, the Ad Note cites that as regards charges of transport, the principle included in Paragraph 5 applies to like products being transferred on the same route and under like conditions.

However, the phrases “same routes” and “like conditions” are not any further defined. Hypothetically “same routes” could imply identical routes and as for the “like conditions”, it could refer to factors such as economy or environment. Unluckily, there has not been a conflict on these exact matters yet, so as to illuminate them.

⁵⁶J Neumann and E Turk, *“Necessity Revisited: Proportionality in World Trade Organization Law after Korea – Beef, EC – Asbestos and EC – Sardines”*, (2003) *Journal of World Trade*, p. 199 - 215.

⁵⁷Joost Pauwelyn, (ed.). *“Global Challenges at the Intersection of Trade, Energy and the Environment”*, (2010), p. 46.

1.7 Art. V § 6

Pursuant to this provision, products have been under transit process across the territory of any third Member must be accorded treatment equally favorable to that, which have been accorded to such products had they been transferred from their origin place towards the destination without having crossed across the territory of such third Member.

Contrary to the rest provisions of the Article, paragraph 6 addresses to Members whose area is considered as final destination of goods under transit⁵⁸. The Panel stated that the phrase is articulated in the present perfect tense, so it might refers to goods that have been recently carried under transit procedure. Also, the second part of the paragraph refers to “direct consignment”⁵⁹, which applies once the goods have been already imported.

In conclusion, it can be deemed that Article V (6) expands most-favored-nation standard from discriminatory treatment in relation with the geographic route of goods under transit until the point of arrival at their ultimate destination. This way, the proper treatment given to goods transferred from the location of their origin towards their final destination, without crossing a third State (transit State), shall be expanded to goods that have been dispatched from the location of origin and crossed a third State as traffic in transit, before reaching their ultimate destination as well. In such case, the most-favored-nation scope could be wider than the freedom of transit

⁵⁸Panel Report. *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted on 27 April 2009, paragraph 7.475.

⁵⁹Direct consignment is prerequisite for the eligibility for entry of goods at preferential rates of duty or that relate to that Member’s method of valuation for duties purposes.

regulation, since the former one will also include imported goods entering the territory of the State of destination.

CHAPTER III: THE RELATIONSHIP BETWEEN ECT (ARTICLE 7) AND GATT (ARTICLE V)

1 ECT § 7 versus GATT § V

It is certain that there is a noteworthy relevance between GATT Article V and the more extended Article 7 of the ECT, as both of them set forth the procedure of international transit. Particularly, in the first (1st) paragraph of Article 7, which points out in general words “the principle of freedom of transit” and the constraint of “unreasonable delays, restrictions or charges”, a direct mention to GATT Article V could have been inserted, in order these wide terms to be elucidated, as being comprehensively set out in it.

Furthermore, it is apparent that the rest of the paragraphs of ECT Article 7 bring in a few major subjects that are not ensued from GATT Article V⁶⁰. As mentioned, some interpreters state that Article 7 (3), for instance, establishes a standard of national treatment, although it is still disputed. Also, Paragraphs 6 and 7 expound the dispute settlement procedure, which is also absent from GATT Article V.

It shall be noted that GATT Article V has seldom been quoted by its contracting parties in terms of a dispute resolution procedure, mainly due to the fact that trade law experts have steadily laid emphasis on “access to

⁶⁰Energy Charter Secretariat, Trade In Energy; “*WTO Rules Applying under the Energy Charter Treaty*”, (Brussels - December 2001), p. 37.

markets” rather than “transit through”. The first conflict concerning Article V, which resulted in the founding of a Panel by the Dispute Settlement Body emerged in October 2007. There have been also six more occasions where this article was invoked, but none of these cases resulted further in a Panel Report. Unfortunately, there is too little official practice or judicial appraisal to contribute to the profound understanding, interpretation and implementation of GATT Article V. This ascertainment was also made by the Colombia-Ports of Entry Panel while struggling to explicate GATT Article V⁶¹.

Nonetheless, this admission as well as the fact that there has not been a notable multitude of disputes arisen, does not signify that the Article has fallen into disuse. Hypothetically, that can also mean that it is well-articulated enough for its implementation and as a result no conflicts have emerged. It can even mean that its users have not been accustomed to the instrument.

Contrastingly, the Treaty is considered of supreme significance concerning the transit issues. The keystone of the ECT is the standard of non-derogation from the WTO Agreements. Besides, the Treaty is originated in order expand WTO provisions to non-WTO Members as regards energy transactions. This is of critical significance, provided that not all ECT parties are WTO Members, while Russia constitutes a remarkable exception in this regard.

The ECT refers to GATT, although in fact it does not encompass GATT provisions. Thus, it is recommended that any interpretation as well as application of Article 7 be attempted in accordance with the provisions and the respective interpretation of the WTO Agreements, specifically GATT

⁶¹Panel Report. *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, adopted on 27 April 2009, paragraph 7.388.

Article V.⁶² Despite the fact that ECT Article 7 was founded on GATT Article V, the former outreaches the latter. Besides, the ECT is more extensive and of course intended for energy transit issues⁶³.

CONCLUSION

Energy transactions occupy a remarkable portion of the international trading flows, even though energy resources are unevenly dispersed. That signifies the importance of transit in the energy sector. Both importing and exporting countries call for assurances in order energy goods to be transported through third countries on a freedom of transit standard. Nonetheless, the latter does not constitute segment of customary international law, provided that each time transit countries have to grant their permission through agreements.

It is appropriate that international transit of energy products and materials shall be regulated by an apt, thorough and integrated framework. Despite the fact that WTO Agreements and the ECT encompass relevant provisions to transit, they do not achieve a complete coverage of the particularities of the energy sector, especially of the complicated transit processes.

As regards the WTO, GATT article V is deprived of crucial provisions for network bound transit. Particularly, the national treatment standard and the right of constructing new or supplementary infrastructures are not present. Furthermore, there are no clear provisions concerning the issues of fixed

⁶²Lapiashvili Natia, *“Freedom of Transit in International Law at the Example of the BTC pipeline legal framework”*, (2010), p. 19.

⁶³World Trade Organization, *World Trade Report, Trade in Natural Resources*, (2010), p. 16.

infrastructures as well as electricity. It appears that GATT Article V is formulated superficially, while being isolated in its textual setting⁶⁴.

Despite ECT contributes to a partial coverage of important gaps, there are a few deficiencies detected. First of all, it does not explicitly stipulate that there should be freedom of transit. Also, the status of most-favored-nation treatment is narrow. Remarkably, there is no provision concerning third party access. Fourthly, the provision of national treatment is being under dispute. Lastly, the dispute settlement procedure provided is not highly effective enough, albeit it is deemed to be the friendliest environment in which to set an energy transit dispute.

After having this survey completed, it appears that the international transit regime needs an imperative reform. The WTO could possibly be the proper institution for handling this essential matter, due to the fact that it provides regular rules, transparent standards, a decent dispute resolution mechanism, a broad-based membership and finally the transitional period would be most likely progressed smoothly.

In this respect, the most proper way to introduce a universal energy transit framework would be establishment of a joint sectoral agreement with regards to energy, as long as transit of energy resources occupies trading in goods and services.

Nevertheless, an undertaking of such range requires a great deal of absorption, as well as coordination between both governments and the

⁶⁴KP Waern, “*Transit Provisions of the ECT and the Energy Charter Protocol on Transit*”, (2002), *Journal of Energy and Natural Resources Law*, p. 172-176.

private sector, with tremendous assistance provided by legal experts and advisors. The need for a fully comprehensive regime is more urgent than any time in the past. Of course, the political will in this endeavor shall be considered as a major prerequisite.

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