The transit of energy materials and products
under the Energy Charter Treaty

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A legal framework for International Energy Transit
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Energy Charter Treaty (ECT) is an of paramount significance international legal instrument which provides among others the legal framework for the transit of energy materials and products. Energy transit in international level is secured by article 7 of the Energy Charter Treaty and acts simultaneously as a safeguard of energy security for the contracting parties. The main targets of this piece of work will be an attempt to apply practically the provisions of article 7 and to provide answers to a series of assumptions that might be arose in the future.

It has to be recognised at first that the majority of developed countries have signed the Energy Charter Treaty; a fact which indicates the will of the contracting parties to contribute to the promotion, trade, transit and investment of energy material and products. By the time the contracting parties have been accessing to the Treaty they have been obliged to facilitate the energy transit between them and to take any necessary measures in order to maintain this obligation in case where for instance the upstreamer state might interrupt the flows of energy.

Historical background and Scope

Energy Charter Treaty has its origin as a European initiative, however, until now it is extended to geographically all around the world due to the urgent unification of the international energy market. The Charter includes the countries of the enlarged European Union, Central and Eastern Europe, the Russian Federation, Central Asia and Caucasus, as well as Japan, Australia and Mongolia. Positive reactions to the Treaty are also reported by China, Iran, South Korea and nations of the South East (AESEAN members). Thus, it seems that this legal instrument has a powerful geographical variation which contributes to the opening of an international energy market and co-operation among all member states.

The ECT, in force since 1998, is a multilateral treaty dealing specifically with energy. It was negotiated following the dissolution of the Union of Soviet Socialist Republics (USSR) at a time when the European Communities (EC) were striving to
reduce their dependence on Middle Eastern energy sources. In exchange for guarantees in investment protection, trade and transit, EC Member States would provide capital to develop the rich natural resource endowments of former-USSR states. Producers, consumers and transit states were to benefit mutually. The ECT is the outcome of the ‘Energy Charter process’, which involves an amalgam of instruments: the European Energy Charter (the ‘Charter’), the ECT, the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA), the Amendment to the Trade-Related Provisions of the ECT (the ‘Trade Amendment’) and the draft Transit Protocol. The Charter is a political declaration concluded in 1991 and currently signed by 56 states. The other four instruments are international treaties; the ECT and PEEREA have entered into force and are legally binding; the Trade Amendment is under the process of ratification, and the Transit Protocol is still under negotiation. The ECT currently has 48 contracting parties and five signatories. While Europe and the former USSR provided the initial geographical focus of the Charter process, the latter has attracted the interest of states in other geographical regions. Japan and Mongolia are ECT contracting parties and the requests of Pakistan and Afghanistan respectively to accede parties and the requests of Pakistan and Afghanistan respectively to accede to the ECT have been approved.

The increasing number of energy-based international organisations and states participating in the ‘Charter process’ as observers including the WTO, the Organisation for Economic Co-operation and Development (OECD), the International Energy Agency (IEA), the Association of South-East Asian Nations (ASEAN), China, Korea, Iran, Nigeria, Jordan, Egypt and the Palestinian National Authority attests to the worldwide importance of the ECT. The ECT contains rules that address four substantive areas: trade (including competition), investment, transit and environment. It establishes compulsory dispute resolution mechanisms; two general and four special. The general forms are: (1) state-to-state arbitration concerning the application or interpretation of the ECT (Article 27), and (2) investor-to-state arbitration for investment disputes (Article 26). The special forms comprise dispute settlement mechanisms for: 1. transit disputes (Article 7(7)); 2. trade disputes (Article 29 and Annex D, which will be amended in accordance with the Trade Amendment, when the latter comes into force); 3. competition (Article 6); and 4. environmental issues (Article 19).
The draft Transit Protocol is of particular relevance despite the fact that it has yet to be concluded. Article 3 of the draft contemplates that it will complement, supplement, extend or amplify the provisions of the ECT. Therefore, the draft Transit Protocol represents not only the deepening of transit obligations in the Energy Charter process, but also the most modern common understanding of the requirements of international regulation for transit in the energy sector. It contains obligations concerning transit agreements, utilization of available capacity, expansion, construction and modernisation of ETFs, transit tariffs, congestion management, charges, technical and accounting standards, metering and measuring, swaps, unauthorized taking of energy in transit, accidental interruption and environmental protection.

It also includes a dispute settlement mechanism analogous to the inter-state arbitration offered in ECT Article 27. The outstanding issues in the negotiations are: 1. the Regional Economic Integration Organisation (REIO) clause; 2. the determination of cost-based tariffs; and 3. the ‘right of first refusal’ for those who have existing long-term contracts. Despite pessimistic views about the duration of the negotiations and whether or not there will be a successful outcome, one should bear in mind that negotiations for important international treaties, such as the UN Law of the Sea Convention, lasted decades. Moreover, the negotiating process may itself inform the development of custom and help crystallise customary rules. 1

Transit

Transit has been of central importance since the creation of nation state. The inevitable interaction between states requires international cooperation. The law of transit is understood as part of the ‘laws of peace’ along with freedom of communications. ECT accept the ‘through-transit’ prototype adopted by earlier international instruments including, inter alia, the Barcelona Statute annexed to the Barcelona Convention on the Freedom of Transit. Transit requires that the passage across the territory of the transit state ‘is only a portion of a complete journey, beginning and terminating beyond [the transit state’s] frontier …’. Transit is relevant

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1 Azaria, D. Energy Transit under the Energy Charter Treaty and GATT
to a wide range of activities: the economic development of states through transit of goods or services, the rights of land-locked states or the freedom of the high-seas and internationalised rivers as well as energy security.

According to Lauterpacht, any convention or customary rule dealing with transit is part of a wider concept of ‘freedom of transit’ in public international law. The substantive scope of the ECT covers Energy Materials and Products (EMPs) defined in ECT Article 1(4) and further listed in Annex EM, as including nuclear energy, coal, natural gas, petroleum and related products, electricity, fuel wood and charcoal (‘energy’ for the purposes of this article). While the proposals being considered in the WTO Doha Round negotiations on Trade Facilitation refer to ‘pipelines and grids’, ECT Article 7(10)(b) refers to ‘Energy Transport Facilities’ as consisting of highpressure 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 EMPs. The term ‘Energy Transport Facilities’ (ETFs) seems to define infrastructure covered under the ECT, and the term ‘fixed infrastructure’ to describe the facilities that are mentioned in the WTO Doha Round negotiations. This approach is consistent with the understanding that ECT Article 7(10)(b) includes ‘other fixed facilities specifically for handling EMPs’, while the Doha Round proposals seem more limited in their scope.

In the light of Energy Charter Treaty under Article 7(10) (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.

Energy materials and products

The energy materials and products are transported over long distances from upstreamers to downstreamers and finally to consumers. As far as the natural gas is concerned is transported by pipelines which involves various different national borders. The distinctive detail of Energy Charter Treaty is that it covers the entire energy chain, including not only investments in production and generation but also the terms under which energy can be traded and transported across various national jurisdictions to international markets. In this way are avoided any bilateral disputes over energy transit and this shall have quickly multilateral implications for gas supply, underlining the importance of standards, accepted by countries on a multilateral basis, to promote reliability of cross-border energy flows.²

Also, the Treaty provides through Article 7 (1) a strategic perspective of energy transit. In a nutshell in the Article are stated the obligations of participating states to take the necessary measures to facilitate transit of energy, consistent with the principle of freedom of transit, and to secure established energy flows. Transit countries are additionally in the light of Article 7(6) under an obligation not to interrupt or reduce existing transit flows, even if they have disputes with another country concerning this transit. Certainly, they may proceed to interruption only after the closure of the dispute. According to Article 7 (4) the establishment of new transportation capacity and thereby facilitates the diversification of supply and of export is supported. The cooperation between the contracting parties in transit, mitigates the effects of the likely interruption or lack of energy.

²Belyi, A. & Klaus, U, Russia’s Gas Exports and Transit Dispute Resolution under the ECT
The Energy Charter's Trade and Transit Group reports to the Energy Charter Conference and is responsible for discussion of all issues related to cross-border energy flows that are covered by the Treaty. Its main tasks are: monitoring and assistance in the implementation of the Treaty and related instruments on trade and transit, suggesting recommendations for improvement of compliance, facilitation to the discussions among the members of the Charter constituency on promoting and securing cross-border energy flows based on the Energy Charter Treaty; analyzing the ways to facilitate the development of open, competitive and sustainable energy markets, and energy flows across the Charter constituency.

Energy - and hydrocarbons in particular - is transported over increasingly large distances from producers to consumers. In the case of natural gas, most of which is transported by pipeline, this often involves crossing different national borders. Bilateral disputes over energy transit can quickly have multilateral implications for gas supply, underlining the importance of standards, accepted by countries on a multilateral basis, to promote reliability of cross-border energy flows. A distinctive feature of the Energy Charter Treaty is that it provides a set of rules that covers the entire energy chain, including not only investments in production and generation but also the terms under which energy can be traded and transported across various national jurisdictions to international markets.

The Treaty's energy-specific provisions on trade and transit are based on those of the WTO, but with two important additional considerations. Firstly, they extend WTO rules for the energy sector even to those Contracting Parties that are not yet members of the WTO; as of March 2013, this was relevant for six member countries of the Energy Charter Treaty that are not yet members of the WTO. The Treaty addresses in more detail the important strategic issue of energy transit. Current Treaty provisions oblige participating states to take the necessary measures to facilitate transit of energy, consistent with the principle of freedom of transit, and to secure established energy flows. Transit countries are also under an obligation not to interrupt or reduce existing transit flows, even if they have disputes with another country concerning this transit. Through its investment and transit provisions, the Treaty also supports the

establishment of new transportation capacity and thereby facilitates the diversification of supply and of export. The substantive provisions of the Treaty in these areas are enforceable through a state-to-state dispute settlement mechanism; this can be particularly valuable for complex cross-border infrastructure projects, like the Baku-Tblisi-Ceyhan and Baku-Tblisi-Erzurum Gas pipelines, that require the consent and agreement of multiple governments.

The Transit protocol

The Energy Charter Treaty and the Protocol on Transit are both instruments of international law developed in recognition of the economic area of energy transit specifically in Eastern and Central Europe. In the preparation of clear rules of energy transit the ECT is transformed as a safeguard of regional stability and security. Article 7(6) of the Treaty obliges the contracting parties not to interrupt or reduce the existing flow of energy in transit in the event of a dispute over transit prior to the conclusion of a set of dispute resolution procedures laid down in Article 7(7) of the Treaty. These conciliation procedures call for the use of a conciliator with powers to set interim tariffs and other terms and conditions for a period of 12 months, or until resolution of the dispute, whichever is the earlier. Unless otherwise explicitly stated, all obligations of the Treaty apply to the states signing and ratifying the Treaty. However, the contracting parties shall not encourage any state enterprise or any entity, which they establish or maintain, which is granted exclusive or special privileges, to conduct its activities in a manner inconsistent with the obligations of the state under the Treaty. If a contracting party establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall conduct its authority in a manner consistent with the obligations of the contracting party under the Treaty. In addition, each contracting party is responsible for the observance of the provisions of the Treaty by regional or local governments or authorities. There is also a set of exceptions to the obligations laid down in Article 7 of the Treaty, such as no obligation of the Treaty may endanger human, animal or plant life or health. A condition of short supply exempts a contracting party from performance of the obligations, as does the protection of essential security interests or the maintenance of public order of the contracting parties.
WTO provisions, Article 29

An important part of the transit provisions of the Treaty is found in Article 29. Article 29 provides for the application of WTO rules for those signatories which are not yet members of the WTO. For a compilation of the applicable WTO rules under the Treaty, the transparency documents of the Energy Charter Secretariat should be consulted. The applicability of WTO rules under the Treaty is of relevance to, inter alia, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Kazakhstan, the Russian Federation, Ukraine and Yugoslavia, which are not yet members of the WTO. All the importation, exportation and transit-related provisions of the WTO apply fully under the Treaty. However, a special, simpler dispute resolution procedure has been established under the Treaty, replacing similar provisions under the WTO. The general exceptions of the WTO rules apply. The Transit Working Group has, since the spring of 1998, identified several impediments to the secure and efficient transit of energy on the territories of the signatories to the Treaty. The mandate for negotiation of the Energy Charter Protocol on Transit ('the Protocol') under the auspices of the Energy Charter Conference was approved by the signatories at the December 1999 Energy Charter Conference. It should be noted that the majority of the existing transit provisions of the Treaty described in the previous section cover a large set of energy carriers, such as, inter alia, crude oil, oil products, natural gas, electricity, nuclear energy, coal, coke or bitumen. The scope of the currently negotiated provisions of the Protocol, which are discussed in this section, is more limited and only includes crude oil, oil products, natural gas or electricity. The Transit Working Group has identified, inter alia, the following issues with regard to secure and efficient transit: (1) the ongoing discussions on multiple pipeline routes in the Black Sea area, the Caspian Sea area, the Baltic Sea area and in the Balkan area, partially or wholly ignoring the possible utilization of existing pipeline infrastructure in the same areas; and (2) the incomplete nature of the legal regime of energy location swaps under international law. The analysis focuses on the currently negotiated third party access provisions and transit tariff design provisions of the Protocol. In addition, the advantages of including provisions on energy location swaps in the Protocol are discussed.

Third Party access
Regulated third party access is provided on the basis of published transportation tariffs, which are not subject to negotiation, and other published terms and conditions for the use of energy transport facilities. A public regulator ensure compliance with energy legislation. Negotiated third party access is provided on the basis of negotiations between the, often private, operator or owner of the energy transport facilities and the shippers of energy. Energy sector legislation and domestic competition laws ensure compliance, objectivity, transparency and non-discrimination. In case of negotiated third party access, the owner or operator of the energy transport facilities is obliged to publish adequate information to give potential shippers of energy the possibility of clearly understanding the procedure according to which the shippers may access the facilities and enter into and conclude transportation agreements. These terms and conditions often include definitions of delivery points and redelivery points of crude oil, oil products, natural gas or electricity, examples of prices usually charged for using the system, the method by which a shipper may request a transportation quotation, the definition of capacity and its use, the terms of payment, technical requirements for access and, finally, crude oil, oil products, natural gas or electricity quality specifications.

It should be emphasised that the Treaty does not contain any obligation of mandatory third party access to energy transport facilities, nor will any such obligation be included in the Protocol. Furthermore, in relation to submarine pipelines and cables, neither the Treaty nor the Protocol shall derogate from or affect the interpretation of existing international law governing such submarine pipelines and cables. There is no provision explicitly addressing access to energy transport facilities in the Treaty. There is only the general provision on state facilitation of transit in Article 7(1). Article 7(1) of the Treaty states 'Each Contracting Party shall take necessary measures to facilitate the Transit of Energy Materials and Products ... without imposing any unreasonable delays, restrictions or charges'. Under some circumstances, access to energy transport facilities may be one of the components of transit facilitation. If any unreasonable refusal to negotiate access to facilities may be construed as imposing an unreasonable restriction, then Article 7(1) may serve as implicitly obliging the contracting parties not to refuse negotiation on access. The under-utilisation of existing pipeline infrastructure may indicate that explicit provisions on access to energy transport facilities may benefit the economies of the
contracting parties to the Treaty. The states negotiating the Protocol propose that owners or operators of energy transport facilities under their jurisdiction should not refuse negotiation on access to negotiate any request for access in connection with energy transit. Such negotiations shall be transparent, based on commercial terms, and non-discriminatory as to the origin, destination or ownership of the energy carrier. The owner or operator shall be obliged to provide a duly substantiated explanation for refusing access. Thus, the facilitation of third party access becomes an explicit obligation of the signatories. The objectives of more elaborate and explicit third party access provisions are to promote more efficient use of available capacity in existing transit infrastructure, to promote more efficient flows of energy in transit and to avoid the duplication of energy transport facilities, including the construction of expensive bypasses. In short, there should be an improvement of economic efficiency under the clear rule of law. Once access rights are established, the next step is to establish provisions on transit tariff design.

Interpretation of Article 7(3)

Under Article 7(3) it follows that: each contracting party shall apply the transit provision in a non-discriminatory way. Specifically shall apply the use of energy materials and products in no less favourable manner than the manner it treats such products which are destined for its own Area. However, under subparagraph 3 a discriminatory manner is allowed only when an international agreements provides as such. If there is an international agreement which treat transit provisions in a more favourable manner then the discrimination is justified and therefore excused. In the text of Article 7(3) there is no explicit obligation to support the interpretation that the domestic traffic must be included into the comparable standard for the purposes of Article 7(3). Nevertheless, a purely linguistic interpretation of the word “or” could support the extension of Article 7(3) to domestic traffic. Moreover, domestic traffic would qualify as benchmark under Article 7(3) of the ECT, whether or not “or” is read inclusively or exclusively. This is because the concept “originating in” is necessary to frame “domestic traffic” but not sufficient to exhaust it. the terms “originating in” and “destined for” can carry a specific meaning in the context of international agreements and that that meaning gives a strong impression of relating to international movement of products across borders. Hence, we believe that there is

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4 *Trade and Investment Law Clinic Papers*, The Graduate Institute of Geneva
contextual evidence to suggest that “originating in” and “destined for” were used as a proxy for the terms of art used in other international trade agreements and that these terms shed light on the intended meaning of the phrase “originating in or destined for… its own Area”. Therefore, we conclude that a wider context of the ECT appears to confirm that the proper interpretation of Article 7(3) was not intended to relate to purely domestic transportation. The central issue of the enquiry is whether, along with an obligation not to discriminate energy materials and products in transit as compared to exports and imports of energy materials and products, the non-discrimination requirement contained in Article 7(3) of the ECT also includes an obligation not to discriminate such materials and products as compared to energy materials and products in domestic traffic (using the WTO terminology, a national treatment obligation).

There is a divergence of views in legal literature as to the proper interpretation of the text of Article 7(3) with regard to the scope of the non-discrimination obligation. On the one hand, some scholars, including Cameron, opine that Article 7(3) provides both national treatment and most-favoured nation obligations, i.e. that the treatment of energy materials and products in transit shall be compared with the treatment of imports, of exports and of domestic traffic. On the other hand, the Russian proposal on the new Understanding of Article 10 of the draft Transit Protocol considers that no national treatment obligation exists in Article 7(3), or, put differently, that the treatment of energy materials and products in transit shall be compared with the treatment of imports and of exports, but not with the treatment of domestic traffic.

Turning to the language of Article 7(3), we observe that in the provision there is no explicit obligation to support the interpretation that the domestic traffic must be included into the comparable standard for the purposes of Article 7(3). Therefore, the specific problem raised by the two hypotheses referred to above, is not merely about the correct interpretation of the word “or” in Article 7(3), but rather the very premise for these hypothesis. Hence, the starting point of our inquiry is the question about what is the possible basis for (or allusion to) the national treatment standard in the text of Article 7(3)?

There seems to be two possible bases for the inclusion of domestic traffic into the scope of Article 7(3). One of them indeed relates to the interpretation of the word “or”

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5 Lothar Ehring, Yulia Selivanova, “Energy Transit, Chapter 2, Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter (Global Trade Law Series)
inclusively (as meaning one or the other or both). In that sense, the provision of Article 7(3) would apply to energy products and materials that are: (a) originating in its own area, or (b) destined for its own area, or (c) originating in and destined for its own area. This last condition would amount to domestic traffic because allegedly the product that originates in one area and is destined for that same area is purely a domestically delivered product. The second basis exists even where the word “or” is read exclusively, as meaning one or the other, but not both. This is because it is enough that one of the conditions joined by the word “or” is met, for the compound statement to be valid. Moreover, the compound statement would also be valid where the two conditions connected with the word “or” equal each other or do not conceptually exclude each other, as is the case here because products “originating in… its own area” can also be the products “destined for… its own area”. Therefore, even if the word “or” is read exclusively as meaning either one or the other, but not both, the disjunctive reading of the word “or” would still allow for a possibility that the other of the two alternative conditions is met or that alternative conditions overlap because the conditions represent concepts that are not exhaustive.

Whatever the underlying hypothesis, the question we need to answer is whether Article 7(3) applies the national treatment standard as a comparable standard for treatment of energy products and materials in transit.

Under Article 7(4) it follows that: in the case that the transit of energy material and products cannot be made on commercial terms as such in Energy Transport Facilities the Contracting Parties shall not establish any barriers in the way of a new capacity being established. This means that it is allowed for new capacities to be formed in order to facilitate the transit and their form is absolutely excused. Nevertheless, if there an applicable legislation which is consistent with paragraph 1 a form of new capacities shall not be made.

Article 7 (5) exempts contracting parties from permitting the construction or modification of Energy Transport Facilities; or new or additional Transit through existing Energy Transport Facilities if any of these raises concerns as to the endanger of 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. Threats to energy security include the political instability of several energy
producing countries, the manipulation of energy supplies, the competition over energy sources, attacks on supply infrastructure, as well as accidents, natural disasters, rising terrorism, and dominant countries reliance to the foreign oil supply.

Article 7(6) explicitly deals with the situation where there is a dispute over matters arising from transit and explicitly prohibits the interruption of transit. 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.

Article 7(7) provides an elaborate system of conciliation intended to resolve, or at least provides interim solutions to transit disputes. It is provided a specialised conciliation mechanism for transit disputes, allowing for a faster and less formal procedure. Conciliation, or amicable settlement, is a process in which the parties submit disputes to a commission who will identify the disputed issues, put forward advices and reports and endeavor to settle the disputes. With its relative flexibility and quickness, conciliation is especially suitable for complicated multilateral disputes, such as disputes on transnational energy pipelines. So the ECT provides a Specialized Conciliation Mechanism to settle disputes over transnational energy pipelines.

By virtue of article 7(7) any CP's involved in a dispute relating to existing transit may refer the matter to the Secretary General of the Treaty Secretariat. The emphasis of the special procedure is clearly on expediency - the Secretary General then has a thirty day period within which to appoint a conciliator to resolve the dispute referred.

The conciliator's role is to act as a vehicle through which the disputing parties can craft their own negotiated resolution to their impasse. If, however, no agreed resolution is forthcoming within 90 days of the conciliator's appointment, then by virtue of Article 7 (7) (c) and (d) must then recommend an interim solution, including tariffs, terms and conditions to be applied which the parties are bound to adhere to for
at least a period of 12 months or earlier if the matter can be resolved by some other means.

As Fatouros (1998, p 8) has asserted, "[t]he...procedure...must be seen to be a major achievement. One should take into account that this is the first arrangement for an international dispute resolution procedure concerning disputes over transit of energy materials". Despite such sentiments, however, the fast-track procedure articulated in Article 7(7) is one which this writer approaches with a combination of discomfort and allure. Clearly the major benefit of the new procedure is that States will no longer be able to disrupt the continuance of transit through their territory at the time of a dispute and moreover, utilise that spectre as a means to move the goal-posts and extort a greater amount of remuneration from those seeking to transport energy through their territory. The conciliation procedure and twelve month period within which the interim award of the conciliator must be adhered to provides a window of opportunity within which disputing parties may be able to craft a resolution to what are often deeply entrenched political impasses.

Some of the main difficulties with the conciliation procedure may emanate, however, from the fact that if no consensual agreement can be reached, the conciliator, hitherto a non-adjudicative neutral, dons a new hat and acts in a judicial manner. It should be noted that there is, however, a clear distinction between the respective roles of the conciliator and the adjudicator. This flows from the fact that whereas the essence of adjudication is founded on adherence to legal norms, conciliation is no more than a quasi-judicial process based primarily on maximisation of mutual political interests. The scope for the success of such non-adjudicative forms of dispute resolution is to a great degree predicated on the candour of the parties to the proceedings and in particular, information flows to and from the conciliator. Parties, aware that sensitive information tendered to the conciliator may be used against them in a subsequent interim award, may find that `the shadow of the law' stifles their candour. The scope therefore for a facilitated settlement may be reduced.6

Against this backdrop, the question remains as to what will occur after a 12 month period has lapsed and no agreement has been reached. At this stage it seems clear that

the transit State's obligations to adhere to the interim solution imposed and continue the flow of transit cease to exist. What options remain seem to be one of academic debate and dissension. Whereas writers such as Walde & Andrews/Speed (1996) have asserted that at this juncture the general State/investor and State/State dispute resolution procedures enshrined in articles 26 and 27 respectively can be invoked, others have eschewed this notion and taken the view that the only remaining course of action is to recommence the Article 7(7) procedures - which hardly seems a satisfactory solution (Fatouros 1998, p 8).

Furthermore, as Bamberger (1996) has pointed out, given the political sensitivities which imbue this intractable area, much ambiguity concerning these provisions remain. In particular, the relationship between the Article 7(7) procedures and the ECT's general dispute resolution procedures which can be invoked in relation to new or additional transit remain unclear and unexplored. Moreover, the procedures serve to act as a 'fall back' position once parties have "exhausted all relevant contractual or other dispute resolution remedies previously agreed between the [parties]..." (Article 7(7)). It remains a moot point whether or not they can be invoked by one party in the face of an undesirable settlement by arbitration or other agreed contractual mechanisms. It is trite to remark that this inherent uncertainty surely cannot help raise confidence levels amongst FSU states and prospective investors.

According to Article 7.7 of the ECT, when contracting parties have exhausted “all relevant contractual or other dispute resolution remedies previously agreed”. There are exceptions to the Energy Charter Treaty obligations, set out in Article 24 of the Treaty. None of the exception provisions directly deal with the facts allegedly underpinning the January 2009 crisis so it is unclear if they would be applicable and how. Articles 7(6) and 7(7) are clearly directly relevant to the state of affairs which arose in the January 2009 crisis. 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

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7 Graham, C. Energy Dispute Resolution: Investment Protections, Transit and the Energy Charter Treaty
summarizing the matters in dispute. The Secretary-General shall notify all Contracting Parties of any such referral. (b) Within 30 days of receipt of such a notification, the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned. (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved. (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator’s decision or until resolution of the dispute, whichever is earlier. (e) Notwithstanding subparagraph (b) the Secretary-General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute. (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

Article 7(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.

Article 7(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).
Connection with GATT Article V

Jackson and others criticise GATT Article V on the grounds that it provides a general regime that permits divergent interpretations. Bamberger suggests that it is ‘one of the less successful GATT articles’. In the Doha negotiations for Trade Facilitation, some WTO members have suggested that GATT Article V is not detailed enough and as a result the terms for transit often have to be determined on a bilateral basis, which causes incoherence. There are complexities regarding: 1. the definition of ‘traffic in transit’; 2. the standards of access; and 3. the treatment of ‘traffic in transit’. The complexities might be resolved through interpretations of the Panel or Appellate Body or through the Doha Round of negotiations. This section of the article considers how GATT Article V as interpreted in the Colombia – Ports of Entry case applies to energy transit via fixed infrastructure. It begins with an examination of that decision and then discusses the energy transit proposals that are being discussed at the Doha negotiations on Trade Facilitation as well as the relationship of GATT and GATS. It will explore the definition of the term ‘traffic in transit’, the specific standards of treatment of energy transit under GATT Article V and the proposed provisions in the Doha Round of negotiations, notably those dealing with access to capacity, transit tariffs and general regulatory treatment as well as congestion management.

With respect to ‘Freedom of Transit’ it follows that: 1. Goods … , and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, … , is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”. 2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport. 3. Any contracting party may require that...
traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered. 4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic. 5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country. 6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party.

It has to be recognized that in order to achieve freedom of transit GATT Article V prescribes two main obligations: (1) not to hinder transit and (2) to accord MFN treatment to ‘traffic in transit’, ie the obligation not to discriminate. The article will first discuss GATT Article V(2), first sentence, which establishes that there shall be freedom of transit via the most convenient routes for international transit. Secondly, the articles examines the non-discrimination duty and MFN treatment established in GATT Article V(2), second sentence and GATT Article V(5) respectively. Thirdly, the article will discuss the obligations in GATT Article V(3) and (4). Freedom of transit is available on ‘routes convenient for international transit’. There are three elements of uncertainty here: 1. ‘International transit’ and how does it differ from plain ‘transit’. 2. Who defines the routes that are convenient for ‘international transit’. 3. The measure of convenience. A referral to convenience of transit either with respect to the requesting state or for a community of states (WTO or non-WTO members) or the convenience of the transit state. It has been argued that the transit state is to determine the ‘most convenient route’. Some delegations at the Doha Round negotiations suggest that this is not a unilateral choice, but rather a bilateral
issue to be determined between the transit state and the state requesting transit. From a practical point of view, a transit state ‘cannot always be aware of what the most convenient route would be for a given economic operator’. Another possibility is that the reference to ‘routes convenient for international transit’ could mean that transit states are able to conclude that there exist more or less convenient routes in the territories of other members or non-members. However, this suggestion may undermine freedom of transit and seems inconsistent with the individual and synallagmatic nature of party obligations under GATT. According to the Panel, the clause ‘via routes most convenient for international transit’ limits the basic freedom. The Panel concluded that ‘[r]easonably, … a member is not required to guarantee transport on necessarily any or all routes in its territory, but only the ones ‘most convenient. for transport through its territory’ (emphasis added). It seems reasonable to confine the analysis to transport through the territory of the transit state. Furthermore, convenient routes have to be relevant to ‘traffic in transit’. Indeed, the transit state is not obliged to allow entry in its territory on any or all routes. But the Panel does not specify who defines convenience or the measure of convenience. By failing to do so and by referring to the clause as a ‘limiting condition on the obligation to provide free transit’, the Panel implies that the transit state will determine convenience at its discretion. Given that fixed infrastructure is the ‘route’ (and indeed a specific permanent route) it is problematic to apply the criterion of convenience to energy transit via fixed infrastructure. As explained already, GATT Article V does not establish an obligation to construct or allow the construction of new pipelines and grids. It only allows transit via existing infrastructure. But not all existing pipelines in a transit state are convenient for energy transit. Convenience greatly depends on the geographical position of the consumer and the producer. Electricity is transported only via grids. Hence, any existing grid might be convenient merely by virtue of its existence. But this does not necessarily mean that it will be commercially feasible in all cases. The same goes for oil and gas if transported by pipelines. The concept of convenience is not confined to geographical concerns in the context of fixed infrastructure. Pipelines have a specific capacity. If an existing pipeline is used for domestic or transit transport and it could conceivably be used for additional transit purposes, issues of congestion management and allocation of available capacity arise.

Inevitably, these factors need to be taken into account when determining convenience. Public international law distinguishes between entry and the treatment of aliens and foreign property. GATT Article V makes no reference to this. The Panel found that GATT Article V(2), second sentence ‘prohibits Members from making distinctions in the treatment of goods …’ and concluded that GATT Article V(2), second sentence ‘requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit’. ‘Level of access’ implies the level of entry in order to proceed to ‘traffic in transit’, while ‘conditions when proceeding in international transit’ can be understood as treatment of ‘traffic in transit’. This would mean that GATT Article V covers both access to the territory and treatment while in the territory. Applied to fixed infrastructure, this creates an obligation to allow access to pipelines or grids – when these are most convenient routes – on a non-discriminatory basis. However, ‘identical level of access’ cannot apply in relation to energy transit via fixed infrastructure given capacity issues. In order to ensure identical levels of access the operator would have to allocate capacity to all producers or owners of oil/gas requesting access to the infrastructure, which implies mandatory third party access (TPA) to pipelines. Yet it cannot be suggested that GATT Article V provides mandatory TPA, neither does ECT Article 7. Another way to ensure non-discriminatory – but still non-identical – levels of access could be through construction of new capacity. But although GATT Article V covers ‘traffic in transit’ via fixed infrastructure, it does not oblige transit states to construct or permit the construction of new fixed infrastructure. In sum, there are limits to the duty to provide a nondiscriminatory (and a physically identical) level of access for energy goods via fixed infrastructure under GATT Article V. The only way to apply the Panel’s finding to carriage via fixed infrastructure is to interpret ‘identical level of access’ as requiring the transit state to establish a procedure to allow the owners of goods identical possibilities to access the infrastructure. This idea, underpinned by the principle of transparency, is central to the Energy Charter process. We can now turn to the phrase ‘conditions when proceeding in international transit’. In the context of fixed infrastructure this must be interpreted as referring to transit transport tariffs. But such tariffs cannot be monetarily equal, because they depend on several factors, inter

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alia, geographical parameters, pipeline design parameters and actual utilisation, financing costs, ownership of the pipeline (public versus private) ‘customised’ (ie, negotiated) rates and on whether the pipeline is used purely for transit or whether it is used for domestic transport and transit. The ‘equal conditions’ standard only makes sense for pipeline tariffs if these parameters and circumstances are to be taken into consideration when measuring equality. The note annexed to GATT Article V(5) supports this interpretation: ‘With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.’ Although the note is explanatory to a clause that is framed in MFN terms, GATT Article V(2) might be subject to the same standard, despite the fact that the Panel was silent on this point. Such an interpretation would again be consistent with the standards established in the draft Transit Protocol and the ECT that tariffs be ‘objective, reasonable, transparent and nondiscriminatory’ (Article 10 of the draft Transit Protocol), rather than ‘equal’. This standard clearly accommodates the specific circumstances of the route and the infrastructure. GATT Article V(3) prohibits unnecessary delays or restrictions. All custom duties and transit duties or other charges in respect of transit are prohibited, except for charges for transport and for administrative expenses entailed by transit or cost of services rendered. Furthermore, GATT Article V(4) requires that all charges and regulations (which must include tariffs) should be reasonable having regard to the conditions of the traffic. The difficulty here is that necessity and reasonableness are both open-textured standards that can only be judged on a case-by-case basis. While this allows adaptability to deal with different circumstances, it opens the door to disputes, delay and inconsistency in application as well and creates opportunities for what might be criticised as ‘judicial activism’. WTO Panels and the Appellate Body have dealt with the principles of necessity, reasonableness and proportionality in different contexts, but not with respect to GATT Article V. It may be possible to draw useful analogies from this experience but such discussion falls outside the scope of this article.

It is difficult to apply the Panel’s conclusions to the conditions of energy transit transport via fixed infrastructure. The convenience of existing routes (fixed infrastructure) depends on special factors: not only geographical considerations (including the geographical position of the producer and the consumer, as well as the geographical position of the producing field), but also questions of commercial
feasibility and the capacity of a given infrastructure. The finding that the standard of entry is ‘identical level of access’ and that the standard of treatment is ‘equal conditions’ are both physically and economically problematic in the energy transit context. The only way for these standards to have reasonable application in the energy sector would be to interpret them in light of the standards of the ECT and the draft Transit Protocol.

Conclusion

The aim of the Treaty is to establish a legal framework to promote long-term cooperation in the energy sector based on the principles enshrined in the European Energy Charter. The key provisions of the Treaty concern the protection of investment, trade in energy materials and products, transit and dispute settlement. As regards completed investments, Contracting Parties must promote and create stable, favourable and transparent conditions for foreign investors and apply the most-favoured nation principle or offer the same treatment that is given to national investors, whichever arrangement is the most favourable. However, for pre-investments the principle of national treatment will be applied in two stages. In accordance with the Treaty, the first stage is to apply the "best efforts" clause. Then, and subject to the conditions to be defined in a supplementary treaty (currently under negotiation), it will become legally binding to offer national treatment regarding investments. Trade in energy materials and products between Contracting Parties is governed by the GATT rules. This means that the signatories to the Treaty must apply the GATT rules on trading energy materials and products even if they are not members of the WTO or GATT. Regarding transit, each party must take the necessary steps to facilitate the transit of energy materials and products in line with the principle of free transit without distinction made on the origin, destination or ownership of such energy materials or products, nor discriminatory pricing on the basis of these distinctions, and without imposing delays, restrictions or unreasonable taxation. All parties undertake to ensure that the provisions on the transit of energy materials and products and the use of energy transit equipment treat energy materials and products in transit in a manner that is no less favourable than that regarding materials and products originating in their area, save where otherwise provided in an international
agreement. The transit of energy materials and products of energy materials and products may not be interrupted or reduced in the case of a dispute on transit arrangements before the relevant dispute settlement procedures have been followed. Other provisions prevent countries through which energy materials and products transit from opposing the creation of new capacity. The Treaty provides for strict procedures for settling disputes either between countries or between private investors and the state in which the investment has been made. In the case of a dispute between an investor and a country, the investor may decide to submit the dispute to international arbitration. In the case of a dispute between countries, and if diplomacy is unsuccessful, an ad hoc arbitration tribunal may be set up. The settlement solutions provided by these mechanisms are binding.
Reference List

In the reference list are listed a couple of supplementary bibliographical sources which founded among others the basis of this research.

- Azaria, D. *Energy Transit under the Energy Charter Treaty and GATT*
- Belyi, A. & Klaus, U, *Russia’s Gas Exports and Transit Dispute Resolution under the ECT*
- Cameron, P. *International Energy Investment Law: The pursuit of Stability*
- Creti, A. *The economics of Natural Gas Storage*, (Milan, Italy: Bocconi University and IEFE, 2009)
- Ellman, M. *Russia’s Oil and Natural Gas*, (UK and USA: Anthem Press, 2006)
- Graham, C. *Energy Dispute Resolution: Investment Protection. Transit and the ECT*
- Heiskanen, V. *The Regulatory Philosophy of International Trade Law*
- Lauterpacht, E. *Freedom of Transit in International Law*
- Lothar Ehring, Yulia Selivanova, “Energy Transit, Chapter 2, Regulation of Energy in International Trade Law. WTO, NAFTA and Energy Charter (Global Trade Law Series)"
- Muchlinski, P. *The Energy Charter Treaty Towards and New International Order for Trade and Investment or a Case of History Repeating Itself*
- Nychay, N. *Interpretation of Article 7(3) of the Energy Charter Treaty*
- Roggenkamp, M. *Transit of Network-bound Energy: The European Experience*
- Saunders, O. ‘*Energy, Natural Resources and the Canada-United States Free Trade Agreement’*
- Shtilkind, T. *Energy Charter Treaty: a critical Russian perspective*
- Waern, K. *Transit Provisions of the ECT and the Transit Protocol*
The Energy Charter Treaty’s existing transit provisions oblige its Contracting Parties to facilitate the transit of energy on a non-discriminatory basis consistent with the principle of freedom of transit. This is a critical issue for the collective energy security of the Charter’s Signatory states, since energy resources are increasingly being transported across multiple national boundaries on their way from producer to consumer. For this reason, the Charter’s participating states have looked to enhance the Treaty’s provisions on transit through the elaboration of a Transit Protocol, on which formal negotiations commenced in early 2000. This item remains under discussion. The Transit Protocol’s aim is to develop a regime of commonly-accepted operative principles covering transit flows of energy resources, both hydrocarbons and electricity, crossing at least two national boundaries, designed to ensure the security and non-interruption of transit. The Energy Charter Conference approved in 1998 a set of rules of procedure for the conduct of conciliation during disputes over matters of energy transit. The Conference also took positive note in 2003 of the first edition of Model Agreements on Cross-Border Pipelines, prepared on the basis of a mandate from the Conference in 1999. All of these documents are available on the Energy Charter’s web site (www.encharter.org).
ANNEX II

ARTICLE 7

(1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges. (2) Contracting Parties shall encourage relevant entities to co-operate in: (a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products; (b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party; (c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products; (d) facilitating the interconnection of Energy Transport Facilities.

(3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

(4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1). (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.

(6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator’s decision.

(7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute: (a) A Contracting Party party to the dispute may refer it to the Secretary-General by a notification summarizing the matters in dispute. The Secretary-General shall notify all Contracting Parties of any such referral. (b) Within 30 days of receipt of such a notification, the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned. (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved. (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator’s decision or until resolution of the dispute, whichever is earlier. (e) Notwithstanding subparagraph (b) the Secretary-General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute. (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

(8) Nothing in this Article shall derogate from a Contracting Party’s rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.

(9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under
this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4).

(10) For the purposes of this Article:

(a) “Transit” means (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.

(b) “Energy Transport Facilities” consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.
ANNEX III

ENERGY MATERIALS AND PRODUCTS
(IN ACCORDANCE WITH ARTICLE 1(4) )

Nuclear energy

26.12 Uranium or thorium ores and concentrates.
   26.12.10 Uranium ores and concentrates.
   26.12.20 Thorium ores and concentrates.

28.44 Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.
   28.44.10 Natural uranium and its compounds.
   28.44.20 Uranium enriched in U235 and its compounds; plutonium and its compounds.
   28.44.30 Uranium depleted in U235 and its compounds; thorium and its compounds.
   28.44.40 Radioactive elements and isotopes and radioactive compounds other than
   28.44.10, 28.44.20 or 28.44.30.
   28.44.50 Spent (irradiated) fuel elements (cartridges) of nuclear reactors.
   28.45.10 Heavy water (deuterium oxide).

Coal, Natural Gas, Petroleum and Petroleum Products, Electrical Energy
27.01 Coal, briquettes, ovoids and similar solid fuels manufactured from coal.

27.02 Lignite, whether or not agglomerated excluding jet.

27.03 Peat (including peat litter), whether or not agglomerated.

27.04 Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon.

27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.

27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.

27.07 Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents (e.g., benzole, toluole, xylole, naphtalene, other aromatic hydrocarbon mixtures, phenols, creosote oils and others).

27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars.

27.09 Petroleum oils and oils obtained from bituminous minerals, crude.

27.10 Petroleum oils and oils obtained from bituminous minerals, other than crude.

27.11 Liquified petroleum gases and other gaseous hydrocarbons

- natural gas

- propane

- butanes

- ethylene, propylene, butylene and butadiene (27.11.14)

- other

In gaseous state:

- natural gas

- other
27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.

27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks.

27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (e.g., bituminous mastics, cut-backs).

27.16 Electrical energy.

**Other Energy**

44.01.10 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms.

44.02 Charcoal (including charcoal from shells or nuts), whether or not agglomerated.