Transit Energy Group 5

A. General Concept
The most common and understood definition of transit http://dictionary.reference.com/browse/transit is:

1. The act or fact of passing across or through; passage from one place to another.
2. Conveyance or transportation from one place to another, as of persons or goods, especially, local public transportation: city transit.

The foundation of the concept is constructed from the concept of movement, more specifically the idea from passing.

B. Introduction
According to its legal definition, transit can be seen in the sense of the second proposition, as the passage or conveyance of goods or people. Transit has been of central importance since the creation of the nation state. The inevitable interaction between states requires international cooperation. Danae Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade p.561 There is a possibility of legal repercussions when goods or persons are passing by different States because of the varying laws and regulations on trade from state to state.

In order to avoid legal complications the States made Treaties and agreements. The Treaties gave a guarantee that all similar cases will be treated equally between Member States. These ideologies provided the foundation for the European Union.

It is said that energy is at the core of economic and social activity in industrialized countries. It is essential for the modern life. Energy costs affect industries and the cost of living of citizens, notably because of the impact of energy prices on transport cost and heating. In order to maintain the supply of energy it is necessary for Europe to buy energy from the countries with resources. There are many different levels of dependence on gas supply between the countries of the EU. The biggest gas supplier is Russia, nevertheless as a consequence of the infrastructure of the pipelines the gas passes by Ukraine. In January 2006 there was a big problem with the gas supply between these countries. Jonathan Stern, The Russian-Ukrainian gas crisis of January 2006. Based on this and other complications, the importance of a clear regulation became obvious.

C. Legal Framework
In response to these concerns, the General Agreement on Tariffs and Trade (GATT) was signed in 1947 and entered into force in 1948. There is also the Energy Charted signed in 1991 as a political declaration of principles and finally the legally-binding treaty was signed in 1994 and came into force in 1998. http://www.wto.org/

The GATT is a multilateral agreement. It was negotiated during the UN Conference on Trade and Employment. The original GATT text is still in effect under the WTO framework, subject to the modifications of GATT 1994.

The function of EC-T is to complement the GATT. But seems to be insufficient in the international energy trade since the most important clauses e.g the access to the grid, the establishment of new infrastructure and the abolish of distortions into the market are promoting non obligation dispositions.

The Energy Charter Conference, held in Istanbul on 7 December 2007, recalled the importance of transparent, non-discriminatory and operational legal frameworks for energy transit, for the benefit of consumers, producers and transit countries. http://www.encharter.org/index.php?id=37

It must be noted that the GATT does not have a section related to energy. Nevertheless, it is the best solution to assume that both regulations are in the matter of transit of energy. But until a clear legal framework sets regulations, this subject is going to be open for debate.

D. Relevance of article V GATT and article 7 EC-T for transit of energy. Annex I
As explained before, these two articles are important interconnected regulations in the international field of energy transit. In the opposite sense a further lecture to Danae Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade. It is to be assumed that there is a hierarchical relationship between the two instruments; that the EC-T has to abide by GATT, which constantly influences the application and interpretation of the former. The preparatory works of the ECT confirm this proposition. As it is explained in Danae Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade p. 560

A comparison of both articles can lead to the conclusion that article 7 ET-C put more emphasis in the principle of State sovereignty then freedom of transit, and that seems to be the aim of the Energy Charter. These can be noted in the grammatical expression of both articles Thomas W. Waelde. The Energy Charter Treaty: an east-west gateway for investment and trade.: GATT Art 5: “2. There shall be freedom of transit...”

ET-C Art 7: “Each Contracting Party shall take the necessary measures to facilitate...”

The first question that comes into the mind in article V GATT is if energy can be considered either good or service. The differences the distinction between energy types and goods and services turns on storability. Consider electricity as a good is controversial because it cannot be "stored". Nevertheless, the concept of “commodity” placed into the concept of good. The article does not include or exclude the energy. It is clear that energy is included into the scope of article V and these seems to be the intention of the parties, however this can be questioned. The article 7 ET-C applies directly to energy transit.

The other issues in article V arise regarding: (i) the definition of 'traffic in transit', (ii) the standards of access; and (iii) the treatment of 'traffic in transit'.

It is important to mention that article V regarding the freedom of transit establish the principle of most favored nation. An analysis of Article 7 EC-T will suggest a more precise definition of transit than that contained in GATT Article V. The definition focuses on 'carriage' and avoids mention of the infrastructure and means of transport used for carriage. Danae Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade p.579.

The article is one of the most important articles regarding transit of energy. The articles include the principle of most favored nation (3) and some important exceptions to this concept. Also contain the no obligation to establish new infrastructure (4), energy transport
facilities (4) and exceptions to transit obligations (5).

E. Conclusion

Article V GATT and article 7 ET-C are the basis of energy trade in the international field. A correct interpretation overall give the principles of energy free transit. However, the interpretation of both articles is not easy. Moreover, the regulations are not transparent enough. The energy security requires clearer rules. That is the reason from divergent opinions in this subject. One of the issues is e.g. the ECT and GATT does not have the same contracting parties Danae Azaria, Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade p. 588 or the problems concern "fixed infrastructure" and the storage of electricity.

With the aforementioned problems set aside, it is more convincing to interpret both articles in a hierarchical relationship. This solution will favor the international trade of energy while new regulations are expected.

F. Annex I

GATT

The Article V "Freedom of transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting part when the passage across the territory of a contracting part when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey begging 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. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)."

The EC-T

Article 7

Transit

(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).

16 (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, or 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

- 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

- 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.