

SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 7

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ARTICLE 7(6) AND (7) OF THE ENERGY CHARTER TREATY Conciliation in the Case of Interruption or Reduction of Transit

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INTRODUCTION

1. This note provides a brief legal overview of paragraphs (6) and (7) of Article 7 of the Energy Charter Treaty (“ECT”). The main aim of this note is to explain the circumstances under which conciliation mechanism set out in paragraph (7) of the Article may apply.
2. It should be noted at the outset that paragraphs (6) and (7) should be read in conjunction with the last paragraph of Article 7(5) which reads as follows:

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.

3. Article 7(5) provides the context in which paragraphs (6) and (7) must be read and interpreted, that being the security of established flows of Energy Materials and Products (“EMP”).

ARTICLE 7(6)

4. Article 7(6) provides for the obligation that, in the event of a transit dispute, a Contracting Party “shall not [...] prior to the conclusion of the dispute resolution procedures set out in paragraph (7)”:
 - a. interrupt or reduce established transit in connection with which the dispute has arisen; or
 - b. require or permit entities within its jurisdiction or under its control to interrupt or reduce such transit.

5. There are, however, three explicit exceptions to this obligation, i.e. the interruption or reduction:
 - a. is specifically provided for in a contract; or
 - b. is permitted in other agreement governing the transit in question; or
 - c. is permitted in accordance with the conciliator's decision.
6. It is imperative to note that the crucial point in the context of paragraph (6) is that in the event of a dispute arising in connection with transit, such transit shall not be interrupted or reduced before the dispute resolution procedures set out in paragraph (7) have been concluded.

ARTICLE 7(7)

7. Paragraph (7) as a whole deals with three main issues: first, the conditions under which the conciliation mechanism will be invoked and operate; second, procedural issues concerning the conciliation mechanism; and thirdly, the conciliator's function and powers.

The chapeau of paragraph (7)

8. The chapeau of this paragraph for the circumstances under which the conciliation mechanism set out in sub-paragraphs (a) – (f) may be invoked.¹ It provides that the conciliation mechanism may be invoked only if all previously agreed dispute settlement procedures between the disputing parties over any transit matter have been exhausted. This implies that, at the time the conciliation mechanism is invoked, the transit dispute in question is still unresolved, in which event it is not permitted to interrupt or reduce the flow of EMP in Transit.² It is also worth mentioning that what also follows from paragraphs (6) and (7) is that, if a transit dispute has been resolved by “relevant contractual or other dispute resolution remedies previously agreed” upon between the disputing parties, there is no dispute anymore, and thus the conciliation mechanism will not be triggered.

Relationship between Article 7(6) – (7) and Article 27 of the ECT

¹ At the moment of writing, the dispute resolution procedures set out in Article 7(7) have not yet been tested.

² For definition of “Transit”, please see Article 7(10) of the ECT.

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9. In this connection the question has arisen as to whether Article 27 of the ECT (Settlement of Disputes between Contracting Parties) provides for a previously agreed dispute mechanism and, if so, what is the relationship between it and the conciliations mechanism in Article 7.
10. Even though the dispute settlement mechanism under Article 27 falls within the scope of a previously agreed dispute mechanism, it has to be relevant to the transit dispute in question. In other words, Article 27 provides for a dispute settlement mechanism for disputes between Contracting Parties arising only under the ECT. Disputes between entities of Contracting Parties arising under any other agreements or contracts will, therefore, fall outside the ambit of Article 27.
11. The inter-relation between Articles 7(6) – (7) and 27 may be explained by two hypothetical examples:
 - a. A Contracting Party to the ECT brings a claim under Article 27 against another Contracting Party (through which Area³ EMP transit) for breaching ECT obligations under Article 7(1). The latter Contracting Party is, according to Article 7(6), under an obligation not to interrupt or reduce the flow.
 - b. A *Transit* Contracting Party may, under Article 27, seek permission to interrupt the existing flow on the grounds that the other Contracting Party, involved in transiting EMP, is in breach of ECT obligation(s). In this case, the *Transit* Contracting Party may not interrupt or reduce the flow, unless it is sanctioned by the ad hoc arbitral tribunal, established under Article 27. If, for whatever reason, the arbitral tribunal sanctions an interruption or reduction the EMP flow, there will be no place for the conciliation mechanism because Article 27(3)(h) stipulates that “[t]he arbitral award shall be final and binding upon the Contracting Parties parties to the dispute.”

Conciliator’s Functions

12. According to Article 7(7)(c), a conciliator⁴ has the following functions:
 - a. To seek the agreement of the parties to the dispute to a resolution therefore; or to seek their agreement upon a procedure to achieve such resolution.

³ For definition of “Area”, please see Article 1(10) of the ECT.

⁴ Appointed by the Secretary-General, in consultation with the parties to the dispute and the other Contracting Parties concerned, pursuant to Article 7(7)(b).

- b. Failing to secure such agreement within 90 days of his appointment, the conciliator shall recommend a resolution to the dispute or a procedure to achieve such resolution.
13. In the latter case, however, the conciliator has to also “decide the interim tariffs and other terms and conditions to be observed for [the continuation of] Transit [...] until the dispute is resolved”.
14. Three points are noteworthy with regard to sub-paragraph 7(c). First, it is clear that the transit dispute in questions has not yet been resolved through the procedures indicated in the chapeau of Article 7(7). Second, the conciliator must seek the agreement of the disputing parties to resolve the dispute or agree upon a procedure to resolve it. Failing such agreement, the conciliator shall recommend a resolution to the dispute, or recommend a procedure to achieve such resolution. Thirds, in addition to the conciliator’s recommendation(s), she/he shall decide what interim tariffs are to be paid and other conditions to be observed for the non-interruption or reduction of the flow of the EMP until the dispute is resolved. Therefore, the main function of the conciliator is to ensure that the existing flow of EMP remains uninterrupted in the case of a transit dispute that has not been resolved.

Obligation to Observe the Conciliator’s Decision

15. Article 7(7)(d) stipulates that “[t]he Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision [made by the conciliator] 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.”

CONCLUSIONS

16. The above brief summary warrants the following conclusions:
 - a. Article 7(6) of the ECT provides for the obligation that, subject to three exceptions, Contracting Parties shall not interrupt or reduce or allow the interruption or reduction of existing transit.
 - b. The conciliation mechanism set out in Article 7(6) – (7) is available only when the dispute has not been resolved by a previously agreed dispute resolution mechanism.

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Conversely, if a dispute has been resolved by “relevant contractual or other dispute resolution remedies previously agreed” between the disputing parties, the conciliation mechanism may not be invoked to overturn such a decision.

- c. The conciliator is not empowered to permit continuation of EMP flow if, for instance, a relevant arbitral tribunal has already decided that the interruption or reduction of Transit is legally permitted.
- d. One of the conciliator’s main functions is to ensure the non-interruption or reduction of the flow of EMP in Transit while the dispute remains unresolved. In this case, the conciliator, in addition to making *recommendations* for the resolution of the dispute shall decide on interim tariffs for the continuation of the uninterrupted flow until the dispute is resolved.

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