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Comments:

EUROPEAN ENERGY CHARTER CONFERENCE SECRETARIAT
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Washington, D.C. 20520



August 10, 1994

~~Craig Bamberger, Esquire~~  
Chairman  
Legal Subgroup  
Conference on the  
European Energy Charter.

Dear Craig:

This letter is in response to your request for our views on the August 3 draft Legal Subgroup report on Article 21(2) of the Treaty, concerning "sovereignty over energy resources".

The draft report well states, on page 4, the core difficulty with Article 21(2), namely, its potential "to conflict with and possibly override other provisions of the ECT, if in their application those other provisions would 'affect the rules in Contracting Parties governing the system of property ownership of energy resources.'" Indeed, on its face, Article 21(2) offers an opportunity for a party to the Treaty to seek to avoid any of its obligations under the Treaty insofar as adherence to those obligations may be said to "affect" those domestic rules. There is no way, it seems to me, to escape that conclusion.

We can go along with your list of possible "conflict points" involving specific ECT articles, so long as it is clear that any such list could at best be illustrative only. In our view there is no way to predict with confidence the potential universe of applications of Article 21(2). In this regard it is necessary not only to identify those provisions of the ECT that might be considered as proper subjects of Article 21(2), but also to take into account that Article 21(2) could also be invoked improperly to interfere with the enjoyment of ECT rights and benefits.

The latter point deserves some emphasis. From an investment perspective, the problem is not simply whether the invocation of Article 21(2) in a given case could or could not be successfully challenged before an arbitral tribunal. A potential investor is likely to be equally concerned that Article 21(2) exists to be invoked at all, thereby confronting the investor with the dismal choice of acquiescing in maltreatment, or resorting to time-consuming and expensive dispute settlement mechanisms in order to test the validity of that treatment under the Treaty.

Such a danger might be tolerable were the text of Article 21(2) sufficiently clear to permit a reliable assessment of its scope. I think that there is general agreement among the great majority of the Legal Subgroup participants that that clarity is lacking. Indeed, the fact of wide differences within the Legal Subgroup over the impact of Article 21(2) on the rest of the ECT suggests, in and of itself, the potential for serious problems. I have to add in this connection that it simply doesn't do for a country (or group of countries) to assert that because it knows what it thinks Article 21(2) means for it, the article presents no problems and no voice to the contrary should be heard. Such an approach neither effectively disposes of alternative interpretations that are equally plausible on the language of the article, nor addresses the problem of parties whose "rules governing the system of property ownership of energy resources" may not meet international law standards.

We consider, moreover, that this problem is evident from the face of Article 21(2), and ought not to be presented as if it followed as a conclusion from material (such as Article 222 of the Treaty of Rome) the relationship of which to the negotiating record of the ECT is, to say the least, problematic. The difficulties ordinarily associated with the use of the travaux to a treaty are here exacerbated by the relative absence of any useful travaux at all: The present Article 21 was proposed in the final hours of the June plenary, and adopted summarily, over objection, and with little, or no, opportunity for meaningful debate or the development of other evidence showing a contemporaneous understanding of the Conference as to what it thought it was doing. Thus, based on the negotiating record to date, the linkage between Article 21(2) and Article 222 of the Treaty of Rome seems coincidental at best.

In any case, we share the concern over the language variance between the two texts--a variation that might even have greater implications if Article 21(2) is taken to have been derived from Article 222. There is the additional problem of invoking one treaty as guidance to the interpretation of another, a problem which is significantly increased when only a minority of the parties to the latter are also parties to, comfortably familiar with, and able ultimately to influence or even control the application and interpretation of, the treaty being invoked. The observations in these respects set out in section III.1.(c) of the draft report are well taken.

An interpretive declaration might assist in removing some of these difficulties, but would nevertheless leave something to be desired. Apart from any question that might be raised as to the propriety of "retroactive" negotiating history, it is hardly satisfactory to have to have recourse to a second document for

the proper interpretation of a treaty provision, where the two appear substantively inconsistent on their face. The preferable approach would be to seek to improve the text of Article 21(2) itself, and while it may not lie within the scope of the present request to the Subgroup to suggest changes to the text of the treaty, it is certainly with the group's inherent authority to indicate the need for such changes if the problems surrounding Article 21(2) cannot be reduced to an acceptable level by lesser means.

Sincerely,



Ted A. Borek  
Assistant Legal Adviser  
Economic, Business and Communications Affairs

cc: Mr. Denis Westerhof