

EUROPEAN ENERGY CHARTER

CONFERENCE SECRETARIAT

Date : 19.7.94

CONFERENCE ON EUROPEAN ENERGY CHARTER

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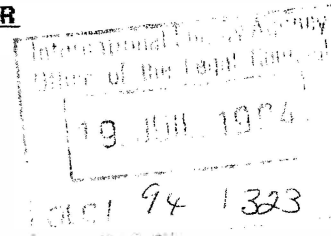
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CHARTER CONFERENCE SECRETARIAT

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N° 3108

Fax from Mr Bamberger dated 16 July 1994
to Mr C.L. Jones

Typed w/o
being
proofed by
CSB

Dear Clive,

Re : Art. 8(6) and (7)

In my opinion Art. 8 is replete with major issues that have not been subject to any serious discussion.

I think an awful lot is being taken for granted about it, that is not supported by its language. I would like to offer a few thoughts that were triggered by the para (7)(f) issue, although that issue is but one small part of a set of larger ones.

Let me begin by pointing to the underlying reason for the LSG's concern about para (7)(f). As we said in our Report, it was because : "paragraphs (6) and (7) can result in the suspension of a prospective supply interruption while dispute resolution is pending, and... paragraph (7)(c) gives the Secretary General no choice but to set a conciliation in motion ..." In other words, the system is non-discretionary and inflexible, para (7)(f) would be yet another rule added onto this automatic scheme.

However, nothing in Art.8 or elsewhere in the ECT insulates paras (6) and (7) from the Art. 31 dispute settlement procedures. And in order for the "non-disruption" mandate of para (6) and the procedures of para (7) to apply, the "dispute" must be one that is within the scope of para (6). That is, it must be a "dispute over [a] matter arising from [the] Transit". This, in turn, requires that the subject matter fall within the Art. 8(10)(a) definition of "Transit," which is based on the terms "originating in," "destined for," "carriage of," and "Area of," each of which can raise a number of issues. Other important terms used in Art. 8(6) or (7) that require interpretation include "dispute" and "resolved".

Before going forward with my argument, let me take a bit of space to discuss these terms that are used in Art.8.

Terms used in Art.8

- (1) "Originating in". This is a familiar concept in trade treaties, including the GATT, and it generally has been applied to mean that the goods must be the "products of" a country as distinguished from their "coming [directly] from" that country, although sometimes the two interpretations merge because of processing in the country that they directly "come from". Under the GATT each importing country is allowed to determine "origin" according to its own rules. Two frequently used approaches are the "substantial transformation" principle and the "value added" (or "percentage-value") technique. In the US-Canada FTA (and, I believe, subsequently in the NAFTA) a different approach was adopted, based in the first instance on whether the goods move into a new Harmonized System Customs category (such as the items listed in Annex EM) in a country. The WTO Agreement contains an "Agreement on Rules of Origin," aimed at

harmonization. But there is nothing in Article 8 or elsewhere in the ECT to indicate for ECT purposes what is meant by "originating in" or how its meaning is to be established, especially as concerns the first definition of "Transit" at Art.10(a)(i).

- (2) "Destined for". This concept also is used in GATT, as for example in the article XI(1) prohibition on restrictions on exportation of products "destined for the territory of" another GATT party; similarly, art.V on "Freedom of Transit" speaks (in 11(2)) of transit "to ... the territory of" other parties, and forbids distinctions based on "destination". I do not personally have much experience with the "destination" concept, but it's my understanding that the term refers to the ultimate destination (rather than to the next country the goods will pass through), and that a substantial amount of technical work has been done both within and outside of the GATT with regard to how the destination is to be documented. Again, I find nothing in Art.8 or elsewhere in the ECT that defines "destined for" for purposes of the ECT, especially in the context of the Art.10(a)(i) definition.
- (3) "Area of". Without wishing to pursue the point, I do want to note that the application of the "originating in" concept and possibly of the "destined for" concept can be further complicated by the fact that "Area" does not have the same meaning as "customs territory" (the concept used in the GATT) and ~~is~~ ^{will} only by chance ~~be~~ ^{we} coextensive with a particular CP's customs territory, or any other definition of its "territory" used by the CP.
- (4) "Transit" and "a Transit". Although defined, the definition as "the carriage ... of Energy Materials and Products" does not give any sense of whether "the carriage" is limited by time, volume, quality or character of goods (the definition does not even say "an" Energy Material or Product), contractual coverage, or any other criterion.
- (5) "Dispute" and (6) "resolved". I will not repeat previous argument. Suffice it to say that in my opinion the meaning of these terms is open to dispute, and the lack of a clear meaning for all of the other terms mentioned above intersect with these two terms to further cloud their meaning.

How to define the Terms

The meanings of these terms can be left to the Art. 31 arbitrators, but I do not think they have been given much to go on, either in the language of the ECT or, in case that language is found to be ambiguous, in the travaux préparatoires.

An obvious alternative might be for the Charter Conference to provide further definition. But can it do so? There is no express ECT authorization to do so. The explicit power that comes closest to an authorization is probably Art. 39(3)(b) : "facilitate the implementation ... of the provisions of this Treaty ..." This is a less clear authorization than might be wished, and it would not surprise me to hear it argued that the further definition is not merely the implementation of existing provisions, but rather the adoption of new ones that impose substantial obligations other than those a CP had meant to undertake. Treaty amendment could prove necessary.

The Effects on Conciliation

According to Art.31(1) and (2), CPs are to try to settle disputes concerning the application ^{or} interpretation of the ECT through diplomatic channels, and if a dispute isn't settled that way within a reasonable period of time, either party can submit the dispute to an ad hoc tribunal under Art.31.

Art.8(6) says that when a dispute that is within the scope of that para arises, the CP of the Transit state is not to cause or allow the supply interruption except where permitted by an agreement, conciliator's decision, or "other resolution referred to" in (7)(e).*

If the Transit state disagrees with the contention that the dispute is within the scope of para(6) —e.g., because the goods allegedly didn't "originate" in the "Area" of the complaining CP — the complaining CP apparently can follow simultaneously both the Art.31 route and the Art.8(7) route. But at some point the Art.31 panel would render a decision, which might or might not be consistent with the outcome of the conciliation.

I assume that an Art.31 ruling in favor of the Transit state would "resolve" the dispute in the sense of Art.8(7)(d), so that the Art.8(7)(e) undertaking would become inoperative. (Would it however be void ab initio?)

Suppose instead that the complaining state did not immediately pursue Art.31 diplomacy/dispute resolution (in which case, could the Transit state later claim laches?), but did make an Art. 8(7)(b) referral. The para(7)(c) obligation of the Secretary-General is with regard to "such a notification," which refers back "the dispute" in para(7)(b) and in consequence to "a dispute referred to in paragraph (6)" in para(7)(a). Does this mean that the Secretary-General might decline to appoint a conciliator if he agreed with the Transit state's interpretation that the dispute in question is not within the scope of para(6)? If he took that position, the complaining state could presumably resort to Art.31, and in doing so could challenge the Secretary-General's interpretation and seek to instigate the conciliation or alternatively pursue the principal dispute exclusively.

Let us assume, however, that the Secretary-General limits his role to a small "m" ministerial one and initiates the conciliation. May the conciliator examine the jurisdictional question? (There is no mechanism through which he can obtain an advisory opinion.) If he does so and reaches a conclusion, cannot the disagreeing party thereupon initiate an Art.31 proceeding over that conclusion?

Or, suppose that the Transit state declines to conciliate, or alternatively, that it does conciliate and in either case the conciliator agrees with the complaining party and makes the interim decisions provided for in para(7)(d) in a manner contrary to the interests of the Transit state. Presumably, the Transit state could at that point initiate an Art.31 proceeding (unless, in this case, the complaining state could successfully claim laches).

And so, all through the conciliation process there is the potential for collateral litigation, which can have substantive effects that interact with those attributable to the conciliation process. I submit that the likelihood of this litigation is greatly increased by the inflexibility and non-discretionary nature of the Art.8(6)-(7) process.

* However, para(7)(d) simply says "until the dispute is resolved."

The Tie-In with Art. 8(7)(f)

As I said at the beginning, the para (7)(f) issue is but one small part of a set of larger issues. If para (7)(f) reads as a rule, it adds to the litigation risks because its application can be challenged. And if that rule injects and relies upon undefined, debatable notions, it adds all the more to those risks. The questions whether one "dispute" is the same as another one, and whether a "Transit" is the "same" or a "different" Transit, are not going to be easy to resolve. Ironically, the lawyer is warning the client not to establish a scheme that will increase the already high risks of litigiousness associated with this Article.

Best wishes,

Craig

(N° 3098)

Fax from Mr. Bamberger to Clive Jones dated 15 July

Clive,

I believe the LSG lawyers who were present shared the view that the Article 8(7)(f) provision is fundamentally flawed, and creates a serious risk that the conciliation procedures can be misused for dilatory purposes due to the unconditional, nondiscretionary nature of the Article's dispute referral and non-curtailment provisions. The unqualified nature of those provisions requires clarity in subparagraph (f), since it is the only possible exception to them.

I do not believe that your current proposed change moves in the direction of clarifying the meaning of the subparagraph. You say that the only question of relevance is whether the "same transit" is involved and that if "other problems" were involved, they "should have been raised" in the first dispute procedure.

But Article 10(a) does not define "Transit" in a way that allows one to speak meaningfully of the "same" Transit. Under the definition, "Transit" can be anything between the carriage of a single molecule and the ongoing delivery of massive amounts over an extended timeframe. There is simply no detail as to what is meant.

In most of the Article, the context suggests reference to an ongoing relationship. I am not sure whether the subparagraph (7)(f) use of "a" Transit would be read as conveying a different sense, but if so it would seem to point in a direction that aggravates rather than lessens the risk of dilatoriness; i.e. by emphasizing (tho in a very unclear way) the distinctions of separate "Transits" within the overall relationship of ongoing carriage. A rule of "transit-specific disputes" would open the door to repeated challenges to the different "transits".

I don't find in the Article, furthermore, any basis for avoiding the activation of conciliation or the effectiveness of the suspension of supply disruption, on the ground that a party should have "raised problems" in a prior dispute. Besides, the party may give very plausible reasons (changed facts, facts not previously known, etc ..) for not having done so. And if the only question of relevance is whether the transit is the same (i.e., not whether the dispute raises the same issues), why should he not be free to argue whatever he wishes?

I do not think you can escape the relevance of the age-old (albeit complex) jurisprudential principles that surround the questions of repeated litigation. The meaning of "Transit" intersects with these issues, including whether a dispute is the "same".

I cannot see how your proposed new language avoids any of the outcomes I described in my 11 July note. Your language only applies until "the previous dispute has been resolved", and in my 11 July scenarios they would have been resolved, but such resolution would have merely led to further delays, because "new" disputes could then be brought.

EUROPEAN ENERGY CHARTER
CONFERENCE SECRETARIAT

Brussels, 12 July 1994

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Note for the attention of Mr Bamberger

Subject: Transit Disputes

The main features of any transit contract will be volume, quality and transport charges. The point of the Article 8 dispute procedure is to prevent transit countries interrupting or curtailing transit as a means of imposing their point of view in disputes about these parameters, before conciliation has been attempted. Only when the conciliation steps in Article 8(7) have been gone through and failed to achieve a resolution (i.e. 12 months after the conciliator's interim decision) is the transit country allowed to interrupt.

The purpose of the (former) Article 8(7)(f) is to prevent the sending or receiving country from delaying that final interruption by raising new disputes. Otherwise there would be no pressure on them to agree to a resolution, and any reasonable demands by the transit country could be resisted indefinitely. The conciliator has no power to impose a permanent solution.

So Article 8(7)(f) must provide that no new dispute can be raised about that transit until the previous dispute is resolved. It does not matter whether it is or is not in substance the same dispute; only whether it is the same transit. If there are other problems with the transit, then they should have been raised in the first dispute procedure.

Combining my suggestion and the LSG's earlier proposal, I suggest the following:

Where a dispute concerning a Transit has already been the subject of the conciliation procedures set out in this Article, no new dispute concerning that Transit may be referred to the Secretary General under paragraph 7(a) above unless the previous dispute has been resolved.



Clive Jones
Secretary General

cc: Ms Weis

VV