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Date 22 July 1994

*Dear Clive,*

ARTICLE 8(6) AND (7)

Clive has sent me a copy of your fax to him dated 16 July.

I think some of the definitional problems you raise are unlikely in practice to arise. The provisions are aimed primarily at transit pipelines in the EITs where there is likely to be a deficiency in the contractual and/or Treaty arrangements governing such transits. In terms of geography, it is almost impossible, now that Turkmenia has joined the negotiating parties, to envisage a case where it is not obvious that either the country of origin or the country of destination is a Charter party. In almost all cases the Energy Materials and Products will be electricity, gas or crude oil which have not in the past raised problems of defining origin and where problems are unlikely to arise in the future. In principle the provisions could touch on the transit of refined products e.g. through Georgia to Armenia but in such cases it is difficult to imagine in practice that there would be any dispute that the country of destination was a Contracting Party. "Area" was of course deliberately used to cover the cases of materials produced e.g. from the Caspian Continental Shelf. I accept that there is more of a difficulty with the definition of "Transit" and "a Transit" but I see no alternative to leaving that to be sorted out by the arbitrator/conciliator: we are almost by definition talking of arrangements which have not been closely defined in contractual or Treaty terms. Nor, surely, is it right to suggest that there are no rules governing the marshalling of Article 8(7) conciliation and Article 31 arbitration. The question of whether a dispute falls within Article 8(6) must surely be for Article 31 procedures and I note that para 7(a) requires Contracting Parties to a dispute referred to in paragraph 6 to exhaust any contractual or other dispute resolution remedies



they have previously agreed, which must include Article 31. It seems to me then that the procedures in paragraph 7(c) on can come into play only after any claim that a dispute is not covered by para 6 has been resolved under Article 31 or other previously agreed dispute resolution remedy. The implication of that is that one of the disputing parties cannot subsequently, after the conciliation procedure has been started, claim that the dispute after all is not a paragraph 6 dispute. If that interpretation is correct, the danger is not so much one of excessive litigation as of a toothless tiger.

We must hope that the effective life of Articles 8(6) and (7) is limited as the flows from the FSU to the West and within the FSU are gradually brought under proper contractual and Treaty arrangements. Your letter does however suggest that the Secretary General needs to be shielded by a good legal adviser: but that I think is a question for the Provisional Charter Conference!

*Yours ever,*

*Sydney*

S W Fremantle

cc Mr C Jones