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Adjudicatory Aspects of Transit Dispute Conciliation Under the Energy Charter Treaty

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The following is an article drafted in 1995-96 by Craig S. Bamberger, who had served through 1994 as chairman of the legal advisory committee to the Conference in which the Energy Charter Treaty was negotiated. Mr. Bamberger circulated this draft article privately at the time of its composition, but did not thereafter prepare it for publication. He has consented to publication of the unfinished article, dated April 30, 1996, in light of the recent developments concerning Russian gas exports through Ukraine, in order to provide a vehicle for discussion of the legal issues presented by the interrelationship of the Energy Charter Treaty's Article 7 on transit with the Treaty's separate provisions governing the arbitration of disputes. The Energy Charter Treaty of course now is in force (although still applied only provisionally by Russia, which has not ratified it), and readers also should be aware that in 1998 the Energy Charter Conference adopted Rules Concerning the Conduct of Conciliation of Transit Disputes, which can be viewed on the website of the Energy Charter Secretariat (http://www.encharter.org). While extensive efforts have been made over several years to agree a supplementary Energy Charter Protocol on Transit, that Protocol has not yet been adopted.

Adjudicatory Aspects of Transit Dispute Conciliation Under the Energy Charter Treaty

By Craig S. Bamberger

Introduction

The Energy Charter Treaty (ECT),[1] which has been signed by 49 states and the European Communities and is now in the process of ratification, establishes a legal framework for trade and investment in the energy sector with the goal of catalyzing economic recovery in Eastern Europe and the former Soviet Union (FSU). It has been said that the "deceptively simple" bargain on which the ECT is perceived to rest is ensuring access to OECD country energy markets in return for access to resources in the "economies-in-transition";[2] however, the treaty also is "West-West" and "East-East" in its legal ramifications.

The most innovative and ground-breaking provisions of the ECT may be those contained in its Article 7 on "Transit," which among other things call for the appointment of a conciliator to resolve a dispute over the transit of certain kinds of energy goods through the territory of a Contracting Party;[3] forbid that Contracting Party from disrupting such carriage during the conciliation; and vest the conciliator with -- and conditionally mandate the exercise of -- extraordinary powers to impose interim tariffs and other terms and conditions that must be observed for 12 months, unless the dispute is resolved sooner. The potential relevance of these provisions was highlighted during the dispute in early 1996 between Russia and Ukraine over Druzhba oil pipeline charges, when a Russian Deputy Minister, appearing before the State Duma, reportedly threatened to invoke Article 7.[4] And Article 7 takes on a special interest in light of the ongoing negotiations concerning Caspian Sea region hydrocarbon development, since all of the directly concerned regional states except Iran are ECT signatories.

The ECT "Transit" article's conciliation provisions are a promising mechanism for resolving energy transit disputes such as those that could arise over the inter-state carriage of

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1 34 International Legal Materials 360 (March 1995) and 1158 (July 1995).

2 A.A. Fatouros, 'The Energy Charter Treaty and Foreign Direct Investment," paper delivered at the International Bar Association Section on Energy and Natural Resources Law Conference in Prague, March 1996.

3 A Contracting Party through which the energy goods are shipped is sometimes referred to herein as a "transit state." It should be noted that although the European Communities are signatories to the ECT, and will have legal rights and obligations under Article 7 separately from their member states, theirs is a special case presenting complexities that are beyond the scope of this paper.

4 BBC Monitoring Summary of World Broadcasts, 19 February 1996.

FSU oil or gas. However, the negotiation of the ECT not only was conducted in the spirit of urgency appropriate to its mission, but also was forced to a conclusion in a context of mounting impatience among the negotiating parties. As a result, it is unsurprising that in some ways the dispute resolution mechanism is sketchily outlined, omitting certain definitions and leaving operating details to be filled in.

The central focus of this paper is on aspects of the "Transit" article's conciliation process that have an "adjudicatory" character. By way of background, the paper describes the Article 7 conciliation procedures and mentions other relevant ECT provisions, including some that permit a Contracting Party to claim exceptions from the treaty's rights and obligations, and those that set out the rights of Contracting Parties or their investors, under Articles 26 and 27 of the ECT, to binding arbitration of disputes under the treaty. It then discusses issues, which seem to warrant further attention in the interest of clarification or interpretation, involving "jurisdiction" and the applicable "remedies" under Article 7; and it addresses the interrelationship between the Article 7 conciliation procedures and the ECT's Articles 26-27 provisions for binding arbitration. Finally, after describing implications of the treaty's current phase of "provisional application," the paper offers suggestions about further work that might be pursued in order to perfect the energy transit dispute conciliation procedures, in light of their "adjudicatory" ramifications.

Description of ECT Article 7, "Transit"

Article 7 is located in Part II of the ECT entitled "Commerce," which begins by stating a general commitment to open and competitive markets, and also includes articles aimed at: avoiding ECT-caused derogations from the operation of the General Agreement on Tariffs and Trade (GATT) as between GATT parties; prohibiting trade-related investment measures; fostering the application of competition rules by the ECT Contracting Parties; and encouraging technology transfer and access to capital markets.

"Transit" refers to "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."[5] The term also has a secondary meaning, with which this paper is less concerned: it covers carriage originating in and destined for the same Contracting Party, where the goods pass through another Contracting Party, unless the parties concerned have opted out of this provision by listing themselves in a specified treaty annex; only Canada and the United States have done so.[6]

The term "Energy Materials and Products" is defined by means of item references to the Harmonized System of the Customs Co-operation Council and the Combined

5 ECT Article 7(10)(a)(i).

6 ECT Article 7(10)(a)(ii) and Annex N. Neither Canada nor the United States has signed or acceded to the ECT

Nomenclature of the European Communities[7] Annex EM to the Treaty, which contains these item references, generally encompasses coal, electrical energy, natural gas, nuclear energy materials, petroleum and petroleum products, and fuel wood and charcoal. The designation of petroleum products excludes some petrochemicals that are within the item references for petroleum products; energy services and energy equipment also are excluded.

Another term used in the definition of "Transit" is "Area." The "Area" is the territory of a state that is a Contracting Party and, subject to certain conditions, its adjacent sea and sea-bed, including sub-soil.[8]

Paragraph (1) of Article 7 obliges each Contracting Party to "take the necessary measures to facilitate" transit "consistent with the principle of freedom of transit" (a reference to Article V of the GATT), "without distinction as to the origin, destination or ownership of [the] Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges."

Paragraph (2) is a "soft law" obligation to "encourage relevant entities to co-operate" in modernizing, developing, operating, and facilitating the interconnection of "Energy Transport Facilities," and in measures to mitigate the effects of interruptions in the supply of energy goods. "Energy Transport Facilities" are defined as fixed facilities specifically for handling "Energy Materials and Products"; a non-exclusive list of such facilities mentions high-pressure gas transmission pipelines, high-voltage electric transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, and oil product pipelines.[9]

In paragraph (3) each Contracting Party undertakes that, unless an existing international agreement provides otherwise, its "provisions" relating to the transport of covered energy goods and to the use of fixed energy transport facilities shall treat energy goods that are in transit through that Contracting Party's "Area" no less favorably than they treat any other such goods originating in or destined for that "Area."

Paragraph (4) says that if transit via fixed facilities cannot be achieved on commercial terms, 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)." An Understanding to this paragraph, contained in the Final Act of the European Energy Charter Conference in which the treaty was negotiated, observes that legislation on environmental protection, land use, safety or technical standards would qualify under this language.

Paragraph (4) of Article 7 is subject to the ECT's "transitional arrangements," providing for temporary exceptions that the "economies-in-transition" have been allowed to

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7 ECT Article 1(4).

8 ECT Article 1(10).

9 ECT Article 7(10)(b).

take from specific provisions of the ECT. Such exceptions, which are listed in Annex T to the treaty, were claimed by six states.

Under paragraph (5) of the article, the transit state is not obliged to permit construction or modification of new transport facilities or to allow new or additional transit through existing ones, "which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply." However, subject to paragraphs (6) and (7), the Contracting Parties "shall...secure established flows...."

Paragraphs (6) and (7) are the primary focus of this paper. Paragraph (6) contains the important provision that 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 the covered energy goods prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where specifically allowed to do so by a relevant agreement or where permitted to do so by a conciliator appointed under paragraph (7).

Paragraph (7), which only applies following the exhaustion of all other dispute resolution remedies previously agreed to between the concerned Contracting Parties or between the concerned entities, allows a Contracting Party that is party to a dispute to refer the dispute to the Energy Charter Secretary-General, who heads the Secretariat that supports the new Energy Charter Conference that was created by the ECT, by means of a notification summarizing the matters in dispute. Within 30 days the Secretary-General, in consultation with the concerned parties, "shall appoint a conciliator." If the conciliator fails to secure agreement to a resolution of the dispute within 90 days, paragraph (7)(c) says that "he shall recommend a resolution and shall decide the interim tariffs and other terms and conditions to be observed...until the dispute is resolved." Paragraph (7)(d) states that the Contracting Parties "undertake to observe and ensure that the entities under their control or jurisdiction[10] observe" the conciliator's decision for 12 months, unless the dispute is resolved sooner. Under paragraph (7)(e) the Secretary-General may elect not to appoint a conciliator if in his judgment the dispute "concerns Transit that is or has been" the subject of a previous, unsuccessful dispute resolution pursuant to the article.

Paragraph (7)(f) states that the Charter Conference "shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators."

Paragraph (8) stipulates that nothing in Article 7 shall derogate from international law, including existing international agreements, and specifically from rules concerning submarine cables and pipelines.

Paragraph (9) notes that the article is not to be interpreted to require any Contracting Party to take any measure with respect to a particular type of fixed energy transport facility

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10 Note that the Contracting Party is obliged to ensure such observance by an entity that is under its "jurisdiction," even if the Contracting Party lacks "control" over the entity.

that is not already in existence within its "Area"; however, it clarifies that this is not intended to excuse the Contracting Party from its paragraph (4) obligation to refrain from placing obstacles in the way of new capacity being established.

Other relevant provisions

Several other ECT provisions have a potential bearing on the operation of the Article 7, paragraphs (6)-(7), dispute conciliation mechanism; these include possible exceptions from the treaty's rights and obligations, and the ECT's Article 27 provisions for binding arbitration of disputes between Contracting Parties.

Exceptions that might be claimed

Among the exceptions allowed by the ECT, there are some that might be cited by a Contracting Party through whose "Area" energy passes, in purported justification of an energy transit disruption. The ECT's Article 24(2) exceptions for measures "(i) necessary to protect human, animal or plant life or health" or "(ii) essential to the acquisition...of Energy Materials and Products in short supply..." are subject to several strict limitations. Such a measure may not constitute, inter alia, a "disguised restriction on Economic Activity in the Energy Sector"[11] or arbitrary or unjustifiable discrimination between Contracting Parties, and "shall not nullify or impair any benefit" reasonably expected under the treaty "to an extent greater than is strictly necessary to the stated end." The "short supply" exception is further subject to requirements of consistency with the principles of equitable sharing of supply among all Contracting Parties, and of discontinuance when the conditions giving rise to it have ceased to exist.

But there also are largely "self-judging" exceptions in Article 24(3)(a) for measures that a Contracting Party "considers necessary...for the protection of its essential security interests" or "for the maintenance of public order," subject in either case to the requirement that such measure does not "constitute a disguised restriction on Transit." Furthermore, Article 21 on "Taxation," which stipulates that nothing elsewhere in the ECT shall create rights or impose obligations with respect to "Taxation Measures"[12] and expressly overrides any conflicting provision, only prohibits a Contracting Party from imposing taxes on transiting energy goods if those taxes contravene the non-discrimination rule of Article 7(3) or, in a case where the ECT's GATT-by-reference rules are applicable,[13] if the taxes imposed contravene the referenced GATT rules.

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11 Defined in ECT Article 1(5).

12 Defined in ECT Article 21(7)(a) to include "any [domestic law] provision relating to taxes...."

13 The ECT's GATT-by-reference rules subject the trade of Contracting Parties that are not parties to the GATT — such as republics of the FSU — to specified provisions of the 1947 GATT, both in those countries' trade relations with GATT countries and in their trade relations with one another.

Entitlement to arbitration of disputes between Contracting Parties

Article 27 of the ECT contains provisions for the settlement of disputes between Contracting Parties concerning the application or interpretation of the ECT, that could be invoked in a dispute over energy transit. In its first paragraph the article calls upon Contracting Parties to "endeavour" to settle their disputes through diplomatic channels; the only apparent exceptions to this exhortation pertain to disputes involving the ECT's GATT-by-reference rules, and its prohibition of trade-related investment measures, both of which Article 28 excludes from the coverage of Article 27.

More importantly, in its subsequent paragraphs Article 27 provides for binding arbitration, by ad hoc tribunals, of Contracting Party disputes concerning the application or interpretation of the ECT. It prescribes procedures for the constitution of panels; invokes the rules of the United Nations Commission on International Trade Law (UNCITRAL); and calls on panels to decide disputes in accordance with the ECT and applicable rules and principles of international law. Where these procedures are not intended to govern, Article 27 so specifies: in addition to the exclusions set out in Article 28, Article 27(2) stipulates the inapplicability of these procedures to disputes under Articles 6 ("Competition") and 19 ("Environmental Aspects") and, for Contracting Parties identified in a related annex, to a specified provision of Article 10(1) ("Promotion, Protection and Treatment of Investments"). But Article 27 makes no exception for disputes concerning Article 7 on "Transit."

Investors' rights to binding arbitration of disputes

ECT Article 26, allowing investor arbitration of disputes with Contracting Parties, is limited in scope to disputes concerning alleged breaches of obligations under Part III of the treaty ("Investment Promotion and Protection"), whereas Article 7 on transit is in Part II. However, the ECT does not exclude the applicability of Article 26 to disputes over breaches of obligations under Part III that happen to arise out of transit disputes.

Paragraph (1) of Article 26 provides that disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the "Area" of the former, which concern an alleged breach of an obligation of the former under Part III, "shall, if possible, be settled amicably." But if such a dispute is not settled within 3 months the investor may submit it for arbitration. Article 26 gives the investor the choice to submit the unresolved dispute: to the fora of the host state; in accordance with some other previously agreed procedure; or, for binding arbitration, to the investor's preference among the International Centre for Settlement of Investment Disputes (ICSID), a forum established under the UNCITRAL rules, or a proceeding of the Arbitration Institute of the Stockholm Chamber of Commerce.

The article states that "each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions" of the article. It also contains several technical provisions to assure the sufficiency of Contracting Parties' consent to arbitration; and it requires that each Contracting Party carry out without delay any arbitral award, and that it make provision for the effective enforcement of such awards.

"Jurisdiction" and "remedies"

The implementation of the Article (7), paragraphs (6)-(7) conciliation procedures presents a number of questions of clarification or interpretation that may arise in the first instance when a dispute is referred to the Secretary-General, when an appointed conciliator must seek the agreement of the parties to the dispute, or when the conciliator makes recommendations and renders a decision on "interim tariffs and other terms and conditions to be observed for Transit"; but it appears that these questions also can be raised in Article 27 Contracting Party dispute settlement proceedings. Some of these issues, including the question whether a Contracting Party has "standing" to pursue the dispute, might be characterized as "jurisdictional" in the sense that their resolution determines whether a dispute is one to which paragraphs (6) and (7) of Article 7 apply; other, interrelated issues concern the scope of application of what might be called the "remedies" under these paragraphs, namely the paragraph (6) injunction to a transit state to refrain from disrupting the "existing flow of Energy Materials and Products" and the paragraph (7)(c)-(d) requirement that Contracting Parties observe a decision by a conciliator of the "interim tariffs and other terms and conditions." These "remedies" and the related "jurisdictional" issues, it should be noted, mean that the Article 7(6)-(7) process involves more than mere conciliation; the remedies are akin to the kinds of measures involved in adjudication, and the operation of the conciliation mechanism therefore involves questions of due process.

This section of the paper discusses several of the questions of clarification and interpretation that may arise.

Intervention in domestic regulation or public activity; absence of threat of transit disruption

Although the Article 7 conciliation provisions are directed at minimizing the risks of transit disruptions, paragraph (6) refers to "a dispute over any matter arising from...Transit" of "Energy Materials and Products" through the "Area" of a Contracting Party, and paragraph (7) says simply that the provisions it contains apply to "a dispute described in paragraph (6)." A literal reading of this language would suggest the potential relevance of paragraphs (6)-(7) to any dispute to which another Contracting Party is party, concerning the transit of covered energy goods, irrespective of whether the dispute involves acts of the transit state that are in their nature either regulatory or "public" (e.g., environmental, safety or health measures of a transit state that have an effect on the carriage of energy goods), and even if there is no suggestion of intended interference with the carriage of the energy goods. Since the Article 7(6) "remedy" on its face does not allow exceptions based on such considerations and subparagraph (c) of Article 7(7) is non-discretionary in its requirement that the conciliator make a binding decision on "interim tariffs and other terms and conditions" where he has failed within 90 days to achieve an agreement resolving or fixing procedures to resolve a transit dispute,[14] this literal interpretation could lead to intervention in areas of domestic energy regulation, or (absent a valid claim of exception, such as under ECT Article 24(2)(i)) in areas of essentially "public" activity, even in the absence of any clear threat to the energy commerce of the Contracting Parties.

14 Subparagraph (c), however, requires observance of these tariffs and other terms and conditions only "from a date which [the conciliator] shall specify."

It might be argued, in defense of such an interpretation, that as it is impossible to foresee whether an existing dispute over transit will lead in the future to a disruption in the carriage of energy goods; the ECT's conciliation mechanism must be available without exception for all disputes over matters arising from energy transit. A logical corollary of this "jurisdictional" position would be a similarly broad application of the "remedies," i.e., of the paragraph (6) obligation to refrain from disrupting "the existing flow of Energy Materials and Products" and of the conciliator's interim decision under paragraph 7(c) on the "tariffs and other terms and conditions to be observed for Transit."

The nature of the "carriage" of energy goods

A closely related question is what is meant by the "carriage" of energy goods. As noted above, "Transit" is defined as involving "the carriage...of Energy Materials and Products." There is no indication of any role intended to be played, in identifying the "carriage," by particular characteristics such as the discrete types of energy goods in question, their volumes, temporal continuity of the shipments, contractual coverage, the parties involved, the use of common transport facilities, or the like. Accordingly, the "carriage" could be construed extremely broadly: for example, as covering the overall energy supply situation between or among two or more states, as distinguished from a narrow application such as to an identified transmission of electricity or shipment of certain petroleum products between two particular entities, through specified facilities.

. It may be necessary to attribute defining characteristics to the term "carriage" in the process of deciding whether (under Article 7(6)) a dispute is a "matter arising from that Transit," or whether (under Article 7(7)(e)) "the dispute concerns Transit that is or has been" the subject of a previous, unsuccessful dispute resolution pursuant to the article. Even if a liberal attitude were taken toward the paragraph (6) decision in the interest of maximizing the scope of the application of the dispute conciliation provisions, the avoidance of readjudication of the same matters under paragraph (7)(e) would require some degree of definition of what is "Transit," which turns in considerable part on what is the "carriage."

Furthermore, the approach that is taken in defining the term "carriage" for these "jurisdictional" purposes has potential ramifications for the "remedies." The scope of the paragraph (6) obligation to refrain from disrupting "the existing flow of Energy Materials and Products," and of the paragraph (7)(c)-(d) requirement to observe a decision by a conciliator of "the interim terms and conditions to be observed for Transit," can be viewed as related to that definition. Thus, the appropriate scope of these "remedies" may be suggested by the "jurisdictional" decision to construe the term "carriage" broadly or narrowly. Indeed, the appointed conciliator may be forced effectively to define the "carriage" in his crafting of his proposed paragraph (7)(c) "remedy," unless the Secretary-General already has done so in the course of accepting referral of the dispute and providing terms of reference to the appointed conciliator.

But, if the "jurisdictional" and/or the "remedies" provisions of Article 7(6)-(7) were to be construed restrictively, it is unclear from the text of ECT Article 7 what criteria should govern the decisions to be made on their circumscription.

Energy goods "originating in" or "destined for" a Contracting Party

Two other terms that feature in "jurisdictional" determinations with regard to the paragraph (6)-(7) conciliation procedures, and bear upon the potential "remedies" under those paragraphs, are the terms "originating in" and "destined for." The paragraph (10)(a)(i) definition of "Transit" applies only to "Energy Materials and Products," carried through the "Area" of a Contracting Party (or to or from port facilities therein for loading or unloading), either "originating in" or "destined for" the "Area" of a third state that is a Contracting Party.

In GATT practice, a distinction has been understood between "originating in" and "coming from," with "originating in" meaning "products of" while "coming from" refers to the geographical routing of the product immediately prior to its entry (e.g., a good "produced in" state A and shipped through state B to transit state C is a good "originating in" A and "coming from" B to C). Under the GATT each importing country has been allowed to determine "origin" according to its own rules. Two frequently used approaches for making the "origin" determination are the "substantial transformation" principle and the "value-added" (or "percentage-value") technique. The US-Canada Free-Trade Agreement and the North American Free-Trade Agreement adopted a different approach, which looks to whether a good undergoes a change in tariff classification as a result of domestic processing. The Agreement on Rules of Origin annexed to the World Trade Organization Agreement set up a work program aimed at harmonizing rules of origin:

The term "destined for" likewise is used in the GATT, most relevantly in the Article V(2) prohibition against denying freedom of .transit based on the "destination" of goods or on their means of transport[15] There is a dearth of GATT legal authority on the meaning of this term; Article V on "Freedom of Transit" has proved one of the less successful GATT articles, and for most GATT purposes there perhaps is no reason to draw distinctions based on whether an interested Contracting Party is an intermediate or the final destination of goods (i.e., to use the illustration given in the preceding paragraph, whether goods shipped from transit state C through state D for consumption in state E are "destined for" D as well as E). However, in one indication of the complexity of the issue, it has been said with respect to GATT Article V that there is "an open question whether freedom of transit applies to goods consigned to a country in bond without a final destination."[16]

The ECT does not define "originating in" or "destined for," and whereas a GATT-by-reference approach is explicitly adopted for other purposes of the ECT,[17] there is no clear indication in ECT Article 7 of an intention to borrow definitions from the GATT.[18] The ECT's negotiators may have believed that definitions of these terms were unnecessary for

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15 See also GATT Articles I(1), XI(2) and XIII(1); cf. Article VI(1)(a) ("destined for consumption in").

16 John H. Jackson, Jr., World Trade and the Law of GATT p. 508 (The Michie Company 1969).

17 See, e.g., ECT Article 29(2)(a).

18 Note, moreover, that a state's "Area" as defined in ECT Article 1(10) ordinarily will not be coextensive with its customs territory.

purposes of Article 7 because in the treaty's primarily Eurasian context, it usually will be reasonably clear that, no matter how these terms are understood, one or another ECT signatory is either the state of "origin" or the state of "destination," even if that specific state is not readily identifiable. But as noted above the Article 7(6)-(7) procedures go beyond mere conciliation; the stay that Article 7(6) imposes on disruption of the transit of energy goods and, particularly, the function of the conciliator to render a binding "interim" decision, are the kinds of remedial measures associated with adjudication. By their nature these "remedies" would seem to necessitate limiting the right to refer a dispute for conciliation and to present a case in the conciliation process, to those Contracting Parties that have legally protectible interests, and applying the "remedies" only against Contracting Parties that have been afforded an opportunity to present their positions in the conciliation process. Yet the lack of definition could create several problems in deciding whether a particular Contracting Party has "standing" to refer a dispute to the Secretary-General, or in determining the appropriate scope of the paragraph (7)(c)-(d) "remedy" that potentially is applicable as a result of that referral.

First, there is the question of standing to make an initial referral. Paragraph (7)(a) allows only a "Contracting Party party to the dispute" to refer that dispute for conciliation. According to paragraph (6), the "dispute" in question should be "over any matter arising from that Transit," i.e., a dispute over a matter arising from the carriage through the "Area" of the transit state (or "to or from port facilities in its Area for loading or unloading"), of energy goods "originating in" or "destined for" the "Area" of a third state Contracting Party. This could be construed to confine the initiation of energy transit dispute referrals to states of "origin" or "destination," because the interests of other states are likely to be more indirect.

It is possible to conjecture that the treaty's negotiators intended to allow the widest possible access to the Article 7(6)-(7) dispute conciliation mechanism by a party to a transit dispute, regardless whether the transiting energy goods are "products of" or "coming from," or are permanently or only intermediately "destined for," the Contracting Party that refers the dispute to the Secretary-General. But while "originating in" could be defined to mean "products of or "coming from," or to mean either of the two, any definition other than "products of" or any open-ended definition of "destined for" has the potential to make more than one state eligible to refer for conciliation a dispute over essentially the same issues. Under these other meanings, for example, state A might have standing as the state that the energy goods in transit through state C are the "products of" while state B potentially could have standing as the state that those same energy goods were "coming from"; and state B could be the transit state in a technically separate dispute involving both state A and state C, which might now become the state of "destination." The ECT's Article 7(6)-(7) conciliation provisions do not address whether the "same" dispute may be referred to the Secretary-General by more than one state, nor do they contain any provisions for intervention in the conciliation by an interested third party.

A related question, unanswered in Article 7, is: who are the "parties to the dispute" referred to in subparagraph (7)(c)? This is relevant because the direction to the conciliator under that subparagraph is to seek the agreement of "the parties to the dispute," failing which he is to recommend a resolution to or means of resolving that dispute and to "decide the interim tariffs and other terms and conditions to be observed." According to subparagraph (b) the Secretary-General is to appoint a conciliator in consultation with the parties to the dispute and with "the other Contracting Parties concerned," and the conciliator may not be a national

or citizen of or permanently resident in either a party to the dispute or "one of the other Contracting Parties concerned"; this distinction between "parties to the dispute" and other "concerned" Contracting Parties is unexplained, but its obvious implication is that there is a category of especially "concerned" Contracting Parties that do not have a right to participate as parties in the conciliation process.

A further point concerns the "remedy" under Article 7(7)(c)-(d). While paragraph (7)(c) directs the conciliator to "decide the interim tariffs and other terms and conditions to be observed", it does not say who must observe them, nor does it explicitly empower the conciliator to decide who must observe them. In fact, the question of observance is dealt with separately in paragraph (d), which provides:

> 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.

This reference to "the Contracting Parties", in principle could be given several possible interpretations, including: (i) all Contracting Patties; (ii) "the Contracting Parties party to the dispute" alluded to in the chapeau to Article 7(7); or (iii) the Contracting Parties mentioned in (ii) above plus "the other Contracting Parties concerned." But if it is only the "Contracting Parties party to the dispute" who may participate in the conciliation process, it would be an odd and arguably unjust result to allow the conciliator's decision to bind any other Contracting Party.

Another problem pertains to the Article 7(7)(e) provision vesting in the Secretary-General authority to refrain from appointing a conciliator if in his judgment "the dispute concerns Transit that is or has been the subject of the [Article 7(7)] dispute resolution procedures...." Although this decision is entrusted to the judgment of the Secretary-General, the judgment that he must make is similar to a jurisprudential determination of whether a second lawsuit is barred because it presents a cause of action identical with an initial one that already has been litigated. As noted above, such a judgment requires an understanding of what is meant by "Transit," which under the paragraph (10)(a)(i) definition depends substantially on the meaning of "carriage". Characterizing the "carriage" through a Contracting Party's "Area", in turn, entails identifying states of "origin" and "destination" between which the "carriage" occurs, and identifying as well as "the parties to the dispute" and the other "concerned" parties; such identification is needed both to assure that "jurisdiction" exists to exercise the conciliation procedures with regard to the "new" dispute, and to help define that dispute.

Finally, it is necessary to remember that although the ECT will go into force when it has been ratified by thirty states,[19] some states may continue for an uncertain duration thereafter to apply the treaty provisionally; and as discussed below, the treaty's provisional application scheme involves significant uncertainties as to its effects on the rights and

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19 See ECT Article 44.

obligations of the provisionally applying states. Thus, energy goods may travel along a chain of several states, some for which the treaty is in force and others for which it still is in provisional application with varying degrees of effectiveness; added to this are the potential for such energy goods either to be produced in a non-signatory (e.g., Middle Eastern) state or to pass through one, en route to the transit state, and the possibility of shipments in bond without a final destination. In such circumstances, it is difficult to see how the jurisdictional issues could be resolved by a simple presumption that, no matter how the terms used in the treaty are understood, one or another ECT signatory must necessarily be either the Contracting Party state of "origin" or of "destination."

The interrelationship between the conciliation and arbitration provisions

The interrelationship among Articles 7 on transit, 26 on investor-Contracting Party arbitration, and 27 on Contracting Party arbitration, nowhere is addressed in the ECT. It appears that the ECT may allow disputes to be pursued on their merits in parallel or sequentially under the three articles and, in addition, that individual issues arising in the course of the Article 7 conciliation procedures also may be subject to resolution in Article 27 arbitration.

Parallel or sequential dispute resolution

As discussed above, Article 27 allows a Contracting Party that is party to a dispute with another Contracting Party over the application or interpretation of the ECT to submit that dispute to binding arbitration; it contains no specific exception for disputes that are subject to conciliation under Article 7. A transit dispute that is potentially subject to conciliation under Article 7(6)-(7) may also be a dispute over the application or interpretation of an ECT-provision, such as the Article 7, paragraph (1) obligation of a Contracting Party to "facilitate" and not to unreasonably delay, restrict or charge the transit of energy goods, or the nondiscrimination requirements of paragraphs (1) and (3) of Article 7. Although Article 27(2) disallows a submittal to binding arbitration under Article 27 where the ECT has "otherwise provided," Article 7 does not seem to "provide otherwise."

In addition, in some circumstances an investor in facilities located in a transit state, such as the owner of a pipeline that carries the energy goods that are in transit, could invoke binding arbitration of a transit dispute under the separate investor-state binding arbitration provisions contained in ECT Article 26. Although Article 26 applies only to disputes concerning alleged breaches of obligations under Part III of the treaty, a transit dispute that is potentially subject to conciliation under Article 7(6)-(7) could involve such an allegation -- e.g., alleged unreasonable or discriminatory measures impairing use of the facilities in violation of Article 10(1); denial of national or most-favoured-nation treatment in violation of Article 10(7); or measures equivalent to nationalization or expropriation in violation of Article 13(1). Furthermore, while Article 26 is not a vehicle for directly litigating Contracting Party rights and obligations under Article 7, the ECT does not forbid Article 26 arbitrators from taking the provisions of Article 7 into account in adjudicating rights and obligations under Part III.

Perhaps an arbitral panel formed under Article 26 or 27 would choose, by analogy with civil procedure notions of exhaustion of remedies or "litispendence," to defer a decision on the merits of a dispute pending the outcome of an ongoing Article 7 conciliation process, but these legal doctrines would seem less relevant to an arbitration submittal by one Contracting Party party to a dispute where it was the other Contracting Party that is a party to that dispute who had referred it to conciliation, or to an arbitration submittal by an investor who had no direct role in the conciliation.

It might even be argued that the exception from the conciliation procedures contained in Article 7(7) for "the exhaustion of all relevant...dispute resolution remedies previously agreed between the Contracting Parties party to the dispute" makes Article 7 conciliation unavailable until the Article 26 and/or Article 27 dispute resolution remedy has been exhausted. This interpretation, although it has a surface plausibility, surely must be rejected since it could effectively nullify the Article 7(6)-(7) conciliation mechanism.[20]

It appears, then, that Article 7(6)-(7) conciliation and Article 26/27 arbitration can be available in parallel or sequentially with regard to the same energy transit dispute. Even if conciliation and arbitration do occur in parallel, the conciliation procedures may be viewed as offering an intermediate solution to a dispute while the arbitration mechanisms are vehicles for a permanent decision, should that prove necessary in spite of the conciliator's efforts; a decision by an arbitration panel could constitute a "resolution" of the dispute in the sense of Article 7(7), subparagraphs (c) and (d). But a party to a transit dispute instead might first initiate conciliation under Article 7, following the completion of which that party and the other party to the dispute and its investors would retain rights to initiate arbitration under Articles 26 and 27 respectively, unless they had agreed otherwise in the course of the conciliation.[21]

Resolving Article 7 transit conciliation issues in Article 27 arbitration

Moreover, the potential exists that individual issues raised in the course of Article 7(6)-(7) dispute conciliation, involving the application or interpretation of the Article 7(6)-(7) procedures, might be submitted to -- as it were, "appealed to" -- an Article 27 arbitration forum by one of the Contracting Parties that are party to a dispute over the transit of energy goods. These include the various "jurisdictional" and "remedial" issues described above, which may arise when the Secretary-General receives a referral and appoints a conciliator, or when the conciliator seeks the agreement of the parties to the dispute or issues

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20 It would, however, be possible to reconcile the ECT Article 7(6)-(7) procedures with the ECT Article 27(a) statement that "Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels." Under this reading, diplomatic efforts to resolve a transit dispute would be a precondition to an Article 7(7)(a) referral of that dispute to conciliation, even if the dispute was a commercial one between private entities in the two states.

21 The interrelationship between Article 26 and Article 27 arbitration is a broader question, not limited to the Article 7 conciliation context.

his recommendations and makes his "interim" decision.[22] They also include decisions on a transit state party's claims of exceptions from the treaty's obligations, discussed above, that the ECT allows, and on such other issues as whether disruption of energy goods transit is "specifically provided for in a contract or other agreement governing such Transit" (Article 7(6)), or whether "all relevant contractual or other dispute resolution remedies" have been exhausted (Article 7(7)).

A number of such questions can come up in an energy transit dispute conciliation, and might result in Article 27 "appeals" of the decisions taken by the Secretary-General or the conciliator. That this can happen, and the lack of rules in Article 7 as to when issues must be raised by the disputing parties, underscore the need for a structured, legally coherent approach to conciliation, which may be lacking in the absence of further clarification and interpretation of Article 7's provisions.

Nothing in Article 27 prevents the disputes over "jurisdiction" or "remedies" that arise in the course of a conciliation from being submitted in a seriatim manner, as they arise, possibly for resolution by different arbitral panels, but that would be highly inefficient. Neither does anything in Article 27 indicate that such individual disputes over ECT interpretation or application during the conciliation process must be submitted for arbitration as they arise rather than upon completion of the conciliation process, but a party to the dispute might fear that if he delayed submittal of the dispute until the end of the conciliation process, he later would be met by a claim of "laches," the legal defense that a party has slept on its rights and that to allow its subsequent, untimely assertion would be prejudicial to the other party.

Provisional application of the ECT

At the present time the ECT is in a phase of "provisional application." The term of course refers to a treaty signatory's commitment to comply with a treaty, in whole or in part, before completion of the ratification process. Article 25 of the Vienna Convention allows for provisional application, which can create obligations going beyond those that Article 18 of the Convention imposes to "refrain from acts which would defeat the object and purpose" of a treaty. In states where the Legislative Branch of the Government has not been asked to consent to provisional application, such a commitment often rests on the actual or implied authority of the Executive Branch, the scope of which may not be clear, and which may be especially problematical as concerns the acceptance of legally binding resolution in an international forum of disputes over domestic matters.

Article 45 of the ECT provides in paragraph (1) that each signatory will apply the treaty provisionally pending its entry into force, "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." However,

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22 ECT Article 27 applies to disputes between Contracting Parties. A dispute over application or interpretation of the ECT will probably qualify as one between Contracting Parties even if it originates in a self-initiated decision of the Secretary-General or the conciliator. Note, incidentally, that Article 27(2) only allows the Contracting Parties that are party to a dispute to submit that dispute for arbitration; Article 27 does not provide for disputes to be submitted for arbitration, or for an advisory opinion, by the Secretary-General or by a conciliator.

paragraph (2) of that article says that a signatory "may, when signing" declare that it "is not able to accept provisional application," in which case the signatory shall only be obliged to apply provisionally the treaty's provisions concerning institutional arrangements (as distinct from its substantive obligations), and then only insofar as that "is not inconsistent with its laws and regulations"; a signatory so electing, and its investors, are not entitled to claim the benefits of provisional application under paragraph (1). Twelve states did make such declarations when they signed the ECT, and some other states, although not making such declarations, reportedly consider themselves excused from provisional application based on the limiting language of paragraph (1), "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."

Even in the case of a state not making such a declaration, it could prove extremely difficult to ascertain the extent to which the provisions of the ECT are inconsistent with the particular signatory's constitution, laws or regulations. Any attempt to apply the Article 7 energy transit dispute conciliation procedures during the ECT's provisional application phase could force such judgments to be made in a novel and extremely complex area of the treaty's operation, involving matters of high domestic legal and political sensitivity.

Developing an adjudicatory framework

It would be unfortunate if the ECT's promising mechanism for the conciliation of energy transit disputes should falter because of unforeseen adjudicatory complications. The purpose of the final section of this paper is to suggest further work that might be pursued to develop the adjudicatory framework. A convenient vehicle for such efforts is set out in Article 7(7)(f) of the ECT, which provides: "The [Energy] Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of directors"; such "standard provisions" can be adopted by a vote of three-fourths of the Contracting Parties present and voting in the Conference.[23]

"Jurisdiction" and "remedies"

There is a need to provide certain definitions, and in general to clarify the intended operation of the conciliation mechanism. Assuming that the term "originating in" is meant to refer to either a "product of" or a good "coming from" a Contracting Party, and that the term "destined for" is meant to refer to both interim and permanent destination, these terms should be defined accordingly. Some indication also would appear needed as to how it should be determined whether goods are "products of" an originating state.

A threshold issue for clarification is the general relationship between the Article 7(6)-(7) conciliation procedures and the Article 27 dispute settlement provisions, including whether the conciliation procedures can be instituted with regard to an energy transit dispute before reasonable efforts have been made to settle that dispute through diplomatic channels, as envisaged by Article 27(a).

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23 See ECT Article 36(4).

There is no explanation in Article 7(6)-(7) of how questions of "jurisdiction" and the scope of "remedies" are to be determined after a transit dispute has been referred to the Secretary-General, or of what rules the Secretary-General and the appointed conciliator should play in this process. The following is an attempt to outline some of the key questions that the Energy Charter Conference might usefully address in this regard:

- Is it a function of the Secretary-General or of the conciliator to decline to accept "jurisdiction" over an initially referred (as distinct from a previously conciliated) transit dispute, based on whether it is considered to be a dispute arising from the "carriage" through a Contracting Party's "Area," or to or from port facilities in its "Area" for loading or unloading, of qualifying energy goods "originating in" or "destined for" the Area of a third state Contracting Party? Note that this question arises immediately upon referral of the dispute, in light of the automatic operation of the paragraph (6) injunction against disruption of the carriage by the transit state.

- What criteria should guide such a decision? Are there any circumstances in which jurisdiction should be declined if a dispute concerns a subject of domestic regulation or an essentially public activity, or if there is no apparent threat of transit characterized?

- Is the right to refer a dispute limited to states in which the subject energy goods "originate" or for which those goods are "destined"? , How are the "parties to the dispute" to be identified? Who are the other "concerned parties," and what is their role? - Can the same dispute be referred to the Secretary-General for conciliation by more than one Contracting Party? May the Secretary-General consolidate, for purposes of conciliation, separately referred disputes concerning the same subject matter?

- Is the subparagraph (7)(f) obligation to observe the conciliator's interim decision on tariffs and other terms and conditions applicable only to the "parties to the dispute"? Does the conciliator have any discretion in this regard in fashioning his decision?

- Is there a definite stage in the conciliation process by which a transit state must either assert or effectively waive any "jurisdictional" objection that it may have, such as the claim of an exception allowed by the ECT? Will such an objection be adjudicated by the Secretary-General or the conciliator?

- Is there, similarly, a definite stage in the conciliation process by which any party to the dispute must submit to Article 27 arbitration, or waive the right to submit, a dispute over an issue of "jurisdiction" or "remedy" arising during the conciliation?

The interrelationship between the conciliation and arbitration provisions

As discussed above, parallel or subsequent resolution of an energy transit dispute under Articles 26 and/or 27 is not necessarily incompatible with the conciliation of that dispute under Article 7(6)-(7), but the prospect that individual issues arising in the conciliation (e.g., "jurisdictional" rulings by the Secretary-General or the conciliator) could be brought to an Article 27 arbitral panel suggests a need for the Energy Charter Conference to impose an orderly structure on this "appellate" process. One possible solution would be to stipulate, in the "standard provisions concerning the conduct of conciliation" that ECT Article 7(7)(f) requires the Energy Charter Conference to adopt, that the referral of a dispute for conciliation under Article 7(6)-(7) will trigger the constitution of an arbitral tribunal under Article 27, to be available to resolve promptly any "appeals" over "jurisdiction" or "remedies" that might be brought to it during the course of a conciliation.

Provisional application of the ECT

The potential exists for invocation of the Article 7(6)-(7) conciliation procedures during the period of provisional application of the ECT. Against the backdrop of an ongoing treaty ratification process, it is critical that any referred dispute be handled fairly and expeditiously. The lack of definition and operating detail in the conciliation provisions combine with the legal uncertainties associated with provisional application to complicate this task.

Pending clarification of the paragraph (6)-(7) provisions by the Energy Charter Conference, the Secretary-General could announce his tentative interpretation of these provisions and his operational plans for the handling of a referred energy transit dispute. He might, additionally, condition his acceptance of such a dispute upon the referring party's agreement to comply with any "interim" decision of the conciliator on tariffs and other terms and conditions, and with any decision of an arbitral panel constituted under Article 27. There is no obvious way, however, to require such an agreement from the transit state; absent its voluntary commitment to that effect, the extent of its existing provisional application obligation could only be evaluated on an ad hoc basis. Then compliance by the transit state will become essentially a political rather than a legal matter, irrespective of whether that state, as allowed by Article 45(2), has declared itself unable to apply the ECT's substantive obligations, or considers itself excused on the ground that binding arbitration with regard to those obligations is inconsistent with its law. If it were desired to depoliticize such issues as much as possible, the Conference might consider putting in place a special arbitral panel, patterned after the panel contemplated in Article 27, to pass judgment on both the provisional application questions and the issues concerning "jurisdiction" and "remedy" that will arise in the course of an Article 7(6)-(7) conciliation.