Possible International Forums for the Resolution of Legal Conflicts Over Pipeline Transit in the Former Soviet Union

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Abstract. The development of the former USSR oil and gas resources presents considerable political and legal challenges, such as intergovernmental agreements, delimitation of borders, and jurisdiction over the energy resources (e.g., Caspian basin). In this respect the pipeline transportation and transit have become increasingly important issues. In view of Article 7 of the Energy Charter Treaty, the novel public international law obligation of states to facilitate and not to impede the transport of energy through pipelines, this article will briefly consider the possible international forums for the resolution of legal conflicts over pipeline transit in the former Soviet Union.

1. INTRODUCTION

With the outbreak of the Caspian Sea petroleum bonanza and the development of other promising oil and gas resources in the former Soviet Union, governments and corporations are faced with the challenges of bringing the oil and gas to prospective markets. Most notably, legal challenges like intergovernmental agreements, delimitation of borders, and resource jurisdiction in the Caspian Sea basin are entwined in a complex web of government and corporate decision-making process. There is a balance of various political interests at stake, such as profit-maximization, national politics of the volatile Caucasus region, Russian and Western influences, the role of Turkey, and so on.1 The question of whether there is an international public law obligation of a transit state to authorize transit of energy by way of a pipeline was settled by the Energy Charter Treaty ("ECT"),2 which introduced in Article 7 a novel obligation of states to facilitate and not to impede the transport of energy materials through pipeline systems. The now customary problem in this respect is the

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enforcement of provisions in question through the court system. Accordingly, this article will briefly give an overview the possible solutions to legal conflicts in the former Soviet Union arising with regard to provisions of Article 7 of the ECT, by way of allocating available resources within the existing infrastructure of international legal forums.

2. Former Soviet Union Pipeline Issues and Article 7 of the ECT

There are two possible Main Export Pipeline (‘MEP’) options for transporting Caspian oil to prospective markets. The first option is the Russian-backed Northern Caucasian route, which includes the Baku-Novorossiisk route through or bypassing the rebellious Chechen Republic. This will carry oil from the Azeri Caspian and Kazakh Tengiz oil fields across the Caspian Seabed and Southern Russia to the terminals of the Black Sea port of Novorossiisk and continue by heavy tankers through the Turkish Bosphorous straits to the Mediterranean or with an exit further north into Europe through the trunk pipeline system of the European part of Russia. This is the first dedicated Caspian basin MEP project, which is due to begin operating in 2001, and is being constructed and managed by the Caspian Pipeline Consortium (‘CPC’). The second option is the southern Caucasian route, which includes the already existing pipeline from Azerbaijan to Georgia’s Black Sea port of Supsa and construction of Baku-Ceyhan pipeline, which is a 1,730 kilometer pipeline intended to carry Caspian Sea oil from Azerbaijan through Georgia to Turkey’s Mediterranean port of Ceyhan. In addition, there is a plan for a 2,000 kilometer Trans Caspian Pipeline (‘TCP’), which would carry Turkmen gas across the floor of the Caspian Sea, through Azerbaijan and Georgia to Turkey, and eventually to West European markets. The United States is backing the southern MEP routes, which will lessen the central Asian and Caucasian republics’ dependence on Russia.

All of the former Soviet Union countries have signed and, except for Russia and Belarus, ratified the ECT, which entered into force in April 1998. One of the main goals of the ECT is to secure pipeline transit of

3. The CPC unites Russia (24%), Kazakhstan (19%), Oman (7%), Chevron (15%), LUKARCO, a joint venture between Russia’s LUKOIL and Arco (12.5%), Russian/British/Dutch Rosneft Shell Caspian Ventures (7.5%), US Mobil Caspian Pipeline Company (7.5%), Italian Agip International (2%), British Gas Overseas Holding Ltd. (2%), Kazakhstan Pipeline Ventures LLC (1.75%), and Oryx Caspian Pipeline LLC (1.75%). Text is available at the official website of the CPC, at http://www.cpc-ltd.com.
4. See D. Thomas, Azerbaijan, The Next Big Oil Play (1996); see also Amirahmandi, supra note 1.
5. Over 40 of 51 signatory countries, including most of the members of the Commonwealth of Independent States, have ratified the ECT.
energy materials to the world markets. Article 7 of the ECT defines transit as the carriage of energy materials or energy products such as crude oil, hydrocarbon natural and associated gas through the territory of one or more contracting parties, crossing at least two borders. Article 7(1) requires the contracting parties to

take the necessary measures to facilitate the transit of Energy materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Material and Products or discrimination as to the pricing on the basis of such distinctions and without imposing any unreasonable delays restrictions or charges.7

Furthermore, Article 7(5) determines that a contracting party through whose territory energy materials may transit shall not impede the pipeline construction, unless it clearly demonstrates to the other parties concerned that such construction would endanger the security of supply.8

Nevertheless, the provisions of Article 7 are not easily applied in the former Soviet Union. In general, transit through former Soviet Union pipeline systems has consistently raised problems with regard to unreasonably high transportation and transit tariffs, impeding the pipeline construction and overlapping and undetermined jurisdictions.9 The ongoing debate over the legal status of the Caspian Sea and related pipeline issues highlight the complex legal issues involved.

3. THE LEGAL PREDICAMENT OF THE CASPIAN SEA

The United Nations Convention on the Law of the Sea (‘UNCLOS’) should be able to determine which Caspian Sea states have sovereign rights over which natural resources. UNCLOS protects the right to lay and maintain submarine pipelines on the ocean floor and on continental shelves worldwide as one of the ‘high sea freedoms.’10 UNCLOS protects the investment of pipeline owners by requiring that states provide for liability for repairing damage to cables and criminal penalties for intentional damage.11 However, the Caspian basin reality presents a complex picture of the basic tension of between, on the one hand, the treatment of a right of laying pipelines as part of the UNCLOS ‘high sea freedoms’ and the ECT Article

[Notes]
7. See Art. 7 ECT.
8. Id.
10. See Art. 87(c) UNCLOS.
11. Id.
7 ‘right to transit’ and, on the other hand, the sovereignty and regulatory powers of nation-states with jurisdiction over land and sea. Before 1991 the Caspian Sea was governed by the regional treaties of 1921 and 1940 between Iran and the Soviet Union, which dealt with navigation and fishing rights but did not establish seabed boundaries or discuss oil and gas exploration. The Caspian Sea may fall under the UNCLOS definition of ‘enclosed sea,’ but it can also be defined as an inland lake, which is not covered by the Convention. Hence, following the break up of the Soviet Union in 1991 the five littoral states of Azerbaijan, Iran, Kazakhstan, the Russian Federation, and Turkmenistan have advanced a series of conflicting claims and concepts seeking to define the seabed ownership. Azerbaijan has consistently been a firm supporter of dividing the seabed, as well as the water and the air space above based on the median line principle. Azerbaijan is currently involved with Turkmenistan in a dispute over where to draw the median lines. This dispute has arisen in large part due to the rising sea level, which has affected the location of the median line. Russia’s current position is that, until a new legal framework governing the Caspian Sea is developed, the existing legal framework of the 1921 and 1940 treaties should govern the Caspian Sea. Russia believes that the sea floor of the Caspian should be divided roughly along median lines between the littoral states to permit the development of mineral resources. Furthermore, Iran and Russia oppose the laying of offshore Caspian pipelines until a legal framework is established to govern environmental and biological issues, and to establish legal responsibility for safe use of the Caspian Sea. There is however a concern that a joint (environmental) management regime could be used to veto cross-Caspian pipelines.

In July 1998 Kazakhstan signed a bilateral agreement with Russia dividing the northern Caspian seabed along median lines between the two countries. Iran and Turkmenistan have already filed protests against this agreement with the United Nations. Finally, on 9 January 2001 Russian President Vladimir Putin and Azerbaijani President Geidar Aliev signed an agreement which divides the seabed along median lines into national sectors, leaving the waters above them to joint governance. With a similar agreement already existing between Kazakhstan and Azerbaijan, the balance has been tipped away from the dichotomy of UNCLOS international public law setting towards former Soviet Union-style bilateral inter-

12. For further information, see W. Wiesse, Grenzüberschreitende Landrohreleitungen und seeverlegte Rohrleitungen im Völkerrecht (1997).
13. Art. 122 UNCLOS.
governmental frameworks. This will inevitably affect the issues of international forum for dispute-settlement.

4. **ECT Choice of Forum**

MEP projects such as the Caspian Pipeline Consortium or the Trans Caspian Pipeline are multi-party commercial operations. That is, MEP projects involve different countries as transit states and privileged enterprises and companies as investors, pipeline shippers (oil and gas companies which ship energy material), operators (owners which offer carriage services) and carriers (organizations responsible for maintenance of pipeline facilities). The multitude of parties and interests involved can give rise to a wide variety of MEP-related legal conflicts with an equal number of possible legal forums for conflict resolution.

Articles 26–28 of the ECT provide for international dispute settlement procedures that can be used between governments and investors. In particular, Article 26 provides *locus standi* for the states. It also provides that, if an investor from another contracting party considers that a government has not fulfilled its obligations under the investment protection provisions, the investor can, with the unconditional consent of the contracting party, choose to submit the dispute for resolution to the national court, to any dispute settlement procedure previously agreed with the government, or to international arbitration. Under Article 26 the Investors can look to dispute resolution under the Arbitration Rules of the United Nations Commission on International Trade Law (‘UNCITRAL’) in Paris, the Stockholm Chamber of Commerce or through the Washington-based International Centre for Settlement of Investment Disputes (‘ICSID’). Article 27 of the ECT stipulates that in the absence of an agreement on the conflicts of laws between the contracting parties, the Arbitration Rules of UNCITRAL shall govern.

As far as specific pipeline transit is concerned, Article 7(7) of the ECT specifically determines that the disputes over any matter arising from pipeline transit can be settled by means of conciliation. According to Articles 26 and 27 of the ECT, the conciliation fora of the ECT are designed to resolve amicably a transit dispute on the inter-state level through the assistance of an independent and impartial conciliator. Although in the energy sector practice most companies are engaged in transit activities, it is only through involving their governments that

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16. Currently, according to President Putin, there is no foreseeable multilateral settlement for the Caspian Sea legal status debate. It is therefore most likely that the littoral states will separately arrange for the establishment of bilateral agreements. See M. Oksanin, *Putin Takes Caspian Sea*, GazetaRu, 9 January 2001. For background information, see R. Cutler, *Cooperative Energy Security in the Caspian Region: A New Paradigm for Sustainable Development?*, 5 Global Governance 251–271 (1999).
companies can make use of the conciliation procedure.\textsuperscript{17} It should be noted that this concerns mainly the conditions of transit, \textit{e.g.}, transit tariffs and fees. According to Article 7(4), a contracting party may refer the case by a notification summarizing the matters in dispute to the Secretary-General who, in consultation with the parties to the dispute and the other contracting parties concerned, appoints a conciliator.

The ECT Rules Concerning the Conduct of Conciliation of Transit Disputes (hereinafter ‘Rules’) was adopted by the Energy Charter Conference in 1998 and applies to conciliation of disputes under Article 7(7) of the ECT.\textsuperscript{18} The Rules establish procedural steps, including notification of a dispute, appointment of a conciliator, conduct of conciliation proceedings, legal representation, witness and expert testimonies, proposals for settlement of a dispute, and agreement between the parties and the recommendation/decision of a conciliator. The conciliation proceedings are subject to the principles of impartiality, equity, and justice enshrined in the Rules. The conciliator ensures that parties and the subject of a dispute are properly identified through questionnaires, conferences, hearings, or the submission of written or other material. A contracting party may submit a proposal for a settlement of a dispute at any stage of the proceedings. If the contracting parties have not reached agreement within the time-limit of 90 days provided for in Article 7(7) of the ECT or in Rules 3(5) and 4(5), the conciliator will submit in writing to the Secretary-General of the ECT the recommendation either for a resolution of the dispute or a procedure to achieve such resolution, and his or her decision on interim tariffs and other terms and conditions of the Transit.\textsuperscript{19} Respecting the contractual freedom of enterprises to negotiate the conditions of transit, conciliation is an effective means to resolve transit disputes with regard to actions of the Transit state, its sub-national authorities, and state or privileged enterprises. Based on the assumption that contracting parties are willing to find jointly a solution to MEP related disputes under Article 27 of the ECT, conciliation is an expeditious and relatively cheap procedure. Nevertheless, it should be confirmed that this procedure mainly deals with the conditions of transit, \textit{e.g.}, transit tariffs and fees. Furthermore, a contracting party may refer to the ECT conciliatory fora only after exhausting all relevant contractual or other dispute resolution remedies under Article 27 of the ECT, which brings us to the issue of available dispute settlement forums in the former Soviet Union.

\begin{itemize}
\item \textsuperscript{17} ECT Transit Conciliation Procedures (1998).
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id.}
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5. **ROLE OF THE COMPETENT AUTHORITY**

With the proliferation of specific intergovernmental and investment agreements regulating the pipeline issues, those who have been involved in former Soviet Union pipeline projects are confronted with specific jurisdictional and administrative problems. In this regard it is important to determine the competent authority for administrative dispute settlement. The competent authority, in accordance with standard petroleum agreements practice, establishes the connection to appropriate ministries and other government agencies (customs, ministries of finance, justice, economic affairs, etc.) which, by virtue of their jurisdictions, may influence the level of transportation charges and taxes and the issues of corporate, real estate, environmental, and other pipeline regulatory matters.

Specific multilateral and bilateral agreements and protocols, which regulate the construction and use of pipelines exist between all of the energy ministries of the MEP countries. These ministries serve as the competent authorities responsible for licensing and for matters pertaining to uninterrupted pipeline transportation within the limits and volumes as stipulated by the contracting parties. With regard to the environmental planning control, there are environmental agencies that will be the competent authority in determining the environmental standards applied to the pipeline systems. It should also be submitted that most of the general issues of co-operation in the energy sector and environmental protection are covered by the conventions of the Commonwealth of Independent States (hereinafter ‘CIS’), which binds twelve countries of the former Soviet Union. The Umbrella Agreement on the Institutional Framework for the Establishment of Interstate Oil and Gas Transportation Systems was signed on 22 July 1999 in Kiev (Ukraine) by all CIS countries except Russia, with the aim of establishing rules in accordance with the ECT and the practice of the international oil and gas industry. Although the Agreement provides for the establishment of a supervisory competent authority for administrative resolution of disputes arising from transit agreements, it refers dispute settlement procedure to a separate protocol to be established later.

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20. See S. Carey, Russia’s Involvement in Caspian Transportation (1999).
21. The energy laws in the former Soviet Union countries contain many similar approaches, which indicates that common problems have similar solutions and lead to similar institutional structures.
22. The CIS was created in 1991 and binds Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine. See CIS Treaties and Documents, Garant legal information retrieval system 2000 (Garant 5.0).
6. **Choice of the Former Soviet Union Forum**

If the competent authority cannot reach a settlement, the dispute can be brought to the former Soviet Union courts. The issues of pipeline access, transit charges, and environmental control will fall within the jurisdiction of local courts under the CIS Agreement of 1992 on economic dispute resolution.\(^\text{24}\) That is, the disputes pertaining to the access to public, municipal, and private lands, transit taxation, and protection of the environment should be addressed to the local courts of general jurisdiction. Disputes with regard to commercial and investment disputes are usually referred to the arbitration courts. For appeals of the CIS inter-state arbitration cases the parties may refer to the Minsk-based Economic Court.

The Economic Court of the CIS was created in 1993 under the Charter of the CIS with its headquarters in Minsk, Belarus.\(^\text{25}\) With the exception of Azerbaijan, Georgia, and Turkmenistan, all of the CIS member states have adopted the Economic Court Statute of 1993 and the Economic Court Procedure of 1994.\(^\text{26}\) Azerbaijan has been involved in a protracted negotiation process to join since 1996 because of its reservations as to the scope of the court’s jurisdiction. Under the CIS Charter, jurisdiction extends over the resolution of the inter-state disputes arising from the implementation of agreements between CIS member states and documents issued by CIS Council of Heads of States or other CIS organs.\(^\text{27}\) The court also interprets the letter of the law with regard to CIS-related economic agreements.\(^\text{28}\) It consists of two judges from each member state, who are elected for terms of ten years. The judges elect the chairman and his deputies for a five-year term subject to confirmation by the heads of the CIS countries. The highest body of the Economic Court is a plenary meeting, which consists of the judges and the heads of the highest arbitration and economic courts of the CIS countries, and which is held at least once every four months.\(^\text{29}\) The court has tried about 50 cases but the majority of them so far did not deal with any major economic disputes between CIS member states. However, there has been a growing consensus between the governments of the CIS that the judicial procedure should dominate in dispute resolution.\(^\text{30}\) There are constant shifts towards clarifying the court’s jurisdiction, which includes all CIS multilateral and

\(^{24}\) For more information, see CIS Agreement on the Resolution of Economic Disputes (Kiev Agreement), 20 March 1992, CIS Agreements (1992).

\(^{25}\) See Art. 32 CIS Charter (1993).

\(^{26}\) See Art. 2 CIS Convention on Economic Court Status (1992); Sec. 1, Economic Court Decree of 1994 on the Court Procedure, CIS Agreements (1994).

\(^{27}\) For the text of the document, see Sec. 3 of CIS Decree on EC activities.


\(^{29}\) Sec. 9, Economic Court Procedure (1994).

\(^{30}\) See the CIS Agreement of 1992 on Mutual Recognition of Property Rights and Regulations, the CIS Agreement of 1992 on Harmonization of Economic Legislation of the CIS Member States, the CIS Convention of 1994 on Mutual Cooperation in Civil, Family and Criminal Matters, Garant 5.0.
bilateral economic relations. In 1996 the Council of Heads of the CIS states developed a “concept of the international concept resolution.” In 1999 the court prepared the Protocol to the agreement on its status that contains proposals regarding expansion of its jurisdiction and authority.

With regard to Main Export Pipeline disputes which involve multiple corporate issues (taxation, real estate, and project finance), a viable option for resolving dispute is the Moscow-based Court of International Commercial Arbitration (“CIAC”) of the Chamber of Commerce and Industry of the Russian Federation, which is a successor of the Soviet CIAC created in 1920. The Federal Law On International Commercial Arbitration of 1993, which includes the Statute and the Rules of CIAC, regulates the activities of the new CIAC. The Statute of CIAC declares that the CIAC is an independent permanent arbitration or a third-party tribunal. Under CIAC Rules disputes may be referred to CIAC only if the parties agree that the CIAC rather than a court will settle disputes between them. Azerbaijan, Belarus, and Ukraine have created similar institutions; the CIAC however has much more extensive experience and expertise in the resolution of international commercial disputes. It is envisioned that the CIAC could handle Main Export Pipeline-related disputes regarding licensing, pricing structure, the joint construction and operation of the pipeline, and shareholder rights.

7. **Proliferation of Legal Problems**

The former Soviet Union pipeline issues have given rise to a specific interdependent decision-making system. For example, in the fall of 1999 Russia’s parliament (the State Duma) approved on first reading the draft Law on Pipeline Transport. If adopted, the Law on Pipeline Transport will establish the principle of free and equal access of any oil shipper to any pipeline. If the pipeline’s capacity cannot accommodate all applicants (including the pipeline operators and carriers), then quotas will be distributed in proportion to each applicant’s total production. Considering Russia’s vital role in MEP-projects, such a provision may bring about new legal disputes, for example, if the shareholder rights of the countries and companies involved in MEP projects or the projected charge rate of shipping product will be disturbed by the new law.

The role of the ECT, and in particular Article 7, will inevitably become

32. See G. Simonyan, Kwoprosu o priznanii yurisdikcii ekonomicheskogo suda SNG gosudarstwami chленами sodruzhestva [On the Question of the Recognition by CIS Member States of the Jurisdiction of the Economic Court], 4 Moscow JIL 104–111 (2000).
34. Art. 15 Law on Pipeline Transport (1999), Garant 5.0.
increasingly important in MEP-related legal conflicts. For example, the Russian Federation currently accuses Ukraine of stealing Russian export gas transiting through the Ukrainian pipeline system. It is alleged that between November of 1998 and December of 1999 Russia lost 1.5 billion cubic meters of gas valued at about US$88 million to the Ukraine.\(^{35}\) Russia intends to bring legal action against Ukraine before the ECT conciliatory fora in Brussels.\(^{36}\) Furthermore, the EC will apparently assume a more important role in enforcing CIS *lex communes*,\(^{37}\) which can also extend over MEP-related issues. The Caspian MEP projects have been the subject of the numerous multilateral corporate contracts, which determine particular arbitration fora and competent authorities. Undoubtedly, the kind of legal conflicts and disputes which were mentioned above will eventually crystallize the appropriate infrastructure of international legal forums for the resolution of MEP-related disputes in the former Soviet Union.

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