Transit Disputes, Supply Disputes & the ECT: Towards an East-West Thaw?

Peter D Cameron
p.d.cameron@dundee.ac.uk
The Problem

1. Interruption to Gas Supply to EU (2006); short duration – 1-4 Jan
2. Interruption to Gas Supply (2009) – duration of several weeks
3. Severe effects of second interruption: sharp reduction in exports to 16 Member States & Moldova and complete cut-off for 3 weeks during a very cold winter
The Reaction

- Initially, blame on Russian supplier (2006)
- Evident lack of understanding in media of transit, and long term character of the problems in the CIS
- More balanced reaction to 2009 crisis but evident failure of existing conciliation mechanism
About 80 percent of the gas which Russia exports to the EU is carried by pipeline across the Ukraine, Belarus and Moldova, while the rest travels to Finland and by the Blue Stream pipeline to Turkey. Of this 80 percent, as much as 70 percent of the gas transits the Ukraine alone.

The main vehicles for the States’ interest in the gas industry are Gazprom (Russia) and Naftogaz (Ukraine).

IEA: Ukraine is “the most important transit country in the world” (2006)
Transit Problems – past and future

- Transit states – in any part of the world – have a tendency to abuse their monopoly of power
- Examples from Middle East and North Africa
- In Europe growing number of pipelines: Nabucco, North Stream and South Stream
- Problems likely to grow in coming years, not decline
ECT: The Answer?

- Context of ECT Birth:
- Euphoria post-Cold War: huge legal push to promote FDI started in 1990s: development of BITs (more than 2600) and MITs, especially ECT
- Tsunami of legal claims in 21st century against host States in East Europe, Turkey and Latin America – activation of ECT in this context
- Concerns of host States: Treaty-shopping by investors; is the system fair?
- The system has teeth!
ECT & Transit

- Broad aim – to depoliticise disputes
- Art 7 contains rules on:
  - non-discriminatory passage with no distinction allowed as to origin, destination, or ownership of products or materials;
  - non-discriminatory pricing;
  - absence of unreasonable delays, restrictions, or charges;
  - modernization of infrastructure;
  - offer of the possible new-build infrastructure;
  - non-interruption of transit in case of dispute, and clear dispute and conciliation procedures
Key Provisions

“"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 Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in Article 7(7)"
Procedure

- Contracting Party may refer the dispute to the SG.
- SG shall appoint a conciliator.
- 90 day time limit to reach decision by all or he may “decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved”.
- Parties shall observe the interim decision for 12 months.
End of a Phase

- Article 7 was to be fleshed out in a special Protocol on transit – talks on this ceased due to disagreements pre-2006
- EC discussions on Partnership & Cooperation Agreement with Russian Federation stalled
- Attempts to depoliticise transit issues stalled
New Phase

- Given seriousness of transit problems, need to revive idea of a Transit Protocol
- Art 33 (1) and (2):
  - “The Charter Conference may authorise the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter
- Any signatory to the Charter may participate in such negotiation”
The End

Thank you!