

SERIES OF NOTES ON THE ENERGY CHARTER TREATY

Note 11

18 August 2014

The Ukrainian Law On Sanctions and the Energy Charter Treaty

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INTRODUCTION

1. Human history is littered with uninformed political decisions or threats of political action that led to destruction and lasting human misery. Indeed, human history is awash with decisions and actions with unintended consequences.
2. A potential candidate for a decision with “unintended consequences” (if implemented) could be Bill No. 4453a introducing the Law “On Sanctions” adopted by the Ukrainian Parliament on 14 August 2014.

THE UKRAINIAN LAW “ON SANCTIONS”

3. During a briefing, on 08 August 2014, Prime Minister of Ukraine announced that:

“The Cabinet of Ministers of Ukraine will submit to the Verkhovna Rada [Parliament] a bill “On sanctions”...
According to the bill, Ukraine has the right to apply 26 types of sanctions, including ... **complete or partial ban on transit of all kinds of resources...**”¹ (emphasis added)

¹ PM declares Govt to submit bill on sanctions to Parliament, 08 August 2014, Department of Information and Communication of the Secretariat of the CMU. http://www.kmu.gov.ua/control/en/publish/printable_article?art_id=247512503 (last accessed on 14 August 2014)

4. On 14 August 2014, the Parliament adopted the Law “On Sanctions”, which shall come into force on the next day of its publication.²
5. According to Article 4(3) of the Law “On Sanctions”, types of sanctions that may be applied include, “restrictions, partial or complete cessation of transit of resources, flights and transportation through Ukraine”.
6. Needless to say, the implementation of this law as far as transit of energy is concerned, thus interrupting the flow of Russian gas to Europe, will be catastrophic politically and, indeed, economically.

THE ENERGY CHARTER PROCESS AS A PLATFORM FOR DIFFUSING THE UKRAINE ENERGY CRISIS

7. It is no exaggeration to suggest that, provided a genuine political will exists, the Energy Charter process makes available a multilateral platform and various mechanisms to address the serious threat of security of energy supply engendered by the Ukraine crisis.
8. One immediate positive political step towards an attempt to defuse the potential energy crisis in question is for the Energy Charter Conference to convene an “Extraordinary meeting” under Article 34(2) of the Energy Charter Treaty (ECT).³
9. Be that as it may, the aim of this note is not to offer any political advice or analysis of the political and geopolitical dimension of the present energy crisis. The aim is to highlight the overall legal framework within which this crisis will have to be understood if political and consequently legal solutions are to be devised.
10. This note is confined to the relevant legal aspects of the ECT. Thus the potential relevance of the WTO rules or other international agreements or contract has not been examined here.

² The Verkhovna Rada adopted the Law “On Sanctions”, 14 August 2014, Information Department of the Verkhovna Rada of Ukraine Secretariat. <http://rada.gov.ua/en/news/News/News/96992.html> (last accessed on 14 August 2014)
For the draft law, please visit http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=51915 (last accessed on 18 August 2014)
For methods of publication, please visit <http://www.ua.spinform.ru/organi.html> (last accessed on 18 August 2014)

³ Article 34(2) stipulates that “Extraordinary meetings of the Charter Conference may be held at such times as may be determined by the Charter Conference, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to the Contracting Parties by the Secretariat, it is supported by at least one-third of the Contracting Parties.”

11. In order to place this note in its wider context, it may be appropriate to recall some of the other notes published in this Series, in particular Note 7.⁴

THE ECT'S TRANSIT REGIME

12. In today's interdependent world, the proposition that, as a matter of international law, there is a general right to **freedom of transit** is compelling. And, perhaps, this proposition cannot be more compelling than in the field of free movement of energy.
13. It is trait to suggest that national, regional and global security of energy supply and demand is inextricably linked to the principle of freedom of transit. It cannot be otherwise. Freedom of transit is fundamental to the rule of law to which the international community must seriously commit, if the political objective of security of energy supply is to have any meaning.
14. It is not surprising, therefore, that the above proposition constitutes one of the underlining premises upon which the whole edifice of the Energy Charter process has been construed.

ARTICLE 7 ECT: FREEDOM OF TRANSIT

15. Article 7 of the ECT codifies the principle of freedom of transit. It is to be noted that Article 7 of the ECT is broader in its scope of application than Article V of the GATT. Article 7 adds some flesh to what is meant by "freedom of transit". This includes the obligation of ECT Contracting Parties to "secure established flows" of energy to other Contracting Parties (for a detailed examination of this obligation see Note 7 of this Series).
16. Thus, Ukraine, as an ECT Contracting Party, is under clear obligation not to "... 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 from or to other ECT Contracting Parties. Under present circumstances the Contracting Parties that will be immediately affected by any interruption or reduction of energy transit are Member States of

⁴ "Conciliation in the Case of Interruption or Reduction of Transit", Note 7, 16 March 2014. See also, "Background Note on the Energy Charter Treaty", Note 2, 10 March 2014; and "A Bird's Eye View of Article 18 of the Energy Charter Treaty: Sovereignty over Energy Resources", Note 4, 11 March 2014. <http://www.menachambers.com/expertise/energy-charter-treaty/>

the European Union (EU) and, indeed, the EU itself, as a Regional Economic Integration Organisation.

ARTICLE 24 ECT: EXCEPTIONS?

17. Ukraine might invoke the relevant exception listed under Article 24 (“Exceptions”) of the ECT. Thus, one way of presenting Ukraine’s justification of its possible transit related measures might be as follows: under Article 24(3) of the ECT, Ukraine is not prevented from imposing the sanction’s law in its present form. This is so because such measures are “... necessary: (a) for the protection of [Ukraine’s] essential security interests including those (i) relating to the supply of Energy Materials and Products to a military establishment; or (ii) taken in time of war, armed conflict or other emergency in international relations...”
18. This is a legitimate argument, but it is incomplete. It is incomplete because the last sentence of Article 24(3) explicitly provides that “[s]uch measure shall not constitute a disguised restriction on Transit.” What exactly this controlling provision of the ECT means is, of course, a matter of interpretation.⁵ It seems, however, that any Ukrainian energy transit restricting measure is not a “*disguised* restriction”, but quite an explicit measure, as is clear from the Law “On Sanctions” itself. It follows that the portion of the Law “On Sanctions” that applies to energy transit cannot be justified under Article 24 of the ECT.

CONCLUSION

19. The legal merits of Ukrainian Law “On Sanctions” (whatever its political objectives) are questionable under the ECT, and constitute a bad precedent. Even a *threat* to interrupt the freedom of transit of energy is a serious enough to engender legal consequences. Transit is an economic activity, which must be cleansed of political objectives; otherwise the “unintended consequences” might spiral out of control.
20. Before things escalate to a point of no return, the EU could attempt to defuse the simmering regional energy crisis by calling for an “Extraordinary” meeting of the Energy Charter

⁵ “The Process Involved in Interpreting a Treaty: With Special Reference to the Energy Charter Treaty”, Note 3, 10 March 2014. <http://www.menchambers.com/expertise/energy-charter-treaty/>

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Conference. It is about time to make use of such potentially pivotal and unique organisation, which the European Communities was instrumental in establishing in the early 1990s.

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2. Background Note on the Energy Charter Treaty (10 March 2014)
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8. Article 45 of the Energy Charter Treaty: Highlights of the Negotiating History of the Provisional Application (21 April 2014)
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