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Telefax message

To: Energy Charter Secretariat
Mr. Vesely
Brussels

Telefax number: 32 2775 9842
From: Tamás Sömjén
Date: Budapest, 1998.06.29.
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ENERGY CHARTER SECRETARIAT
Date: 29/06/98
Reg No: 11694
For Info: CC/DSG/IP/LA

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Message:

Dear Mr. Vesely,

With reference to Article 26(3)(bii) of the Treaty please find enclosed a statement composed by the Ministry of Justice.

Your sincerely

Tamás Sömjén

Under the rules of Article 26(3)(a) a Contracting Party gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of European Energy Charter Treaty. As a result of this possibility in the case of subparagraph (2)(b) the previously concluded agreement would be disregarded, that is to say, the performance thereof would become impossible. It means, that an individually negotiated contract would be overruled by a more general "agreement", the parts of which are the unconditional consent on the side of the contracting state and the submission on the other side. On the contrary, it is a well-established legal principle, that the special rule (originating from legislation or from contract) prevails over the general one. Consequently, it is the individually negotiated dispute settlement mechanism, that must be applied preferably.

In addition, if the procedural alternatives could even be deemed equal, the choice of one of them fixes the forum, terminating the alternative character of the obligation, so it will be the only proceedings which must be considered to be agreed, and pacta sunt servanda applies.

The later possibility of alteration would give opportunity to the plaintiff for vexatious litigation. The Civil Procedure Act (1952. évi III. törvény a Polgári perrendtartásról, 160.§) stipulates, that prior to the hearing of the lawsuit on its merits, the plaintiff may abandon his petition even without the consent of the defendant; but after the commencement of the hearing on the merits he may do so only if the defendant consents to such abandonment. In either case the plaintiff shall reimburse the defendant for the costs incurred through the institution of the lawsuit. The consideration of this rule is to protect the defendant from improper litigation. The defendant, who has the chance to win the case, has to have as well the opportunity to obtain res iudicata in favour of him, by not allowing to discontinue the lawsuit before the court renders its judgement. This solution is capable of saving time and costs. For this reason hungarian law could not accept a provision which allows the plaintiff (investor) to turn to the Energy Charter Treaty arbitration after the commencement of the proceedings mentioned under the subparagraph (2)(a).

Finally, it must be mentioned, that Arbitration Act (1994. évi LXXI. törvény a választottbíráskodásról, 8.§), as far as the relationship between arbitration and the procedure of court of law is concerned - in accordance with the UNCITRAL Model Law on the international commercial arbitration - stipulates, that a court, before which an action brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refers the parties to arbitration. It

means, that the court will enforce the arbitration agreement by dismissing the case, but only until the hearing on the merits. After that point the parties are deemed to terminate tacitly the arbitration agreement. In this way the bad faith litigation causing undue delay can be prevented, as well as the abuse of court.

To sum up: hungarian law acknowledges the principle of pacta sunt servanda, the maxim of good faith, endeavours to ensure time and cost saving enforcement of rights, which does not permit to accept the possibility of turning from one way of dispute settlement to another one after the commencement of the proceedings.