

EU – RUSSIA ENERGY RELATIONS

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Euroconfidential



EU RUSSIA ENERGY RELATIONS



Legal and Political Issues

Over the last 36 months the energy relationship between Europe and Russia, a customer and its supplier, has been re-written in many ways. This new book endeavors to grasp the political and legal issues that surround these developments.

Firstly, the political aspects of the EU-Russia relations are discussed by some of the leading practitioners and academics in the field. With Russia being the single most important energy supplier for the European Union, the security of supply issue inevitably hinges to a large extent on the complex relationship between Brussels and the Kremlin. The events following the most recent disruption of gas supply from Ukraine in 2009 is evidence of the fragile political interrelation between the EU and Russia and it is not surprising that speculation about the future of Russian energy supplies to the EU keeps growing. These issues are further complicated by the stated intention of both parties, the EU in particular, to diversify their energy flows. In the first section of the book, the Energy Commissioner Andris Piebalgs and his colleague from the Cabinet, Ferran Tarradellas, approach the issue from an EU perspective as international relations practitioners. Their viewpoint on EU-Russia relations is then followed by an academic assessment from Dr Fraser Cameron.

Above and beyond policy issues, the legal issues that surround the intricate political backdrop of the relationship are also examined in much detail. Indeed the legal relations between the two partners are at the center stage of this book. Various mechanisms including the EU-Russia Partnership Agreement, the EU-Russia energy dialogue and the Energy Charter Treaty are examined and debated. Another re-occurring theme of the book is the role of transit countries. Here, the international law aspects of EU- Russia energy relations are discussed by an eminent group of experts including Mark Baker, Dr. Andrey Konoplyanik, Dr. Dirk Buschle, Sophie Nappert and others. These experts discuss issues including the Energy Charter Treaty, EU-Russia Partnership Agreement and the enforcement of arbitral awards in Russia.

The changing legal regime, in the EU in particular, also has its effects on EU-Russia relations. Some of the most significant and controversial changes in EU energy law and policy and its implications for EU-Russia energy relations are examined in the chapters written by some of the leading academics from various countries including many EU Member States, Ukraine and the US. The authors include Dr. Michelle Michot Foss, Dr. Dmitry Volkov, Dr. Gürçan Gülen, Dr. Alan Riley, Arnoud Willems, Jung-ui Sul, Yohan Benizri, Michael Gonchar, Vitalii Martyniuk and Olena Prystayko, Aleksander Kotlowski, Kim Talus and Michaël Hunt.

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A Common Russia-EU Energy Space (The New EU-Russia Partnership Agreement, Acquis Communautaire, the Energy Charter and the New Russian Initiative)¹

Andrey Konoplyanik²

1. Introduction

At their St Petersburg Summit in May 2003, the EU and Russia agreed to start working on the creation of four “common spaces”, meaning closer cooperation and integration in economics and energy; internal security and justice; foreign and security policy; and education and culture.³ They agreed on “road maps” for the four spaces at the Moscow Russia-EU Summit in May 2005 with the legal framework for these four spaces to be implemented within the new Partnership Agreement (PA)⁴ replacing the previous Partnership and Cooperation Agreement (PCA)⁵, signed in 1994, which

¹ This article draws on the author’s presentation on “Russia-EU common energy space – how to create it best: New Bilateral Russia-EU Partnership Agreement? Export of EU “acquis communautaire”? Energy Charter Treaty!” at the international conference: “Russia-EU Energy Dialogue: in the aim of future strategic partnership”, 30 October 2008, Luxembourg, and is an expanded and updated version of his chapter “Regulating energy relations: Acquis or Energy Charter?”, pp. 103-115 in K. BARYSCH, *Pipelines, Politics and Power: The future of EU-Russia energy relations*, Centre for European Reform – CER, October 2008, 117 pp., and of his two earlier publications on this issue in Russian: (a) *Обойти пункты преткновения. – «Политический журнал»*, № 6-7, pp. 183-184, 21 апреля 2008 г., с. 40-44, and (b) *Россия, ЕС и Энергетическая хартия: что дальше? – «Время новостей»*, № 210 (2092), 13 ноября 2008 г. с. 8. The shortened version of this article was published in the *Journal of Energy and Natural Resource Law* №2, 2009, pp. 258-291.

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³ Joint Statement of the Russia-EU Summit, 31 May 2003, St Petersburg (http://www.delrus.ec.europa.eu/en/p_234.htm).

⁴ 15th EU-Russia Summit Moscow, 10 May 2005, Press Release, 8799/05 (Presse 110)(http://www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc).

⁵ Соглашение о партнерстве и сотрудничестве, учреждающее партнерство между Российской Федерацией, с одной стороны, и Европейскими сообществами и их государствами-членами, с другой стороны, от 24 июня 1994 г. //Собрание законодательства Российской Федерации. – 20 апреля 1998 г. - № 16. – Ст.1802.

lasted until the end of 2007. Energy relations are included in the road map on the common economic space⁶ which defines the aim of cooperation and necessary actions.⁷

On 26 May 2008 the European Commission finally received a mandate from the EU Council of Ministers to open the next round of negotiations for the new EU-Russia Agreement.⁸ At the Russia-EU Summit held in Khanty-Mansiysk (the oil capital of Russia's Western Siberia) at the end of June 2008, the parties had agreed to start negotiations on the new bilateral Partnership Agreement.⁹ The first round of negotiations took place on 4 July 2008. Following the conflict in the Caucasus, the European Council of 1 September 2008 decided to postpone meetings on the negotiations. At the meeting of EU Foreign Ministers of 10 November 2008 the Commission received political backing to pursue negotiations.¹⁰ One of the key objectives of the new PA is to harmonise legislation and to develop a legal framework for the creation of a common Russia-EU economic space, including energy.¹¹

⁶ Russia and the EU first mentioned the idea of a common economic space between the two in their Joint Statement at the EU-Russia Summit held in Moscow on 17 May 2001, in which they stated: "We agree to establish a joint high-level group within the framework of the PCA to elaborate the concept of a common European economic space".

(http://www.delrus.ec.europa.eu/en/images/pText_pict/239/sum31.doc)

⁷ "The objective of the common economic space is to create an open and integrated market between the EU and Russia. Work on this space will bring down barriers to trade and investment and promote reforms and competitiveness, based on the principles of non-discrimination, transparency and good governance. Among the wide range of actions foreseen in the road map, an EU/Russia regulatory dialogue on industrial products is to be launched, as well as greater co-operation on investment issues, competition and financial services. It is also foreseen to enhance co-operation in the telecommunications, transport and energy fields, on issues such as regulatory standard-setting and infrastructure development...".

(15th EU-Russia Summit Moscow, 10 May 2005 Press Release, 8799/05 (Presse 110))(http://www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc)

⁸ EU-Russia Summit in Nice on 14 November, IP/08/1701, Brussels, 13 November 2008, (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1701&format=HTML&aged=0&language=EN&guiLanguage=en>).

⁹ Joint statement of the EU-Russia summit on the launch of negotiations for a new EU-Russia agreement, Khanty-Mansiysk, 27 June 2008, 11214/08 (Presse 192)

(http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/101524.pdf).

¹⁰ EU-Russia Summit in Nice on 14 November, IP/08/1701, Brussels, 13 November 2008, (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1701&format=HTML&aged=0&language=EN&guiLanguage=en>).

¹¹ The author has earlier expressed his views on the common rules for common spaces in e.g.: A.Конопляник. Единые пространства: единые правила. – «Ведомости», 20 августа 2004 г., N 149 (1189), с. А4.

The practical issues associated with the preparation of a new PA were further discussed at the next Russia-EU Summit held in Nice (France) on November 14, 2008.¹² It seems that there will be an energy chapter in the new PA, but the architecture of the chapter is still to be discussed. The previous PCA of 1994 did not possess an energy chapter and thus it is time to outline the principles of such a chapter and if possible a fully-fledged legal framework for such a common energy space.¹³

There are three ways to develop such an energy legal framework. The first avenue (clearly preferred by the EU) is to export the EU's emerging *acquis communautaire* (i.e. the common internal legislation of the enlarging EU) to the countries outside the EU. The second avenue is to prepare a new bilateral Russia-EU Partnership Agreement, either "on the basis of the Energy Charter principles" or a totally new agreement. This option has been preferred by Russian authorities¹⁴, but is also considered as a possible avenue for moving forward by some EU officials¹⁵ and even – indirectly – by the EU as a whole.¹⁶ But there is also a third way which is to use the Energy Charter Treaty (ECT) itself as the basis for such a framework. This third approach may be practical in spite of Russian concerns as to the

¹² It was difficult to expect substantial debate or progress on a new PA given that only 45 minutes was reserved for the Plenary Meeting within an 2.5 hours-long Summit (see: "EU-Russia Summit" at http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-11_2008/PFUE-14.11.2008/sommet_ue-russie).

¹³ Analysis of the broader set of issues related to the development of a new PA, other than the development of the common energy space, goes beyond the scope of this paper. There is a significant body of literature, both in Russia and Europe, on this topic including: M. EMERSON, F. TASSINARI, M. VAHL, "A New Agreement between the EU and Russia: Why, what and when?", N° 103 *CEPS Policy Brief*, May 2006. This CEPS paper is a response to two articles published in N°2 *Russia in Global Affairs*, Vol. 4, April-June 2006: "Toward a Strategic Alliance" by T. BORDACHEV and "Russia-EU Quandary 2007" by N. ARBATOVA (<http://www.ceps.be>).

¹⁴ See, for instance, the following statement of V. YAZEYEV, Deputy Chairman of the Russian State Duma, to the press early April 2008, which reflects his long-standing views. "My view of the situation is that it is impossible to modify the Energy Charter [Treaty – A.K.] to the extent which could make it possible for the State Duma to ratify it. A different, seriously thought-through document is required," told Yazev. "Russia and Europe, being strategic partners in the field of energy, have to start developing new institutions capable of coordinating inter alia the functioning of the forming global energy market," added the Vice-speaker. (Press service of the Deputy Chairman of the RF State Duma V. A. Yazev. Press-release, 09.04.2008).

¹⁵ This was, for instance, mentioned by some speakers at the 2008 Annual Conference of the French Institute of International Relations (IFRI) "The External Energy Policy of the European Union", held on 31st January - 1st February 2008 in Palais d'Egmont, Brussels, Belgium.

¹⁶ "The new Agreement will cover results-orientated political co-operation, the perspective of deep economic integration, a level playing field for energy relations based on the principles of the Energy Charter... The new agreement will build upon the current four Common Spaces." (EU-Russia Summit in Nice on 14 November, IP/08/1701 <http://www.delrus.ec.europa.eu/en/news_1094.htm>).

unbalanced character of the ECT and the possibility of interpreting some of its provisions to the detriment of energy producers.¹⁷

In my view, the first two avenues are counter-productive. The third avenue presents the most (if not the only) effective practical way to create the mutually-beneficial legal framework for the common Russia-EU energy space. It would be based on a multilateral legal foundation which has already been in force for more than 10 years.¹⁸

Criticisms of the ECT at the highest Russian level continue. For example, the President of Russia, Dmitry Medvedev, during his meeting with the CEO of Gazprom, Alexei Miller, on 20 January 2009, criticized the ECT for its inability to play a constructive role prior to and during the Russia-Ukraine gas crisis of January 2009.¹⁹ Some of this broader criticism is well-substantiated and is based on the fact that the Charter in its different facets (Energy Charter Conference as an international organisation with its organisational structure (Ad Hoc and permanent working groups and standing bodies); the long-term process of multilateral cooperation and forum for political debate organized within this organisation; multilateral documents such as the political declaration of 1991 and the legally binding instruments of 1994, 1998, etc. as the material products of this organisation's activities and of the above-mentioned debates; the Secretariat as an administrative body of this multilateral international organisation) was the result of a multilateral compromise of almost 20 years ago which reflects the realities of that time. This means that it will be essential to address well substantiated Russian concerns regarding the ECT. Thus, this third avenue is not a cost-free way of creating the legal framework of the Russia-EU common energy space. Nevertheless, I suggest that it will provide more benefits and will be less costly and time-consuming to put in place than the second option. And it will be practically impossible to implement the first option.

¹⁷ See, for instance, the presentation of the official Russian representative at the Conference organised by the Energy Charter Secretariat, the International Energy Agency and the Organisation for Security and Cooperation in Europe, 25 October 2006, Palais d'Egmont, Brussels, Belgium, at http://www.encharter.org/fileadmin/user_upload/Conferences/25_Oct_2006/Gorban_-_RUS.pdf.

¹⁸ The ECT came into force on April 16, 1998.

¹⁹ <http://www.kremlin.ru/text/appears/2009/01/211884.shtml>

The next section examines each of the three available options in more detail.²⁰

2. First Option: Export of the Acquis Communautaire (the EU's Preferred Approach But a “no go” For Russia)

A common Russia-EU economic (and thus an energy) space presupposes the convergence and harmonisation of the legislation and law-enforcement practices of the two parties. But the approach of Russia and of the EU to harmonisation differs.

For the EU, the *acquis communautaire* is supra-national. The EU sees the *acquis* as the product of the convergence process of EU Member States and proposes it for external use. Thus, for the EU, the convergence of EU law with the legal systems of third states (i.e. non-EU states) means the adoption of the *acquis* by such legal systems.²¹ This approach extends to EU energy policy.

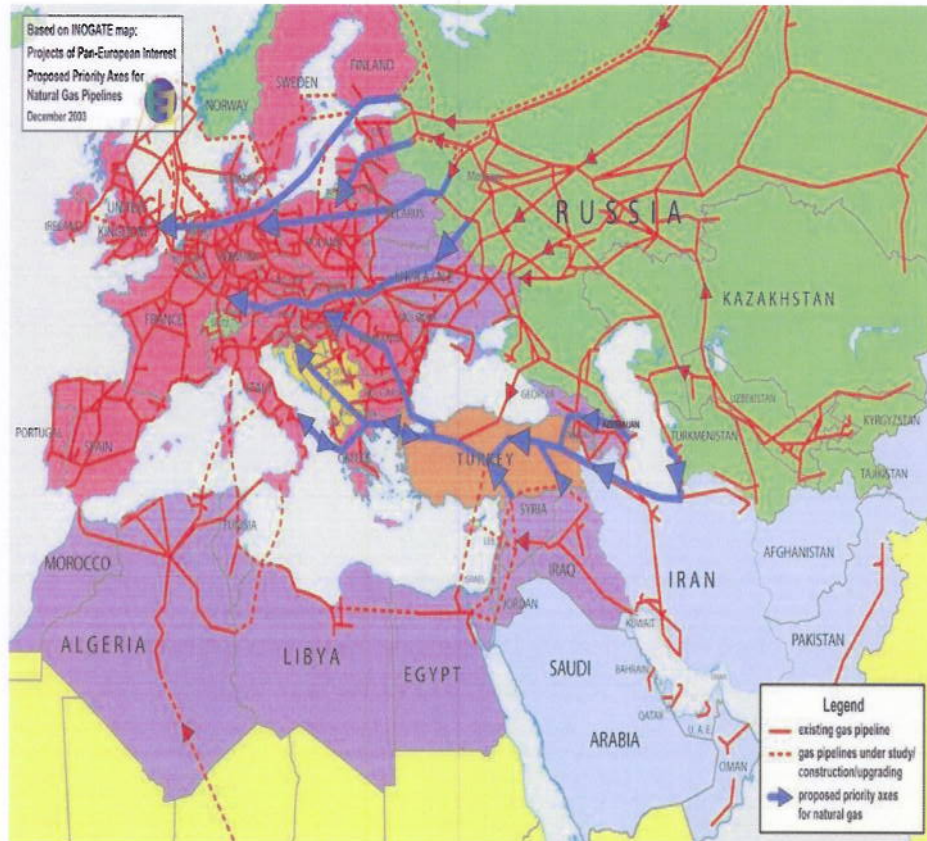
The EU has implemented this approach through the “direct” and “indirect” expansion of the geographical area of the zone of practical implementation of *acquis*.

²⁰ The author's analysis of these options is based not only on his understanding of the relevant legal instruments, but also on his understanding of the geopolitical context. This, in turn, is based on his practical experience within the Energy Charter Secretariat in his capacity as Deputy Secretary General during the period 2002-2008 and also, much earlier, as the Head of the Russian delegation for the negotiations on the ECT (1991-1993), as well as on his long-term involvement, in different capacities, in the practical issues of international energy. Thus the analysis here is not a purely academic-style legal analysis of the theoretical background for future cooperation between Russia and the EU in developing a new PA. The author argues for a practical and even pragmatic “road-map”, based on legal, economic and financial considerations, and aimed at creating a mutually-appropriate legal framework for cooperation in the field of energy between the two parties.

²¹ Энтин М.Л. *В поисках партнерских отношений: Россия и Европейский Союз в 2004-2005 годах*. – СПб.: СКФ «Россия-Нева», 2006, с. 330.

A. “Direct” expansion of the ‘acquis’ area

There are at least four parallel, simultaneous and mutually dependent processes which expand the geographic area of implementation of the EU’s energy acquis (see Figure 1²²):



(Figure 1: Common rules of the game in the Eurasian energy and export of the EU’s acquis)- (See legend to figure 1 and 2 in the annex)

²² The author acknowledges that although the maps of the INOGATE programme are used as the background for Figures 1 and 2, there is no further mention here of the later Baku Initiative and some other pipeline projects promoted (facilitated) by the EU, and/or the role played by the integration (actively promoted by the EU Commission) of the EU acquis in this context. The INOGATE map is used to show the major existing and future pipeline routes from inside and outside the EU and state boundaries. It allows me to present in different colours the different groups of countries (according to my grouping) and to illustrate that major current and future (not necessarily *all* the future planned, probable, possible, potential, etc.) pipelines will *not* be covered through all their cross-border length by the current and/or future EU acquis communautaire or its energy facet.

Firstly, there is the enlargement of the EU per se. Following the dissolution of the USSR, EU membership increased in May 2003 from 15 to 25 Member States and then in January 2007 to 27. In all these States, EU legislation, including energy legislation, is fully applicable. Other EU candidate countries (Croatia, Macedonia and Turkey) are still in the process of aligning on EU legislation but full compliance is not likely before membership. Serbia and other Balkan countries hope to obtain candidate status. As the EU enlarges, so too does the geographic area of implementation of the full *acquis*.

Secondly, there is the Energy Community Treaty between the EU and seven countries of South-East Europe (Croatia, which is already an EU candidate, Serbia, Montenegro, Bosnia, the Former Yugoslavia Republic of Macedonia, Albania, and Kosovo – Figure 1).²³ Under this Treaty only the emerging EU legislation on internal electricity and gas markets is applicable within these 7 states. The aim is to create the common internal EU energy market and to expand it through the Energy Community Treaty to the Member States of this Treaty. This Treaty extends the geographic area of implementation of the energy *acquis* (not the full *acquis* at the outset but still in a very significant energy sphere) with the aim of creating a common internal energy market composed of the EU and South-East Europe.

For the non-EU Balkan countries (parts of the former Socialist Federal Republic of Yugoslavia) membership in the Energy Community Treaty is a first step towards internal implementation of the EU rules preparatory to joining the EU later. This is similar to the role played by the Energy Charter Treaty in the countries of Central Europe after the collapse of the COMECON. The Energy Charter Treaty served as the “training class” for implementing EU energy rules in non-EU states before they joined the EU. The difference between the two ECTs (and it is somehow symbolic that both treaties have the same abbreviation) is that the Energy Charter Treaty is based - as one of its sources - on the rules of the First EU Directives on electricity and gas (of 1996²⁴ and 1998²⁵) while the Energy Community

²³ The Energy Community Treaty. // *Official Journal of the European Union*, OJ L198/18, 20. 7. 2006. (http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_198/l_19820060720en00180037.pdf).

²⁴ Directive 96/92/EC of the European Parliament and the Council of 19 December 1996, on Common Rules for the Internal Market in Electricity, OJ L27/30, 1996.

²⁵ Directive 98/30/EC of the European Parliament and the Council of 22 June 1998 on Common Rules for the Internal Market in Natural Gas, OJ L 204/1, 1998.

Treaty is fully based on the more liberal rules of the Second EU Directives on electricity and gas (as of 2003²⁶). Furthermore, while the Energy Charter Treaty sets minimum standards for its Member States, the Energy Community Treaty obliges its Member States to implement in full the emerging EU's *acquis communautaire*.

Thirdly, there is the EU Neighbourhood Policy.²⁷ The countries which are the objects of this policy include 8 FSU/CIS countries - Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine -, and 10 North African and Eastern Mediterranean countries - Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria, Tunisia (Figure 1). Enhanced energy cooperation with these countries is based on National Action Plans²⁸ with Ukraine and Moldova (as well as with Israel, Jordan, Morocco, the Palestinian Authority and Tunisia). Partial application of EU energy policies and legislation may be possible in the future.²⁹ Some countries from the EU Neighbourhood Policy, like Ukraine and Moldova, are observers to the Energy Community Treaty and aim to become full members of this Treaty as soon as possible so as to move to a higher level of integration with the EU in energy. This will lead to a higher level of acceptance of EU *acquis*. As the EU Energy Commissioner, Andris Piebalgs, stated in late November 2008, the EU plans to bring Ukraine and Moldova into the Energy Community Treaty as early as 2009.³⁰ Piebalgs

²⁶ Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003, concerning Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC, OJ L176/37, 2003; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning Common Rules for the Internal Market in Natural Gas and repealing Directive 98/30/EC, OJ L176/57, 2003.

²⁷ Communication from the Commission to the Council and the European Parliament "Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Brussels, 11.3.2003, COM(2003) 104 final (http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf); Communication from the Commission "European Neighbourhood Policy. Strategy Paper". {SEC(2004) 564, 565, 566, 567, 568, 569, 570}, Brussels, 12. 5. 2004, COM(2004) 373 final, (http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf).

²⁸ Communication from the Commission to the Council on the Commission Proposals for Action Plans Under the European Neighbourhood Policy (ENP), Brussels, 9 December 2004, COM(2004) 795 final (http://ec.europa.eu/world/enp/pdf/action_plans/communication_commission_enp_action_plans.pdf).

²⁹ Communication from the Commission to the Council and the European Parliament "Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", Brussels, 11.3.2003, COM(2003) 104 final, p. 5, 10, etc. (http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf).

³⁰ По России ударят током. Евросоюз намерен уже в 2009 г. интегрировать в свой энергетический рынок Украину и Молдову. - «Независимая газета», 28.11. 2008.

also mentioned that the EU plans to start similar negotiations with Turkey in the first half of December.

Fourthly, there is the EU Eastern Partnership³¹ with 6 FSU states which “holds out the prospect of free-trade pacts, financial aid, help with energy security and visa-free travel to the EU for Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine”. The partnership adds a specific eastern dimension to the EU’s umbrella policy for neighbouring countries. The six countries will receive increased financial assistance from the EU to help with political and economic reforms. Successful reforms may lead on to comprehensive Association Agreements with the EU, which would include free-trade pacts and commitments on energy security – important for EU countries whose oil and gas supplies from Russia transit the region.³² This policy will in any case try to bring its recipients closer to the EU’s standards, incl. in the organisation of the energy markets and energy legislation based on the EU’s principles.

The approach of direct expansion of the *acquis* area through enlargement of the EU or through multilateral treaties based on implementation of the EU law in full or in relation to a particular segment of economic activity (e.g. energy in the case of the EU-SEE Energy Community Treaty) may be realistic for some transit States and a few energy-producing States within the spectrum of energy supply chains destined for the EU, but as EU energy dependence grows, especially in gas, one can expect that key gas exporters, especially those that are part of the integrated Eurasian (EU + non-EU) gas supply system based on fixed infrastructure, will want to remain outside the EU legal regulation area (see Figure 1).

For example, the then Russian Deputy Prime-Minister, Victor Khristenko (afterwards the Energy and Industry Minister, and now the Minister for Industry), expressed his concerns with respect to the European Neighbourhood Policy in a letter to the then CEC DG TREN Director General, Francois Lamoreaux, immediately after publication of the Policy

³¹ Commission of the European Communities. Brussels, 3. 12. 2008. COM(2008) 823 final. Communication from the Commission to the European Parliament and the Council. Eastern Partnership {SEC(2008) 2974}.

³² The EU launches programme to forge closer ties with six countries in Eastern Europe and the Southern Caucasus. (http://ec.europa.eu/news/external_relations/090508_en.htm).

which initially mentioned Russia as a possible recipient country.³³ It was only after this letter that Russia was excluded from the Policy and therefore as a potential recipient of EU energy acquis. It is very difficult to imagine Iran (inevitably one of the future direct key gas suppliers to the EU through fixed infrastructure) or other Islamic gas producers adopting EU acquis (or at least EU energy acquis) however far out into the future one looks.

B. “Indirect” expansion of the ‘acquis’ area

The whole system by which the EU signs international treaties with third countries makes it very difficult to reach agreement with the EU (in the person of the Commission) except on the basis of compatibility with the acquis.³⁴ According to Article 300(6), the European Parliament, the Council, the Commission and Member States may ask the European Court to rule on the compatibility of a draft international Treaty with EU law. A negative conclusion means that such an international Treaty will have to be ratified by all EU Member States. This significantly diminishes the practical possibility of such a Treaty entering into force³⁵, especially within the enlarging EU.

This means that EU international treaties with third states de facto function to expand the geographical area of the acquis (the acquis is a subject of “hidden” export in such treaties). The EU has tried to use this approach with Russia. The PCA of 1994 is based on a concept which is very close to the EU’s concept of harmonisation of legal systems since the PCA establishes a soft obligation for the convergence of Russian law with European law. Article 55(1) of the PCA acknowledges that convergence of legal systems is an important condition for the improvement of economic ties between Russian and the EU. It then states that Russia will endeavour gradually to achieve the compatibility of its legislation with that of the Community. Thus, convergence in the PCA means the movement of Russian legislation

³³ Communication from the Commission to the Council and the European Parliament “Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours”, Brussels, 11. 3. 2003, COM(2003) 104 final (http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf).

³⁴ This was clearly demonstrated by the (6-year+) long process of Russia-EU bilateral consultations on the (three) open issues of the draft Energy Charter Protocol on Transit.

³⁵ И.В.Гудков. *Газовый рынок Европейского Союза. Правовые аспекты создания, организации, функционирования.* – М.: ООО «Издательство «Нестор Академик», 2007, с. 244-245.

towards EU legislation rather than a process of mutual movement of both parties towards each others' interests.

The 2005 Road Map for the Common Economic Space³⁶ does not require convergence of Russian and European law on the basis of the *acquis*. According to I.Gudkov, this confirms the intention to upgrade the principle of equality in Russia-EU relations.³⁷ But, in my view, this was just a temporary pause in the long-standing EU approach of exporting its *acquis* to the external neighbourhood, including Russia. The next EU attempt followed in 2006.

The official position of the EU Commission towards Russia has shifted towards harmonisation (or convergence) on the basis of reciprocity.³⁸ But this reciprocal approach is understood differently by Russia and by the EU³⁹. For Russia “reciprocity” means an exchange mostly by *quantitative* parameters i.e. “volumes-by-volumes” types of exchange, for example, the preparedness of Russian authorities to exchange assets in Russia for adequate assets in the EU.⁴⁰ Under this approach to “reciprocity” the organisational structure and governing rules of energy markets in both parties could still be different. For the EU (and especially the Commission) reciprocity means first and foremost an exchange by *qualitative* parameters

³⁶ 15th EU-Russia Summit Moscow, 10 May 2005 Press Release, 8799/05 (Presse 110). (http://www.delrus.cc.europa.eu/en/images/pText_pict/465/Press%20release.doc).

³⁷ И.В.Гудков, *О.с.*, с. 245.

³⁸ In the energy field, this position has for instance been stated in EU Commission Communication (2006) 590 on External Energy Relations and in EU Energy Commissioner A. PIEBALGS' speech on “EU and Russian energy strategies” of 30 October 2006. In general, this more consensual (and reciprocal) approach of the EU towards Russia has been, among others, discussed in C. HILLION, “Russian Federation”, in S. BLOCKMANS and A. LAZOWSKI (eds), *The European Union and Its Neighbours*, (TMC Asser Press, 2006). See also chapter 6.1 “EU-Russia Energy Relations” in S. S. HAGHIGHI, *Energy Security: The External Legal Relations of the European Union with Major Oil- and Gas-Supplying Countries*, (Oxford and Portland: Hart Publishing, 2007), pp. 341-358.

³⁹ Other analysts have also remarked on the different interpretations of reciprocity by the two parties: “... the EU and Russia mean different things when they talk about reciprocity... For Europeans, reciprocity means a mutually agreed legal framework that facilitates two-way investment. For Russia, reciprocity means swapping assets of similar market value or utility” (K. BARYSCH, “*Russia, realism and EU unity*”, Centre for European Reform, Policy Brief, July 2007, p. 5).

⁴⁰ This approach stimulated the debate in the international press on the “symmetry” of the proposed “exchange of assets”. The debate was dominated by statements of the asymmetric character (in favor of Russia) of existing asset swaps (upstream assets in Russia for mid- and/or down-stream assets in the EU). For a typical example see a recent article on the Nord Stream pipeline project which stated, though without proof, that “the cross-investment is far from being symmetrical” (V. SOCOR. “Nord Stream in the Russo-German Special Relationship”, *Der Spiegel*, January 29, 2009).

of cooperation (“values-by-values” type of exchange). This means (at least for the EU) an exchange of equal/same (European) values. So reciprocity in the “rule of law” area would finally mean, from the EU’s view, the rule of European law within the common space/area between the two parties. So, in my view, the “reciprocity” approach to energy cooperation, and in particular to the creation of the common energy space between the two parties, is considered by the EU authorities as another and more sophisticated “hidden” form of export of the *acquis*.

While it is reasonable to expect EU candidates to submit to EU norms it is difficult (if not impossible) to find solid grounds for implementing the same approach with respect to Russia since Russia has not expressed an intention to become a member of the EU. Moreover, it has been clearly stated by Russian officials that Russia would not want to implement the *acquis*.⁴¹ This means that we need to find another approach for creating a legal basis for the common energy space for the new PA.

Based on the above, the area of implementation of the EU’s *acquis communautaire* does not cover today and will not cover in the future the full length of all major energy supply chains destined for the EU States (see Figure 1). Major current and future gas exporters (including Russia, Central Asian states, Iran, etc.) and some transit states will not be the recipients of the EU’s *acquis*. This is why it is counter-productive and impractical to try to use the *acquis communautaire* as a legal basis for the creation of the common Russia-EU energy space (or of any multilateral common area in energy).

In sum, while the first option (export of *acquis*) is definitely the EU’s preferred choice, it is a “no go” for Russia.

⁴¹ For instance, Russian Deputy Foreign Minister Alexander Grushko, while voting for the development of the Russia-EU common energy space “*which will enable Moscow and Brussels to be more competitive in the global economy*”, also stated that “*Russia is seeking equal treatment at the energy market*” and that “*we are against that the rules which are adopted in the EU will automatically be expanded to Russia*”, (МИД РФ выступает за создание единого энергетического пространства России и ЕС, www.lawtek.ru, 05.11.2008).

3. Second Option: A New Bilateral Treaty

The second option is to prepare a new bilateral Russia-EU PA with an energy chapter “on the basis of the Energy Charter’s principles”.

This proposal was originally introduced by the Russian side. It has limited support from some European politicians who perhaps understand that “export of *acquis*” is a dead-end but who remain influenced by (substantiated and non-substantiated) Russian criticism of the Energy Charter.⁴² At the first glance, it seems that this proposal has its positive sides. “The Energy Charter principles” are presented in the European Energy Charter of 1991 - the one political document signed by all members of the G-8. This declaration and even some segments of the legally-binding

⁴² For discussion of Russian criticisms of the Energy Charter Treaty and critical analysis see the following publications of the author, (all available at www.konoplyanik.ru) : А.Конопляник. «Ратификация ДЭХ Россией: прежде всего, необходимо развеять добросовестные заблуждения оппонентов». – гл. 22 (стр. 545-614) в кн. «Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада» (под ред. Т.Вальде – англ.изд. и А.Конопляника – рус.изд). – М.: Международные отношения, 2002; А.Конопляник. Договор к Энергетической Хартии: «Ратифицировать надо, но не сегодня...». - «Промышленный мир», 2001, № 2, с. 44-48; Он же. Есть только один путь к ратификации ДЭХ. Чтобы договориться, надо понять возражения противной стороны. - «Нефть и капитал», 2001, № 3, с.8-10; А. KONOPLYANIK, “We must ratify Energy Charter Treaty – but not yet”. – “Oil & Capital. Russia & CIS Energy Magazine”, April 2001, p.6-8; Трудный путь к ДЭХ. Развитие энергетических рынков, Договор к Энергетической Хартии и законодательные приоритеты Президента Владимира Путина. - «Нефть России», ноябрь 2002, № 11, с.48-51; Развитие рынков газа, долгосрочные контракты и Договор к Энергетической Хартии. – «Нефтегаз», 2002, № 4, с. 25-33; Сила аргумента или аргумент силы. Что дает России Энергетическая Хартия? – «Мировая энергетика», июнь 2004 г., №6, с. 50-53; Россия, «восьмерка» и ратификация ДЭХ. – «Мировая энергетика», май 2006, № 5, с. 60-61; Энергетическая хартия: Мифические угрозы. – «Ведомости», 5 июня 2006 г., № 100 (1627), с. А4; Борьба с мифами. О мнимых выгодах и угрозах Договора к Энергетической Хартии. – «Политический журнал», 13 июня 2006 г., № 21 (116), с. 32-36; EU/Russia must meet half way. – “Petroleum Economist”, September 2006, p. 32-33; Многосторонняя Энергетическая хартия не должна становиться заложником двусторонних переговоров. – «Ведомости», 24 октября 2006 г.; Энергетическая Хартия обеспечит баланс интересов. – «Политический журнал», 5 февраля 2007 г., № 3 / 4 (146 / 147), с. 42-45; Энергетическая Хартия: проигравших не будет. – «Нефтегазовая Вертикаль», 2007, № 3, с. 26-29 (совместно с А.Мернье); Когда один договор стоит тысячи. - «Нефть России», апрель 2007, № 4, с. 7-10, № 5, с. 10-13; Энергетическая Хартия: О понимании и доверии. – «Ведомости», 07 декабря 2007, № 232 (2006).

ECT 1994 were used (sometimes verbatim⁴³) in the documents of the St. Petersburg's G-8 2006 Summit on energy security.⁴⁴

However, more recently, and following the Russia-Ukraine gas crisis of January 2009, there is less reference to the Charter's principles as the basis for the new international Treaty in energy, at least from the Russian side.⁴⁵ This is because the Russian side believes that the Energy Charter (though it would have been more correct to say: the Energy Charter Secretariat) failed to play an active role in preventing and solving the aforementioned crisis. For instance, the most recent statement of Russian President Dmitry Medvedev, as of 20 January 2009, said:

“When we met with the leaders of the states and the governments at well-known meeting in Moscow⁴⁶ the main position that I have voiced was brought even not to overcoming of the consequences of this crisis..., but to the preventing of the similar events in the future ... We should consider what international agreements – multilateral international agreements – are able to provide for the interests of sellers, transit countries, and consumers. Why do I mention this?

Everyone knows about the so-called “Energy Charter”, which was developed to a large extent with a view to protecting the interests of consumers – which is not a bad thing. One should not forget, though, that sellers are equally parties in any contractual relations and their interests should also be protected to the same extent as the interests of transit states. To make this protection effective, one needs new international mechanisms. I believe, we could think about either

⁴³ A. KONOPLYANIK, “Energy Security: The Role of Business, Government, International Organisations and the International Legal framework”, N°6 *International Energy Law & Taxation Review*, 2007, pp. 85-93.

⁴⁴ Global Energy Security. - Official Documents of St. Petersburg G-8 Summit, July 15-17, 2006 (<http://en.g8russia.ru/docs/11-print.html>)

⁴⁵ Though this option was most recently repeated at the eve of the EU-Russia Summit on 21-22 May in Khabarovsk in the EU press-release (IP/09/817, Brussels, 20 May 2009): “For the longer-term the EU and Russia are negotiating a New Agreement to replace the existing Partnership and Cooperation Agreement which should set out reinforced legally-binding provisions for the whole range of EU/Russia relations; in the field of energy it should be based on a relationship of interdependence and mutual benefits, enshrining the principles of the Energy Charter”, (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/817&format=HTML&aged=0&language=EN&guiLanguage=en>).

⁴⁶ Summit of Russia with the consumers of Russian gas held on 17 January 2009 in Moscow.

amending the existing version of the Energy Charter (if other member countries agree to that) or developing a new multilateral instrument, which would fully correspond to these objectives, and which would address both procedural, technological and legal issues related to guarantees of payment for the gas supplied, performance by transit states of their functions and prevention of such problems, which, unfortunately were created by Ukraine late last year.

I consider that both the Government of the Russian Federation and JSC “Gazprom” (as our main supplier of gas) ought to think about what mechanism to this effect could be appropriately developed and proposed to all members of the international community. I view this as our special task in the energy area by virtue of Russia being the largest energy producer in the world.

*As I’ve mentioned, for my part I will offer a number of ideas during the April meeting in London, which will be devoted to overcoming consequences of the financial crisis, because such things as the conflict that’s just happened could also aggravate the financial crisis. I’ll do so also at other events, including the G 8 Summit. I ask you to get involved into this process”.*⁴⁷

Alexey Miller, the CEO of Gazprom, has adopted the same approach ⁴⁸ as have other officials. For example, Nikolai Tokarev, the President of Russia's Transneft company, told the Czech Republic's energy envoy Vaclav Bartuska that “*a new international Treaty on the protection of the rights of oil consumers and oil exporters and obligations of transit nations is necessary*”. And Transneft official spokesman, Igor Dyomin, announced after the meeting that “*the latest events surrounding gas supplies to Europe are further proof that the Energy Charter ... is not efficient*”. In Transneft's opinion, the Czech Republic, which at the date of the meeting has been presiding over the European Union, could have initiated work to draft new

⁴⁷ <http://www.kremlin.ru/text/appears/2009/01/211884.shtml>.

⁴⁸ Ibid. “In connection with the Ukraine's blockade of the Russian gas transit to Europe, and the situation as it has unfolded practically for the last few weeks one may say that one needs a new legal mechanism of ensuring the interests of the consumer-, transit-, and producer countries. Much criticism and, indeed serious criticism, was addressed to the Energy Charter Treaty. And we've seen that in this practical, specific situation this mechanism – the Energy Charter mechanism – has seriously malfunctioned”.

treaties on European energy security.⁴⁹ A few days later, Russia's ambassador to the EU, Vladimir Chizhov, repeated that "*the Energy Charter Treaty has lost a lot of credibility*" and that thus "*the ECT should be revised or be completely replaced*".⁵⁰

What would be the possible consequences of developing a totally new bilateral Russia-EU Treaty, based "*on the Energy Charter principles*"? It seems that this would be easier than developing a totally new multilateral instrument, unrelated to the Energy Charter, for the future Russia-EU common energy space - but it would still be a major challenge.

Firstly, a bilateral Russia-EU Treaty will exclude (and thus not bind) any transit states between the EU and Russia. This is clearly problematic since events such as the most recent Russia-EU gas crisis of January 2009 demonstrate that transit states are the major cause of energy problems between Russia and the EU. This might favour a new multilateral instrument instead of a purely Russia-EU Treaty but we have already seen that any new, especially multilateral, international Treaty that derogates from the *acquis* has little chance of being ratified by all (currently 27) EU Member States.

Secondly, it is totally unclear in practice how to implement the words "*on the basis of the Energy Charter's principles*". What does this mean operationally? One possibility is that the new text would draw language "*based on the principles*" of the *political* European Energy Charter of 1991 instead of from the *legally-binding* Energy Charter Treaty of 1994. But this might lead to two different standards which would increase (rather than diminish) the legal risks and the cost of raising capital for Russian and EU investors in energy projects of mutual interest.

Thirdly, it would be more difficult to negotiate a new Russia-EU legally-binding Treaty today than it was in the early 1990s when the former 1994

⁴⁹Transneft Calls for New Oil Treaty. - January 22, 2009
(<http://www.istockanalyst.com/article/viewiStockNews/articleid/2975898>).

⁵⁰ R. JOZWIAK, "Chances of Russia ratifying energy charter are 'minimal'. Ahead of high-level EU-Russia meeting, Russia's EU ambassador says international energy Treaty needs revision or replacement". "*European Voice*", 04. 02. 2009
(<http://www.europeanvoice.com/article/2009/02/chances-of-russia-signing-energy-charter-are-minimal/63821.aspx>).

PCA and the 1994 Energy Charter Treaty were negotiated. This is due to technical, legal, political and operational reasons:

- *Technically*: although in name “bilateral”, in reality a new PA would be a multilateral Treaty with 29 members (27 Member States plus the EU as a whole plus Russia) since it would need to include at least some derogations from the *acquis* (see above). In 1994 when the PCA was signed there were only 15 EU Member States;

- *Legally*: in the early 1990s the Russia-EU PCA was negotiated mostly on the basis of the then existing *acquis* which was much less liberalised than today. It is evident that the “liberalisation gap” between the EU and Russian legal systems has increased, and with it the scope for potential derogations from the *acquis*, which might be needed to reach a compromise. This makes the task much more difficult from a legal perspective;

- *Politically*: today, in 2009, the window of political opportunity is much narrower than it was in the early 1990s after the fall of the Berlin Wall, the end of the Cold War, and the dissolution of the COMECON and the USSR. The euphoria and expectation of change on both sides were so high that they opened a broad window of political opportunity for negotiations aimed at creating common rules of the game and a level playing field, particularly in energy, in a broader Europe. Today this window has most probably narrowed (hopefully just temporarily) dramatically;

- *Operationally*: it took almost six years for the delegations of the two parties (Russia and the EU) to negotiate and discuss informally at the expert level the three open issues in the draft Energy Charter Protocol on Transit – and the debate is still not over.⁵¹ Given that, when could we expect a new and broader Treaty to be finalised and ratified?

⁵¹ On the debate on the Energy Charter Protocol on Transit and its evolution – see the author's publications (all available from www.konoplyanik.ru): Три вопроса по Протоколу. – «Нефтегазовая Вертикаль», 2002, № 16, с. 46-49; Протокол по транзиту к ДЭХ: проблемы, вызывающие озабоченность России, и возможные пути их решения. – «Нефть, газ и право», 2002, № 5 (47), с. 49-62; Не потерять лицо. Успешное завершение переговоров о транзите энергоресурсов зависит от готовности России продолжать в них участвовать и искать взаимоприемлемые решения с ЕС. – «Мировая энергетическая политика», декабрь 2002, № 10, с. 54-57; Energy Charter: Counter-acting through Inaction. - “Oil, Gas & Energy Law Intelligence”, Issue 2 OGEL, Vol. 1, March 2003; Протокол по транзиту к ДЭХ: на пути к согласию. Какой режим будет предоставлен российскому газу на территории стран ЕС? - «Мировая энергетическая политика», март 2003, № 3, с. 56-60; В

In sum, the prospects of finalizing a totally new legally-binding Treaty (whether based on the Charter's principles or not) are very foggy and the risk of failure is very high.⁵² Given this, it seems more appropriate to try to build a common Russia-EU energy space on the basis of the already existing common legal denominator in energy between Russia and the EU - the multilateral Energy Charter Treaty. I argue for this position despite the long-standing Russian criticism of the Energy Charter⁵³ and the most recent sharp criticisms from the highest Russian level, as shown above, and the most recent Russian initiative on the new instrument for the new international order in the global energy, as will be shown later.

условиях высокой конкуренции. О возможностях России по расширению своего присутствия на европейском газовом рынке. - *«Мировая энергетическая политика»*, май 2003, № 5, с. 62 – 67; “Russian Gas to EU Markets - 1: Thorny issues impede progress toward final Transit Protocol”, № 40 *Oil & Gas Journal*, Vol. 101, October 20, 2003, pp. 60-64; “Russian Gas to EU Markets - 2: Compromise is best course for Russia, EU in Protocol negotiations”, № 41 *Oil & Gas Journal*, October <http://www.kremlin.ru/text/appears/2009/01/211884.shtml> 27, Vol. 101, 2003, pp. 68-75; “Energy Charter Protocol on Transit: On the way to Agreement – What Kind of Treatment will be Accorded to Russian Gas in EU Countries.”, *Oil, Gas & Energy Law Intelligence*, Issue 1 *OGEL*, Vol. 2, February 2004; “Stiff Competition Ahead – As Russia moots Ways to increase Presence on European gas Market.”, *Oil, Gas & Energy Law Intelligence*, Issue 1 *OGEL*, Vol. 2, February 2004; Труба зовет. Транзитные проблемы и пути их решения. – *«Политический журнал»*, 26 июля 2004 г., № 26 (29), с.36-38; Transit Protocol progress. - *“Petroleum Economist”*, July 2004, p.34; “From Russia-EU Summit to multilateral transit agreement: a road ahead.”, *Oil, Gas & Energy Law Intelligence*, Issue 3 *OGEL*, Vol. 2, July 2004; “Russia-EU Summit: WTO, the Energy Charter Treaty and the Issue of Energy Transit.”, №2 *International Energy Law and Taxation Review*, 2005, pp. 30-35; Эффект матрицы. – *«Нефтегазовая Вертикаль»*, 2005, № 7, с. 18-22; Транзитный узел. – *«Нефтегазовая Вертикаль»*, 2005, № 8-9, с. 112-114, 116; “Russia-EU, G-8, ECT and Transit Protocol.”, №3-*Russian/CIS Energy & Mining Law Journal*, Vol. 4, 2006, pp. 9-12.

⁵² The author has not analysed here the discussion on the EU-Russian energy dialogue and the work done by the thematic groups. Such a detailed analysis is unnecessary to make the points I wish to make in this article.

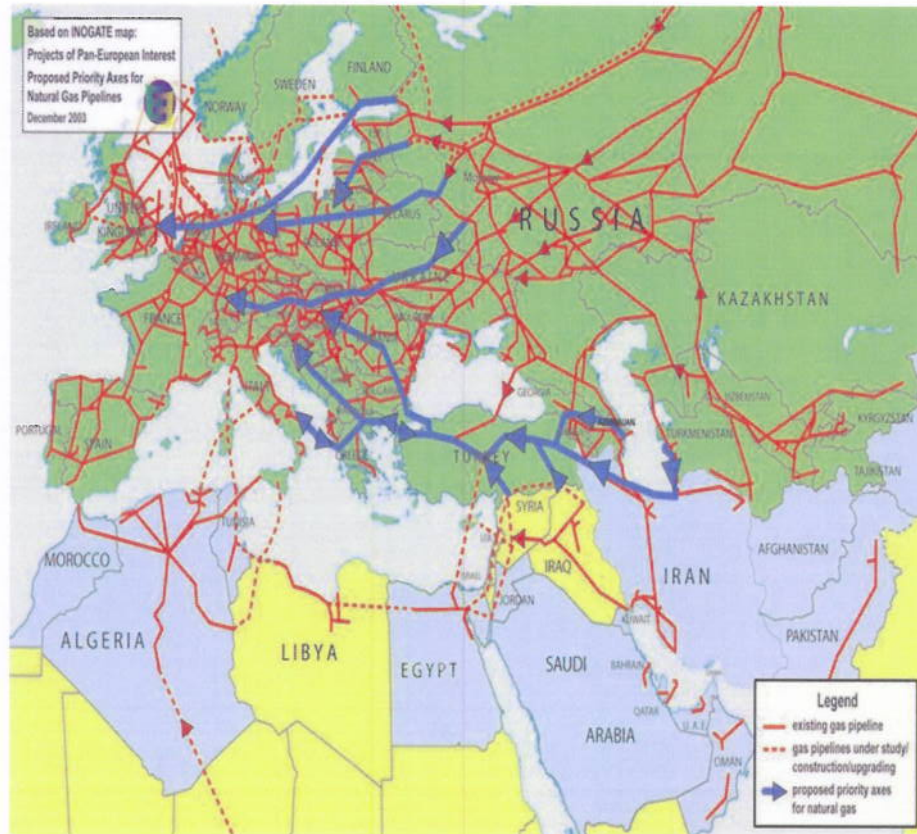
⁵³ See, for instance, publications of long-standing regular opponent of ECT in Russia, current Deputy Chairman of the State Duma Valery Yazev (В.Язев. Своей трубы не отдадим ни пяди. Почему Россия отказывается ратифицировать Договор к Энергетической Хартии. - *«Труд»*, 1 февраля 2002 г.; «Россия без ТЭКа просто замерзнет». - интервью В.Язева журналу *«Мировая энергетика»*, 2004, №3; Риски нас останавливают. Госдума не спешит с ратификацией Энергетической хартии. – *«Независимая газета»* (*«НГ-ЭНЕРГИЯ»*), 09.08.2006; Россия-ЕС: Вопросы энергетической политики. - выступление В. Язева на пресс-конференции «ЭнергодIALOG России со странами Европы и СНГ: последние события» в информационном агентстве РИА «Новости» 17 мая 2007 г.) and О.Фоменко (О.Фоменко. К позиции России по ДЭХ. – *«Нефтегазовая Вертикаль»*, 2004, № 18, с.30-31; Энергетическая Хартия вредит России. – *«Нефтегазовая Вертикаль»*, 2005, №5, см.40-41). See also: Российский дипломат: Россия не обещала ратифицировать Энергохартию. - РИА Новости 22.11.2006; Т. SHTILKIND, “Energy Charter Treaty: A Critical Russian Perspective.”, *Oil, Gas & Energy Law Intelligence*, Issue 1 *OGEL*, Vol. 3, March 2005, and the author’s publications, mentioned in footnote 42, addressing much of this criticism.

4. Third Option: a New PA Energy Chapter Based on the 1994 ECT

The Energy Charter Treaty, signed in 1994, comprises 51 Member States of Eurasia, including all the countries of the EU and the FSU/CIS, including Russia, plus the EU and EURATOM as two Regional Economic Integration Organisations.⁵⁴ The ECT entered into force in 1998. Since then it has been an integral part of international law and acts as a common legal background for its Member States.⁵⁵ A further 23 States from Europe, Asia (e.g. Middle East, South, South-Eastern and North-Eastern Asia), Africa, North and Latin America are observers in the Charter process. This means that the ECT (through its members and observers) covers all major current and future energy (gas) value chains for the EU (see Figure 2).

⁵⁴ See footnote 69.

⁵⁵ The most detailed explanation and analysis of the ECT and the Energy Charter process is presented in: T. WAELDE (ed.). *European Energy Charter Treaty: An East-West Gateway for Investment & Trade*. (CPMLP, University of Dundee: International Energy and Resources Law & Policy Series). (London - The Hague – Boston: Kluwer Law International, 1996), 700 p., and in *Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада* (под ред Т.Вальде – англ.изд. и А.Конопляника – рус.изд). – М.: Международные отношения, 2002, 632 стр. For the most recent, shorter and updated overview of the Energy Charter see: A. KONOPLYANIK and T. WAELDE, “Energy Charter Treaty and its Role in International Energy.”, N°4 *Journal of Energy and Natural Resources Law*, Vol. 24, November 2006, pp. 523-558.



(Figure 2: Common rules of the game in Eurasian energy and expansion of the Energy Charter Treaty)- (See legend to figure 1 and 2 in the annex)

The ECT therefore represents a minimum standard of common rules for a broader area than just a Russia-EU space. It is therefore optimal that the energy chapter of a new PA should declare that the ECT is the legal background of the Russia-EU common energy space.

What are the practical obstacles to this?

Although Russia has yet to ratify the ECT 1994, it has been applying it on a provisional basis (ECT Article 45). In order to make the ECT 1994 the fully-fledged legal basis for the new Russia-EU PA it will be necessary for the multilateral Energy Charter community to address all substantiated

Russian concerns that present obstacles to Russian ratification.⁵⁶ But it is also necessary to assess whether or not other parties have concerns with the current Treaty. I will try to show below that (it seems that) the EU is not as interested in the Charter as it was in the 1990s. In my view, the EU lost interest in the Energy Charter when it began in the late 1990s to prepare for and then adopt (in 2003) its Second Gas and Electricity Directives⁵⁷ which went much further in liberalising the EU internal market compared to the minimum-standard provisions of the Energy Charter Treaty. Since then, the EU has expressed verbal support for the Charter process but has not always followed through. Moreover, some EU actions in regard to the Charter and Russia were practically aimed at reaching totally opposite results.⁵⁸ But my conclusion (perhaps paradoxical to some) would be the following: despite diminished interest (albeit for different reasons) in the Energy Charter from both Russia and the EU, there is no other practical way for the two parties, effectively and at least cost, to develop a common legal foundation for the common Russia-EU energy space (provided of course that this remains a joint goal).

A. *Russia and the ECT*

Russian concerns regarding the ratification of the ECT are well known⁵⁹ and can be divided into three groups.

First group – “political concerns”. The political concerns are represented by the natural reaction of Russia to outside political pressure aimed at forcing Russia to ratify the ECT as it stands while ignoring Russian concerns regarding the Treaty. A prominent example of this is the long-standing and

⁵⁶ The author has suggested several practical ways to address substantiated Russian concerns regarding the Energy Charter, especially in regard to its transit provisions, on the mutually acceptable basis in several publications (see footnotes 42 and 51) and consistently implemented them in practice during his tenure with the Energy Charter Secretariat.

⁵⁷ Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning Common Rules for the Internal Market in Electricity and repealing Directive 96/92/EC; Directive 2003/55/EC of the European Parliament and the Council of 26 June 2003 concerning Common Rules for the Internal Market in Natural Gas and repealing Directive 98/30/EC.

⁵⁸ See for example the EU-proposed wording of Art. 20 of the draft Transit Protocol (the so-called “REIO clause” – see discussion below). Insisting on this clause with the EU-proposed current wording means, in operational terms, that the TP will never be finalized since Russia and some other countries have clearly expressed their disagreement with the proposal since it carries the implication that the EU will negotiate multilateral rules that it will not apply within its own territory.

⁵⁹ See footnotes 42 and 51.

repeated demand that Russia ratify both the Treaty *and* the Transit Protocol (TP) – though negotiations on the Protocol are not yet finalised. This demand has been voiced for a long time by the EU side at the highest political level (within the current Commission - Barroso, Solana and less senior representatives) as well as by individual EU countries, especially prior to the 2006 G-8 St. Petersburg Summit. The pressure has continued despite the fact that, as long ago as 2001, the Russian State Duma stated that it would not consider ECT ratification until the TP had been finalised with full consideration of Russian concerns.⁶⁰ The Duma's operational approach would have provided Russia with an opportunity to clarify, in the text of the Transit Protocol, its substantiated concerns regarding the transit provisions of the Treaty.

The attempts of the EU to push this agenda (de-packaging of the ECT ratification and TP finalisation) are counterproductive. For example, EU efforts on the eve of the 2006 G8 Summit in St. Petersburg to achieve Russian ratification without first finalizing the TP led to tough talk from the Russian leadership⁶¹ about the impossibility of a fast-track and separate ratification of the ECT, and about the unbalanced character of the Energy Charter and its documents, etc. Many observers interpreted this response as Russia's refusal to ratify the ECT in principle. This set off a new wave of criticism against Russia for its alleged unwillingness to promote the rule of law in international relations.

These political concerns are usually based on incorrect interpretations of the ECT by both parties such as questionable or incorrect statements by both Western and Russian politicians or the mass-media to the effect that “*the ECT opens access to the Gazprom transportation system at the discounted domestic transportation tariffs*” or the claim that the ECT “*obliges Russia to open access to its energy resources-in-place*”, or it “*requests the unbundling of Gazprom*”, or “*requests cancellation of long-term gas export*”

⁶⁰ Стенограмма Парламентских слушаний на тему «О ратификации Договора к Энергетической хартии», Государственная Дума Федерального Собрания Российской Федерации, 26 января 2001 г. See also, e.g.: М.Бужкевич. «Троянский конь» по имени ДЭХ. – «Мировая энергетика», сентябрь 2007 г., № 9 (45).

⁶¹ To mention just few (positions mentioned as of the date of 2006 G-8 Summit): Valery Yazev, Head of Energy Committee, State Duma, Konstantin Kosachev, Head of Foreign Relations Committee, State Duma, Sergey Yastrzhembsky, Aide to the President for the Russia-EU cooperation, Igor Shuvalov, Aide to the President - Special Envoy on relations with G-8, Victor Khristenko, Minister of Industry and Energy, and others including, finally, Vladimir Putin, the then President of Russia.

contracts”, etc..⁶² Sometimes politicians even allege that the ECT contains the opposite of that for which it in fact stands. For example a long-standing opponent of ECT ratification, the former member and then the Chairman of the Energy Committee, and nowadays the Deputy Chairman of the Russian State Duma, Valery Yazev, contended for a long time (repeating the earlier similar official statements of the former Gazprom CEO Rem Vyakhirev⁶³) that the ECT provides for mandatory third party access (МТРА) to the energy infrastructure. Sometimes he stated that “*the Treaty does not mention МТРА to pipelines, but it creates the basis for discussing this topic*”⁶⁴, while ECT Understanding IV.1(b)(i) clearly states instead that “*the provisions of the Treaty do not oblige any Contracting Party to introduce mandatory third party access*”.^{65 66}

A second group of concerns relates to what I will call “negotiating tools”. A quite commonly used negotiating technique is when one of the negotiating parties first presents a broader list of concerns compared to the actual issue to be negotiated and, later on, usually at the final stage of negotiations, takes away some of the non-related (non-directly-related) issues from the negotiating table as a good-will gesture towards the negotiating partner(s) in expectation that the latter will payback such good-will by counter (reciprocal) concessions as a part of the commonly used “package deals”. The argument here is that it can be assumed that Russia has raised a number of “artificial” concerns in different areas not directly related to the current

⁶² For instance, see the author’s debate on this in: А.Коноплиник. «Ратификация ДЭХ Россией: прежде всего, необходимо развеять добросовестные заблуждения оппонентов». – гл. 22 в кн. «Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада» (под ред Т.Вальде – англ.изд. и А.Коноплиника – рус.изд). – М.: Международные отношения, 2002, стр. 545-614; Сила аргумента или аргумент силы. Что дает России Энергетическая Хартия? – «Мировая энергетика», июнь 2004 г., №6, с. 50-53; Энергетическая хартия: Мифические угрозы. – «Ведомости», 5 июня 2006 г., № 100 (1627), с. А4; Борьба с мифами. О мнимых выгодах и угрозах Договора к Энергетической Хартии. – «Политический журнал», 13 июня 2006 г., № 21 (116), с. 32-36.

⁶³ See А.Коноплиник. «Ратификация ДЭХ Россией: прежде всего, необходимо развеять добросовестные заблуждения оппонентов». – гл. 22 в кн. «Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада» (под ред Т.Вальде – англ.изд. и А.Коноплиника – рус.изд). – М.: Международные отношения, 2002, стр. 564-565.

⁶⁴ В.Язев. Своей трубы не отдадим ни пяди. Почему Россия отказывается ратифицировать Договор к Энергетической Хартии. - «Труд», 1 февраля 2002 г.

⁶⁵ http://www.encharter.org/fileadmin/user_upload/document/EN.pdf, p.25.

⁶⁶ Based on these misunderstandings and misinterpretations Mr.Yazev has even stated: “The Charter is outdated. It should be torn up and discarded!” («Россия без ТЭКа просто замерзнет». - Интервью В.Язева журналу «Мировая энергетика», 2004, №3).

ECT (e.g. addressed to something that the current ECT does not cover) in order to give them up at a later stage as “concessions” to the EU and other Member States in a trade-off for ECT ratification. An illustration of this, in my view, might be the so-called “problem of the Turkish and Danish straits” mentioned frequently by Mr. Yazev as a rather weak, if valid at all, argument preventing ECT ratification.⁶⁷ With such an approach it does not matter which issues the ECT covers – concerns such as “*we are not satisfied with the ECT since it does not cover this or that issue*” (and the list of these issues can be endless) can be voiced. So the usual criterion of what I will call “negotiating tools” is that this group’s concern will relate to something that the ECT does *not* cover. Such an approach ignores the fact that the ECT, like any other multilateral Treaty, is a product of multilateral compromise – and will always be such a compromise, independent of when it was negotiated or updated. So it will never cover all the initial proposals of any given party – it will present the common denominator of the issues upon which the negotiating parties have managed to agree. And in order to insert a new clause into the multilateral Treaty, the country which initiates this proposal needs to persuade all the other Member States that this clause is really vitally needed, which means that it needs to use its “force of argument” and not an “argument of force” to reach the desired result.

The third group comprises the “fair and well-founded (economically and legally) Russian concerns”. These, firstly, are the controversial interpretations of two provisions of ECT Article 7 dealing with “Transit”:

- The correlation of the levels of transit tariffs and of tariffs for domestic transportation (ECT Art. 7.3), and
- The mechanism for recalculating interim transit tariffs as final tariffs following application of the conciliation procedure for transit dispute settlement (ECT Art. 7.6-7.7).

⁶⁷ According to Mr. Yazev, “another aspect of the Treaty that does not suit Russia is that the document does not mention the problem of the Bosphorus and Dardanelles Straits, which serve as a key transit route for oil shipments from Russia, Kazakhstan and Azerbaijan to world markets... Russia should take the initiative in finding a solution to this problem.” “ECT does not regulate oil transit through Bosphorus, Dardanelles, Danish straits. Russia is left vis-a-vis Turkey. Today Azery and Kazakh oil fall under same restrictions”, (V. YAZEVA presentation at Press-conference “Russia’s Energy Dialogue with European and CIS states: recent events”, RIA “Novosti”, 17 May 2007).

The most practical way to clarify the interpretation of these provisions is through a special supplementary legally-binding instrument to the Treaty, i.e. the Energy Charter Protocol on Transit. The Russian State Duma clearly prefers (see above) this way of proceeding. This operational approach has been always consistently and clearly articulated by the then Minister of Industry and Energy Victor Khristenko (nowadays the Minister of Industry). There, secondly, remain three open issues within the draft Transit Protocol itself:⁶⁸

- The basis for setting transit tariffs (draft TP Art.10). On the one hand, all ECT Member States agree in principle that transit tariffs should be cost-based and include operating and investment costs, including a reasonable rate of return. On the other hand, the EU insists that auctions be used as one of the available capacity allocation mechanisms though cost-based tariffs are by definition inapplicable in the case of an auction;
- The appropriate mechanism for resolving the so-called “contractual mismatch” problem. This problem arises when the duration and volume of the long-term export supply contract fails to match the duration and volume of the transit agreement provided to the shipper by the owner/operator of the transportation system within unbundled energy systems (draft TP Art.8); and
- The application of the Transit Protocol within the EU (based on the version of the “REIO⁶⁹ clause” proposed by the EU) (draft TP Art.20).⁷⁰ Under the EU proposal for Article 20, “transit” would mean the flows of energy which would cross *only* the territory of the EU as a whole and *not* the territory of its individual Member States even though Article 7 of the ECT refers to “transit” as the crossing of the territory of both the EU as a whole *and* of the individual EU Member State. This issue is a key point of

⁶⁸ On the debate on transit-related concerns of Russia in regard to the ECT and draft Transit Protocol see the author’s publications mentioned in footnote 51, see also: T. SHTILKIND. “Energy Charter Treaty: A Critical Russian Perspective.”, *Oil, Gas & Energy Law Intelligence*, Issue 1 *OGEL*, Vol. 3, March 2005; М.Бужевич. «Троянский конь» по имени ДЭХ. – «*Мировая энергетика*», сентябрь 2007 г., № 9 (45).

⁶⁹ Regional Economic Integration Organisation (see definition in ECT Art. 1.3).

⁷⁰ http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf.

disagreement between Russia and the EU.⁷¹ For the EU this raises an internal issue as to the consistency between the ECT and the *acquis* within the EU, suggesting that the key to ECT ratification by Russia is in the EU's hands.

In summary, Russia has five well substantiated transit-related issues:⁷² two of them stem from the ECT and three from the draft Transit Protocol. Technical solutions to all these issues except the “REIO clause” have been informally agreed upon in principle at the multilateral level within the Energy Charter community including a draft new article on congestion management (TP Art.10bis). A way forward on the “REIO clause” was agreed multilaterally (with major input from Russia and the EU) in October 2008⁷³ though practical movement forward in solving this issue was not achieved in the following time due to lack of action from the Russian side: key Russian experts, those who were always the drivers of the proactive actions in reaching the technical agreements with EU experts in the recent past, were not in the Russian team to the two next meetings of the Energy Charter Trade and Transit Group in February and May 2009. In light of this how might we proceed?

Option 1: Russia must first ratify the ECT following which the Energy Charter community will finalise and ratify the Transit Protocol. This has long been the demand of the EU but it has been unacceptable for Russia since the outcome of the Transit Protocol negotiations was unpredictable.

Option 2: The parties must first finalize and ratify the draft Transit Protocol giving full consideration to valid Russian concerns, following which Russia

⁷¹ See for instance, publications mentioned in the footnote 51 and 53.

⁷² I do not regard Russia's other concerns (including on trade in nuclear fuels and on Supplementary investment Treaty) as equally well-substantiated criticism of the ECT *per se*. For more details with respect to these other concerns see: Российский дипломат: Россия не обещала ратифицировать Энергохартию. - РИА Новости 22.11.2006; М.Буякевич. «Троянский конь» по имени ДЭХ. – «Мировая энергетика» сентябрь 2007 г., № 9 (45); А.Конопляник. Многосторонняя Энергетическая хартия не должна становиться заложником двусторонних переговоров. – «Ведомости», 24 октября 2006 г.; А.Мернье, А.Конопляник. Энергетическая Хартия: проигравших не будет. – «Нефтегазовая Вертикаль», 2007, № 3, с. 26-29.

⁷³ Detailed analysis of the above-mentioned transit issues is presented in the author's article on “Gas Transit in Eurasia: transit issues between Russia and the European Union and the role of the Energy Charter” in the *JENRL* special-double issue in memory of the late Prof. Thomas Waelde, N°3 *Journal of Energy and Natural Resources Law*, Vol. 27, August 2009, pp. 445-486.

will ratify the ECT. However, under ECT rules no state can ratify an Energy Charter Protocol unless it has first ratified the ECT.

Option 3: According to this last option, Russia will ratify the ECT and the draft Transit Protocol simultaneously. This requires the multilateral Energy Charter community to concentrate on practical ways of making this happen.

One requirement is that Russia needs to present the international community with a closed list of its concerns. The best way to do so is within the framework of the Energy Charter Ad Hoc Strategy Group, established in 2007, to discuss, in line with the conclusions of the 2004 Energy Charter Policy Review (based on ECT Art.34.7)⁷⁴, the new challenges and risks in international energy markets and how best the Energy Charter process can adapt to them. A closed list is needed in order to reassure the international community that as issues are resolved Russia will not advance new groups of concerns (including those of a “political” and “negotiating” character).

B. The EU and the ECT

The application of the draft Transit Protocol within the EU has been an issue within the Energy Charter community since 2002.⁷⁵ This much-debated issue is related in part to the correlation between the *acquis communautaire* and international treaties to which the EU is a party and is also related to the signing and ratification of the ECT by the EU and its Member States. The EU and its Member States have ratified the ECT in two capacities:

- (a) as each EU Member-State, and
- (b) as the EU as a whole (as a Regional Economic Integration Organisation).

This “double-capacity ratification” creates a set of internal EU problems in regard to the ECT not only related to transit (e.g. factual difference in the term “transit” according to its definition in the ECT and its practical meaning in the draft Transit Protocol if the latter comes into force with the

⁷⁴http://www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf

⁷⁵ This was when the EU delegation first proposed the new Art. 20 of the draft Transit Protocol.

EU proposed Art. 20), but to a broader set of issues (such as the implementation of ECT-based dispute settlement procedures within intra-European disputes).

According to the ECT, “*transit means the carriage through the Area of a Contracting party ... 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*” (Art. 7.10). This includes carriage that crosses the area of the EU as a whole *and/or* carriage across an individual EU Member State. But throughout the years of Russia-EU bilateral consultations on this issue the EU delegation has insisted that their proposed wording of the “REIO clause” (draft TP Art.20) is designed to limit the definition of “transit” *only* to carriage across the territory of the EU as a whole, and *not* of its individual Member States as well.

The difference between these two uses of the term “transit” seems to be crystal clear. More important are the well understood risks of negative economic consequences of this “editorial change” (narrowing the term “transit”) for export flows, destined for the EU and originating in non-EU states, firstly in Russia. After EU enlargement in 2003 and 2007 the delivery points for Russian export gas flows have been placed deep inside EU territory.⁷⁶

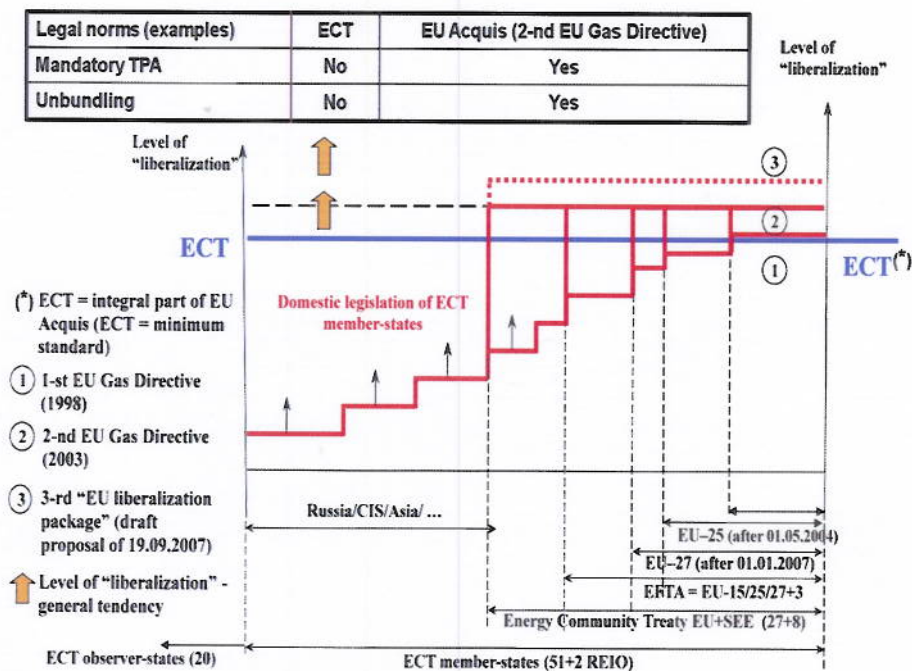
There is also a second aspect since the effect of implementing the proposed EU wording of the “REIO clause” will mean that the EU will have participated in developing the common rules of the game for the expanding Eurasian energy market, but will not implement these rules within its own enlarging territory.⁷⁷ Fortunately, in October 2008, the parties finally seem

⁷⁶ For more details, see, for instance the above-mentioned author’s article in the *JENRL* (August 2009) special double-issue in memory of the late Prof. Thomas Waelde. See also: A. KONOPLYANIK, “Russian Gas to Europe: From Long-Term Contracts, On-Border Trade, Destination Clauses and Major Role of Transit to ...?”, N°3 *Journal of Energy and Natural Resources Law*, Vol. 23, 2005, pp. 282-307.

⁷⁷ This has been a long-standing and well-substantiated arguments of Russia which is de facto a key to ratification of the ECT by Russia: whatever improvements and solutions in regard to Russia’s concerns are incorporated in the draft Transit Protocol, they will have no practical sense for Russia if TP is not to apply within the EU territory since a number of Russian concerns have been particularly addressing the issue of securing transit flows within the EU territory which is nowadays (since 2003) a pure practical issue for Russian gas supplies to Europe.

to have identified a way to a mutually acceptable compromise to be further discussed by the multilateral Charter community in February 2009.⁷⁸

Another long-standing conflict between the EU acquis and the ECT is the increasing gap between the growing level of liberalisation in the individual energy markets of EU Member States and the emerging internal EU energy market and the relatively “fixed”⁷⁹ multilateral minimum standard for the broader Eurasian community as prescribed by the ECT (see Figures 3).



(Figure 3: ECT and EU acquis: “minimum standard” within evolving Eurasian common energy space vs. “more liberalised” model)

⁷⁸ Proposals made by the EU at the special seminar, held in Brussels on February 11, 2009, in response to Russian concerns regarding Art. 20 of the draft TP, still need to be examined by the Energy Charter community. Unfortunately, key experts of the Russian delegation, who were most instrumental and proactive in the course of Russia-EU bilateral experts meetings which have resulted in finding working compromise on all open issues except one, did not attend nor the February’09 event, nor the May’09 meeting of the Trade and Transit Group. This once again sent a negative message to the Energy Charter community, this time multiplied by the negative effect of President Medvedev’s proposal as of 21 April either to re-write the Energy Charter (Treaty?), or to prepare a totally new document.

⁷⁹ Though it can be of course in principle changed through the multilateral amendment procedure of the Treaty.

The “level of liberalisation” of the EU energy acquis has been upgraded step-by-step from the First electricity (1996) and gas (1998) Directives, to the Second Directives for electricity and gas in 2003 and now to the Third Directives (expected to be finalised in 2009). In addition, the geographic area of implementation to which these more-and-more liberalised EU rules apply has been expanding over the same time-frame from the EU-15 to the EU-27, plus the additional 7 members of the Energy Community Treaty thereby creating the de facto “EU-34 in energy”.

When the 1994 ECT was being negotiated and drafted in the early 1990s the EU was preparing its First energy Directives. Accordingly the work on both legal systems (ECT and EU energy acquis) proceeded in parallel and aimed at implementing mostly the same legal principles (but with different approaches) in both systems. Both legal systems (First EU energy Directives and ECT) entered into force at the same time (in 1998) and thus reflected similar views on the level of liberalisation of the energy markets. Thus, at that time there was no gap between the ECT and the EU energy acquis. The gap appeared with the preparation of the Second EU energy Directives and has continued to grow with the EU transition to the draft Third energy Directives (Figure 3).

Two examples, the approach to third party access and unbundling, illustrate the differences that have emerged within two legal systems (Figure 3). Since the ECT acts as a “minimum standard” for its members, each ECT Member State is free to upgrade the “liberalisation level” of its domestic energy market at its own discretion but ECT does not require it. Thus the 1994 ECT can be seen as an instrument that protects non-EU and EU companies against “excessive” liberalisation of internal EU energy space.

In the beginning, the EU perhaps saw the ECT as an instrument for infiltrating the EU energy acquis into legal systems of the non-EU states – members of the ECT. As already mentioned, the ECT served as a preparatory class for Eastern European countries that wished to join the EU. The multilateral instruments of the ECT (e.g. regular and in-depth country reviews of the investment climate and market structure, energy efficiency, etc.) helped EU candidate states to adapt to the (then similar to the ECT) EU energy acquis. In addition, the ECT also provided access to information as to the countries of the East, which in the 1990s was quite a problem.

From the time the EU began preparing the Second Electricity and Gas Directive the ECT lost its role as an instrument to export the energy acquis (a role that it had fulfilled in the 1990s), because of the substantive gap that emerged between the ECT and the EU energy acquis. It was necessary for the EU to find a new instrument to play this role and in my view it is nowadays the EU-SEE Energy Community Treaty. This may also explain why the ECT has been losing its value for the EU at the same time as the Energy Community Treaty has been growing in importance for the EU.⁸⁰

The EU may also be less supportive of the ECT because of the perceived risk that intra-European disputes may be dealt with under the ECT rather than within the EU system.⁸¹ This conclusion was recently confirmed by the competent legal community in the course of anonymous electronic voting by the audience of the conference “The Energy Charter Treaty: Energy security, investment protection and future developments” on topical issues related to the Treaty’s role and its application (see Table 1).

⁸⁰ See, for example the following note: “Well-placed sources of *Kommersant* report that references to the Energy Charter are likely to be deleted from the EU-Russia energy Treaty as a concession to Moscow. As compensation, Brussels is going to integrate in its energy strategy Russia’s transit partners. The EU hopes to expand the Energy Community Treaty to include Russia’s neighbours Ukraine, Moldova and Turkey.” (Europe Offers Russia a New Energy Deal, www.kommersant.com, Jan. 22, 2007).

⁸¹ There is jurisprudence and literature on the application of investment treaties within the EU (see, for instance: SODERLUND, “Intra-EU BIT Investment Protection and the EC Treaty”, N° 24 - Issue 5 *Journal of International Arbitration*, 2007, <http://www.kluwerlawonline.com/document.php?id=JOIA2007034>. A legal analysis and reference to the appropriate sources is not the subject of the present article or the author’s particular expertise. The author acknowledges that this is a difficult question and that others are better equipped to explore it in relevant publications.

| Questions | Answers (% of participants) | | |
|--|-----------------------------|----|-------|
| | Yes | No | Maybe |
| Can the ECT serve as a basis for an Article 26 arbitration claim by an EU investor against an EU Member State? | 65 | 14 | 22 |
| Do you think the European institutions will take steps to prevent intra-European disputes from being dealt with under the ECT? | 84 | 9 | 7 |
| Is it likely that we will see disputes where the European Community, as opposed to an EU member state, will be a respondent? | 42 | 28 | 31 |

Notice: Structure of the conference audience participating in the poll: 39% - solicitors, 20% - barristers, 3% - in-house counsels, 5% - government representatives or embassy staff, 14% - students, 20% - other.

Source: Conference on “The Energy Charter Treaty: Energy security, investment protection and future developments” organized by the Energy Charter Secretariat in cooperation with the British Institute of International and Comparative Law (BIICL) and the Arbitration Institute of the Stockholm Chamber of Commerce, 18-19 September 2008, BIICL, London (results of the anonymous electronic voting by the audience on topical issues related to the Treaty’s role and its application); see: <http://www.encharter.org/index.php?id=382&L=0>

*(Table 1: Results of the anonymous electronic voting on the potential conflict between dispute settlement procedures based on the ECT and on the EU’s *acquis communautaire* rules)*

Of the audience (two-thirds of whom were professional lawyers) 86% considered that it was possible the ECT could serve as the basis for an ECT Art. 26 arbitration claim by an EU investor against an EU Member State. Fully two thirds of the audience considered that it is likely that we shall see

sphere. On the one hand, the EU verbally continues to support the Charter and has been continuously requesting that Russia ratifies the Treaty and finalizes the Transit Protocol. On the other hand, Russia did not appear (from time to time) at important working meetings, and has showed strong public criticism of the Charter at the Governmental, Parliamentary and Presidential level, etc. This “action gap” has been clearly and widely interpreted by the international community as if Russia, and not the EU, is disinterested in the Charter since Moscow has not been willing to move forward with ECT ratification.

5. The Energy Charter and Consequences of the Recent Russia-Ukraine Gas Dispute (Role of the Energy Charter Secretariat)

As discussed above, the highest Russian officials (President Dmitry Medvedev and earlier Prime-Minister Vladimir Putin) expressed strong criticism of the role of the Energy Charter during and immediately after the January 2009 Russia-Ukraine gas crisis. Do these criticisms effectively close the door on using the ECT as a legal basis for the new Russia-EU PA? In responding to this it is important to consider both long-term and short-term aspects.

The criticism of the Energy Charter for its “unbalanced character” (failing to protect the interests of producers) is a long-term criticism. As Dmitry Medvedev acknowledged, the Charter “*was developed to a large extent with a view to protecting the interests of consumers – which is not a bad thing*” and that, as one of the options, “*we could think about ... amending the existing version of the Energy Charter (if other member countries agree to that)*”.⁸⁵ These comments correspond to the adaptation of the Energy Charter process (including both its political and legal components)⁸⁶ to the changing realities of the external world as well as to changes within the Energy Charter community. In fact, this adaptation process is ongoing based on the Conclusions of the 2004 Energy Charter Policy Review⁸⁷ where the Contracting Parties and other Signatories to the Energy Charter Treaty

⁸⁵ <http://www.kremlin.ru/text/appears/2009/01/211884.shtml>.

⁸⁶ See: A. KONOPLYANIK, “The future of the Energy Charter Process: to find a competitive niche”. – Presentation at the internal ECS Seminar, Brussels, 28 May 2004 (available at http://www.encharter.org/fileadmin/user_upload/DSG/Presentations/2004/11-E-Brussels-28.05..pdf and <http://www.konoplyanik.ru/speeches/11-E-Brussels-28.05..pdf>).

⁸⁷ <http://www.encharter.org/index.php?id=22>.

*“consider that the work of the Charter process must evolve to reflect new developments and challenges in international energy markets, and also recognise and respond to the implications of broader changes across its constituency...” (conclusion N° 3).*⁸⁸

The Energy Charter framework contains a number of different facilities:

- (1) The Charter as a policy forum: transparency, reporting, discussions, Policy Reviews, etc.;
- (2) Non-binding instruments: guidelines, benchmarking, recommendations, policy coordination, model agreements, declarations in addition to the basic 1991 Energy Charter political declaration (European Energy Charter);
- (3) Legally-binding instruments: protocols, amendments to the Treaty, association agreements in addition to the basic Energy Charter Treaty.

All these instruments are at the disposal of member countries although negotiations and implementation become more complex as they become more binding. But Treaty amendments are not the only instruments to adapt the current Treaty to the realities of the changing world. Furthermore, the unbalanced character of the Treaty is not the only issue that needs to be addressed. Other changes may be desirable to take account of the natural evolution of the energy markets and the evolving mechanisms of energy investment protection and stimulation.⁸⁹

In the short-term, the criticism of the Energy Charter was based on its inability to act as a “crisis management” vehicle. The Charter does possess some instruments to address “crisis management” (such as the conciliatory

⁸⁸http://www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf.

⁸⁹ For the debate on natural evolution of the energy markets and evolving mechanisms of energy investment protection and stimulation see, for instance: A. KONOPLYANIK, “Energy Security: The Role of Business, Government, International Organisations and the International Legal framework.”, N°6 *International Energy Law & Taxation Review*, 2007, pp. 85-93; A. KONOPLYANIK and T. WAELDE, “Energy Charter Treaty and its Role in International Energy”, N°4 *Journal of Energy and Natural Resources Law*, Vol. 24, November 2006, pp. 523-558; A. KONOPLYANIK, “Energy Security and the Development of International Energy Markets” in B. BARTON, C. REDGWELL, A. RONNE and D. N. ZILLMAN, *Energy security: Managing Risk in a Dynamic Legal and Regulatory Environment*, (Oxford: Oxford University Press, 2004), pp. 47-84.

procedure for transit dispute settlement) but the parties never activated those procedures.

In order for the instruments of the “Energy Charter” to be implemented prior to or during the course of this or any other crisis, three components need to be available:

- The availability of relevant instruments of the “Energy Charter” and appropriate triggering procedures;
- The willingness of the parties in dispute and/or touched by the consequences of this dispute to trigger and use the relevant instruments;
- The competence, capability, readiness and willingness of the political leadership of the relevant administrative bodies of the “Energy Charter” to act accordingly in the given circumstances.

The instruments of the Charter are neutral by themselves. In order to bring them into operation in conflict situations (like the Russia-Ukraine gas crisis) either Member States need to trigger the relevant procedures (most probably after the conflict has arisen), or the Secretary General needs to act preventively in order to help the parties escape the conflict.⁹⁰ And it is here that the political leadership of the Secretariat needs to be able to understand not only the consequences of its actions, but also of its inaction. By inaction

⁹⁰ In his “A Word from the Secretary General on the Energy Crisis of Early 2009” added to the Energy Charter web-site on 13 February 2009 (http://www.encharter.org/index.php?id=21&id_article=171&L=0), the Secretary General denied the very possibility of advanced action on his part saying that “*Only the Member States have the right to initiate a procedure under the dispute resolution mechanism of the Treaty. The Secretariat does not have this mandate*”. This is correct - if and when we are speaking about the crisis already in place. But the political leadership of the Secretariat in line with both the spirit and letter of the Energy Charter also needs to take advanced proactive action. This type of “passive” readiness is clearly demonstrated in the first, rather watered down and late, statement of the Secretary General on the Russia-Ukraine gas dispute, added to the Energy Charter web-site on 23 December 2008; “*In the case of a transit dispute, the Energy Charter Secretariat stands ready to support the work of an independent conciliator, as foreseen in Article 7 of the ECT, should the parties call for it*” (http://www.encharter.org/index.php?id=21&id_article=167&L=0). But, according to my knowledge, nor the parties involved were approached by the political leadership of the Secretariat with practical preparation of the conciliatory procedure, nor even the name of the potential conciliator was preliminary agreed with them by the leadership of the Secretariat in advance, though on the working level this person gave his agreement already at the very beginning of December 2008 to act as a conciliator should the parties enter in transit dispute at the beginning of January 2009.

I mean both no action at all and inadequate or untimely (late) action, such as when the relevant activity is undertaken in a (bureaucratically safe) reactive manner. Political leadership in the Secretariat is essential to ensure that the organization takes adequate action in non-routine situations. This is why the Member States accord the Secretary General absolute operational power so that he can effectively respond to non-routine situations, preferably, prior to their transformation into full-fledged crises.

During the first Russia-Ukraine gas dispute (December 2005) the Secretariat prepared the conciliatory procedure in advance in case the parties would not be able to reach agreement. Both parties gave preliminary agreement to its acceptability (after it was again explained to them in detail) and to the proposed conciliator, though this procedure was not finally used because the parties in dispute managed to reach a bilateral solution.⁹¹ In the January 2009 crisis the political leadership of the Secretariat did not even communicate the name of the proposed conciliator (the same George Verberg accepted by both parties in 2005) to the parties in dispute until January 9⁹² – e.g. only after transit to the EU was fully broken on January 7 and through the public website. This delayed and inadequate reaction of the political leadership of the Secretariat in the given situation provided an opportunity for Russia to criticize the “Energy Charter” organisation as a whole - within the whole spectrum of its multi-facet activities and dimensions.

It is important for the Member States to reflect constructively on this negative experience. One possible forum for such constructive actions is the next regular Energy Charter Policy Review which takes place in 2009 and will culminate in the next Energy Charter Conference at the end of this year. Member States may wish to pay more attention to the organisational aspects of the Energy Charter process including the role of the Secretariat and, in

⁹¹ See: Андрей Коноплиник: «Единственным вариантом обеспечения предсказуемости и прозрачности ценообразования между «Газпромом» и «Нефтегазом» может быть только формульный подход». – *«Экономические Известия»* (Украина), 24 ноября 2008 г., № 212 (975), с.1, 3; Андрей Коноплиник: «Газотранспортная система Украины и России всегда была единой». – *«Экономические Известия»* (Украина), 24 декабря 2008 г., № 234 (997), с.1, 3, republished in English in *OGEL Special Issue on Russia-EU energy* (Vol. 7 - Issue 2, May 2009): “A Formula Approach May be the Only Option for Guaranteeing Pricing Predictability and Transparency Between Gazprom and Naftogaz of Ukraine” and “The Gas Transportation System of Ukraine and Russia Has Always Been Unified”.

⁹² http://www.encharter.org/index.php?id=21&id_article=167&L=0.

particular, the role of the Secretary General. Too much depends on this single person. If that person is not knowledgeable enough in energy, economic, financial, and political issues to foresee the possible and negative consequences of the situation, and/or is not willing to actively participate in preventing negative developments by all available means, then the neutral and potentially effective instrument of the ECT will not be used in time and will lose its efficiency and efficacy.⁹³ If not used to prevent conflict (and this is the most important role of the ECT which aims at diminishing non-commercial risks throughout cross-border energy value chains) then the organization will act at best as just a monitoring/registering vehicle, that reacts late to the post-effects of the dispute. And by doing so the organization will lose its competitive niche within the international energy environment and will continue to lose the support of Member States.

The Russia-Ukraine gas crisis of January 2009 was a moment of truth for the Energy Charter Secretariat – and the political leadership of the organization did not pass with flying colours. But this does not mean that the organization as a whole has failed. The inaction (inadequate action) of individuals authorized to act on behalf of the organization need not reflect on the organization as a whole. The international community needs to draw the correct conclusions from this lesson and the 2009 Energy Charter Policy Review is the best place and time for this. If these conclusions can be drawn, then the ECT will be able to fulfill its potential role as the best available legal foundation for the new Russia-EU common energy space and as a level playing field in energy for the emerging Eurasian energy market recognizing that the contents of this foundation will not necessarily correspond at any given point in time to the state of development of the EU energy acquis.

⁹³ In “A Word from the Secretary General on the Energy Crisis of Early 2009”, a diplomatically worded self-excuse for inadequate action prior to and in the course of the crisis, it is stated, on the one hand, that “*The Treaty ... has never had as its aim to resolve immediate crisis situations*” (which is quite correct, if we limit the Energy Charter only to its legal component and deny all other aspects of the Energy Charter process), but, on the other hand, proposes the whole spectrum of crisis management instruments (although taken only from the experience of military or security organisations like the International Atomic Energy Agency, the Organisation for the Prohibition of Chemical Weapons, or the Treaty on Conventional Armed Forces in Europe, whose aims and methods of operation are quite different from that of the Energy Charter).

6. New Russian Energy Initiative and the Energy Charter

On April 20, 2009, Russian President Dmitry Medvedev declared in Helsinki that Russia “*did not ratify the Energy Charter and other documents and does not consider itself to be bound by these decisions*” and that Russia intends to change the legal base for relationships with energy consumers and transit states.⁹⁴ The next day the “Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)” was published in five pages on the Kremlin’s official website.⁹⁵ Arkady Dvorkovitch, the Aide to the President of the Russian Federation, who most probably was in charge of preparing this “Conceptual Approach...”, explained that the document may replace the Energy Charter. “*We are not satisfied with the Energy Charter and the documents, comprising the system of the Energy Charter in its present state... There is a need for a new international legal base*”, Dvorkovitch pointed out and recalled that Russia has signed the Charter, but yet not ratified it. “*That means that we do not consider ourselves bound by this Charter... Regarding the Energy Charter Treaty, we do not consider ourselves bound by the obligations under this Treaty either. These documents in fact did not apply to us*”, Dvorkovitch said.⁹⁶

A. Russia is bound by the ECT

Unfortunately, these assertions appear vulnerable and they may be disputed. Currently 51 countries and two collective organisations (EU and Euratom) have signed the legally binding Energy Charter Treaty (ECT). Meanwhile, Russia and four other countries have not in fact ratified it. However, under Article 45 of ECT (Provisional application) Russia, along with Belarus, applies the Treaty provisionally, that is “*to the extent that such provisional application is not inconsistent with its constitution, laws or regulations*”. The Treaty entered into legal force on April 16, 1998 and, since then, has constituted an integral part of international law, for Russia as well. As a matter of fact, Russia is bound by the ECT, but only to the extent its provisions do not conflict with national legislation.

⁹⁴ <http://www.1tv.ru/news/polit/142214>

⁹⁵ <http://www.kremlin.ru/text/docs/2009/04/215303.shtml>

⁹⁶ <http://www.kremlin.ru/text/docs/2009/04/215309.shtml>

This is quite obvious, and the statement about our country not being bound by the corresponding documents can be used by Russia's opponents as an argument to throw discredit on the adequacy and legal relevance of Moscow's position.

Moreover, one needs to remember that the multi-faceted term "Energy Charter" to which many politicians and commentators worldwide have been referring, can simultaneously mean both the process, international organisation, and system of documents. This term means:

- An expanding package of multilateral documents such as the basic political (and thus legally non-binding) declaration of the 1991 "The European Energy Charter"; existing legally-binding documents such as the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects (both of 1994); the Trade Amendment of 1998; other binding and non-binding existing and future documents: Protocols (like the draft Transit Protocol), Understandings, Decisions, Declarations, Statements, Model Agreements, etc.;
- The long-term Energy Charter process with its objectively-motivated life-cycle with the following consequential phases: multilateral negotiations on new instruments; monitoring of their implementation, political discussions on their adaptation to the new realities of the international energy markets; new multilateral negotiations on the adaptation of existing instruments and/or development of new ones⁹⁷;
- An international organisation – the Energy Charter Conference with its specific competitive niche within the group of international energy organisations; within the Conference activities of its different Working Groups take place;
- The Energy Charter Secretariat as an administrative body of this international organisation.

⁹⁷ See: A. KONOPLYANIK, "The future of the Energy Charter Process: to find a competitive niche", Presentation at the internal ECS Seminar, Brussels, 28 May 2004, http://www.encharter.org/fileadmin/user_upload/DSG/Presentations/2004/11-E-Brussels-28.05..pdf, <http://www.konoplyanik.ru/speeches/11-E-Brussels-28.05..pdf>.

Regarding above-mentioned statements of the Russian President's Aide on ratification and obligatory character of decisions: Only legally binding documents need to be ratified (and, contrary to A.Dvorkovich' statement, not the Energy Charter Political Declaration of 1991). It is not possible to sign and ratify any Charter legally binding document unless the ECT has been signed and ratified by the State in question and prior to this that the country signed the Political Declaration of 1991. Decisions are taken by the Energy Charter Conference (Art. 36) and by its working bodies and do not request ratification. After being approved by the Conference (usually by consensus), these decisions become obligatory for Member States. The results of the debate within the Energy Charter multilateral community in 2005 during the selection of the new Secretary General on whether ECT signatories (i.e. those countries that have signed but not yet ratified the ECT) have the right to vote, showed, that in the decision-making process within the Energy Charter, all the ECT signatories (both those that have ratified and those which have not yet ratified) have the right to vote.

On April 29, Russian Prime-Minister Vladimir Putin stated in Sofia that "*Russia does not see sense in keeping its signature under the Energy Charter*".⁹⁸ Let us suppose that Russia is really debating internally the possibility of terminating provisional application under Article 45(3)(b) of the ECT, in other words, the intention of not becoming a Contracting Party to the Treaty. If this is the case, the negative consequences of such a declaration for Russia and its administration are quite obvious, whereas there are no convincing arguments in favour of it, in my opinion.

B. Consequences of withdrawal from the ECT

Firstly, by declaring its intention not to become a contracting party and to withdraw from provisional application of the ECT, Russia will play into the hands of the anti-Russian political forces, which will repeatedly label Russia as a country that does not respect the rules of law.

Secondly, the ECT is the only multilateral instrument of investment protection and promotion in the most capital-intensive and risky business field – the energy sector. In the course of time, the ECT will increasingly

⁹⁸ Путин: Россия не видит смысла в сохранении подписи под Энергетической хартией. – «ПравоТЭК», 29.04.2009, www.lawtek.ru.

protect not only foreign investments in Russia, but also Russian investments abroad (in the case of ECT ratification by the Russian Parliament), primarily, from “liberalisation risks”, and aggravations in the EU market as a result of certain possible anti-Russian provisions of the Third Liberalisation Package, adopted recently by the European Parliament in its second reading.⁹⁹

Thirdly, the ECT has been an integral part of international law since 1998. Russia’s non-participation in the Treaty will not lead to its termination. Other countries will simply enjoy its advantages thanks to a reduction in the costs of financing their energy projects and thus increase the competitiveness of their energy projects compared to Russian ventures.

Fourthly, Russia’s repudiation of the ECT does not mean that it will succeed in creating an alternative and more effective instrument in the foreseeable future. The window of political opportunities is much more narrow today than at the beginning of the 1990s when it led to rapid completion of negotiations and signing of the ECT. On the other hand, it is very possible and necessary to work, consistently and on a well-argued basis, on further improvement of the multifaceted Energy Charter process and its instruments. That must be the objective of all initiatives arising in connection with the ECT, and the Charter process provides for that through its incorporated adaptation mechanisms. The lack of effective crisis prevention and quick conflict resolving mechanisms in the ECT (this is a justified statement), along with the inaction of the Energy Charter Secretariat’s political leadership on the threshold of the January 2009 Russia-Ukraine gas crisis, provide a basis for initiating modernisation of this part of the package of legally-binding Charter documents by supplementing it with a corresponding agreement based on Russia’s draft agreement on prevention of emergencies in transit.

⁹⁹ COD/2007/0195. Energy: rules for the internal market in electricity (repeal. Directive 2003/54/EC) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5533232>) ; COD/2007/0196. Energy: rules for the internal market in natural gas (repeal. Directive 2003/55/EC) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5533242>) ; COD/2007/0197. Electricity and gas market: Agency for the Cooperation of Energy Regulators. (<http://www.europarl.europa.eu/oeil/file.jsp?id=5533252>) ; COD/2007/0198. Energy: internal market in electricity, cross-border exchanges, access to network (amend. Regulation (EC) No 1228/2003) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5533292>) ; COD/2007/0199. Energy: internal market in natural gas, access to the transmission networks (repeal. Regulation (EC) No 1775/2005) (<http://www.europarl.europa.eu/oeil/file.jsp?id=5533272>).

Finally, the EU system of international Treaty-making with third-party states is arranged so that it is extremely difficult, not to say impossible, to reach an agreement with the EU on the terms, which are not obviously compatible with European law. The EU has been exporting its legislation through its system of international treaties. Today only the ECT offers an opportunity to stand up to this trend. At the beginning of the 1990s, simultaneously with the negotiations on the ECT, the EU was preparing its First Directives on energy (adopted in 1996 and 1998); there are no principle disagreements between these Directives and the ECT. After adoption of new, more liberal Second EU Directives (2003) and the expected adoption of even more radical Third Directives (foreseen in 2009), the gap between the ECT and European energy law in the level of liberalisation of the “open and competitive markets” will increase dramatically.

This being the case, the ECT is an integral part of EU legislation. ECT application is based on the “minimum standard” principle, which means that every country can proceed further in its national legislation - than it is required to under the ECT - in respect of competition, liberalisation and non-discrimination levels, but cannot require the same of other Member States of the ECT, based on ECT provisions. Repudiation of the ECT under these circumstances will deny non-member countries the possibility of negotiating a “new global energy order” with European countries on terms different from those provided for in the EU legislation.

C. Transit: common fallacy

The pet subject of ECT ratification opponents and supporters of the Treaty’s repudiation is Article 7, dedicated to transit.

As mentioned earlier, during the course of Parliamentary Hearings on ECT ratification in January 2001, the State Duma came to the reasonable and legally feasible decision, that Russia’s justified concerns in connection with the ECT transit provisions could be resolved by executing a separate, legally binding Energy Charter Protocol on Transit (the negotiations of which started in 2000). During bilateral consultations on the draft Transit Protocol, Russian and EU experts have worked out special, mutually acceptable,

Understandings with regard to the relevant provisions of this ECT article which were provisionally agreed upon at multilateral level.

Russia's declaration about withdrawing from ECT provisional application, if followed by non-participation in the ECT-related programme of work, will block the completion of the Transit Protocol without prospects of resumption, or will lead to finalization of this Protocol without due consideration of fair Russian concerns (especially in regard to its draft Article 20). As a result, Russia will not obtain the necessary and acceptable multilateral legal instrument of transit regulation, which it has been enforcing and which took over ten years of preparation.

In respect of the ECT, some politicians often express fear that, in the case of direct gas supply contracts between Central Asian producers and European customers, the ECT will bind Russia to permit access to its gas transportation system to cheap Central Asian gas for its transit at low Russian domestic transportation tariffs. As a result, after its transportation through the territory of Russia, gas from Central Asia will compete with Russian gas in the European market and will gain a competitive edge (pricewise).

This is a common fallacy. The ECT does not stipulate the need to permit access to transit facilities to third-party countries. The Treaty sets forth that *"each Contracting Party shall take the necessary measures to facilitate the Transit..."* (Art.7-1) which means the existing transit, not a new one, and it *"shall encourage relevant entities to cooperate"* in the sphere of transit (Art.7-2). *"... the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation..."* (Art.7-4), and for those countries, applying the ECT provisionally, national legislation has priority over the ECT in case of conflict of laws. The transit country which is party to the Treaty shall not be obliged to permit the construction or the modification of its transit systems or to allow new or additional transit, *"which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply"* (Art.7-5). In total, the ECT specifies five levels of proven protection for the transit country's interests if it does not want to allow new transit through its territory to third states.

Thus, the ECT does not state as mandatory the granting of access to Gazprom's gas transportation system (GTS); on the contrary, it provides internationally approved mechanisms for justifying denial of access to national GTS for a new (potential) transit. Moreover, within the Energy Charter framework, the issue of the correlation of transit and domestic transportation tariffs has been resolved at the expert level in the course of Transit Protocol finalization (and now it waits for approval at political level) – they need not be equal within at least the non-EU ECT Member States.

It should also be remembered that Central Asian gas is no longer “cheap” (in terms of pricing mechanisms). Since January 2009, export gas price formation both in the EU and in the post-Soviet area has been based on the net back to delivery points from replacement value of gas at the EU market.¹⁰⁰ Selling Central Asian gas at a formula price at their external borders is a more profitable export scenario for these countries than transiting their gas by themselves to Europe. In the former case, Central Asian exporters receive the highest marketable price (based on the EU end-users gas replacement values) at their external border; and there is no need to transit/transportation through Russia. Moreover, it is Gazprom which transits the gas purchased in Central Asia through the territories of Uzbekistan and Kazakhstan and which faces the corresponding costs and risks. In the latter case, Central Asian countries have to bear costs and risks related to transit without having additional benefits.¹⁰¹

There was also criticism of the ECT because of the YUKOS case: allegedly, the Energy Charter gave grounds for lodging a claim against Russia, arising out of the YUKOS case and supported by the provisions of the ECT¹⁰², and we should eliminate such a possibility in the future by withdrawing from the

¹⁰⁰ On more details on international oil and gas pricing mechanisms see: *Putting a Price on ENERGY: International Pricing Mechanisms for Oil and Gas*. – Energy Charter Secretariat, Brussels, 2007, 236 pp.

¹⁰¹ A. KONOPLYANIK. “Russian and Central Asian gas in the FSU and continental Europe: evolution of contractual structures and pricing mechanisms”. - Presentation at the Harriman Institute and Center for Energy, Marine Transportation and Public Policy (CEMTPP), School of International and Public Affairs (SIPA), Columbia University, 3 March 2009, New York, NY, USA (www.konoplyanik.ru).

¹⁰² This author's views on arbitration prospects of the YUKOS case are presented in: “The Energy Charter Treaty: Dispute Resolution Mechanisms – and the Yukos Case.”, N°1 *Russian/CIS Energy & Mining Law Journal*, Vol. 3, 2005, pp. 27-33; Energy Charter Treaty – and “Yukos case”. N°8 *Petroleum Economist*, July 2005, pp. 35-36; ДОХ и «дело ЮКОСа». – «Нефть России», август 2005, №8, с. 83-86.

ECT. However, in the event that a signatory terminates provisional application, according to Art.45(3)(b), the obligation to apply Part III “Investment Promotion and Protection” and Part V “Dispute Settlement” of the ECT “with respect to any Investments made in its area during such provisional application by investors of other signatories shall nevertheless remain in effect with respect to those investments for twenty years following the effective date of termination”. Thus, if, supposedly, Russia would like to withdraw from the ECT in 2009, this country’s obligations on investment protection will remain in force for the next 20 years (till 2029), as well as the possibility of arbitration proceedings against Russia arising out of a breach of ECT investment provisions.

D. Destroy or renew

“Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)”, proposed by Russia, cannot be seriously considered as an alternative to the ECT and related documents, but, in the author’s opinion, it may be accepted by the international community as a proposal on the future improvement of the Energy Charter process, the latter being a single universal mechanism of legal regulation in the international energy sector.

On the one hand, the promulgated document does not contain any suggestions as to its conceptual novelty or principal differences from the provisions of the Energy Charter documents. These proposals should be viewed not as an alternative, but rather as a list of questions, offered to the Energy Charter international community and aimed at analyzing the efficiency of the multi-faceted directions of its activity. This will help reduce the negative effects of the declarations and proposals made by the Russian party and will turn discussions on the matter into something constructive and positive.

The fact is that the Energy Charter Policy Review, based on Art.34(7) of the ECT, takes place once every five years. Since 2007, the special Energy Charter Ad Hoc Strategy Group has been discussing the particularities of adaptation of the Charter process and the provisions of the Charter documents to the new challenges and risks of the international energy markets, based on the Conclusions of the 2004 Policy Review. The next

Policy Review Conclusions, with the particular decisions on the adaptation of the Charter process and its documents, will be adopted by the Energy Charter Conference at the end of 2009, following the results of the regular Energy Charter Policy Review taking place this year.

This is an excellent opportunity to introduce a number of justified changes and amendments to the Energy Charter process and its documents which will alleviate proven and well-argued concerns of Russia. But to achieve this, my country's delegation must work efficiently within the framework of this adaptation process, including the fully-fledged participation of the Russian delegation in all Energy Charter meetings and their proper preparation of them. It would also be quite reasonable to propose to the Charter community a transit agreement, indicated in the "Conceptual Approach...", aimed at preventing such crises as the Russia-Ukraine dispute in January, as part of the complex Russian initiative on the adaptation of the Energy Charter to the new challenges and risks of the international energy markets development.

It should be noted that this draft agreement on transit crises prevention was prepared by Gazprom's experts explicitly as a document supplementing the ECT and the draft Transit Protocol, rather than substituting them. There is only one innovative element in the text of this agreement but it is an important one – a system of international commissions authorized to resolve extraordinary situations, connected with transit, if a threat of their occurrence should arise.

7. Practical Actions for Moving Forward

This article has argued that a common legal background for Russia-EU common energy space should be based on the Energy Charter Treaty. In conclusion I suggest the following practical actions to implement this option:

- (1) Finalize and sign the Transit Protocol giving full consideration to Russia's substantiated concerns on transit both in the draft TP and in the ECT.¹⁰³
- (2) Address a closed list of other substantiated Russian concerns with respect to the ECT. Russia might present this closed list to the ECT community within the framework of the Energy Charter Ad Hoc Strategy Group.¹⁰⁴

The conclusions of any discussions might be adopted within the 2009 Energy Charter Policy Review. Items (1) and (2) can be developed in parallel. After the aims of items (1) and (2) have been achieved, Russia should simultaneously ratify the ECT and the Transit Protocol, thus achieving in full a level playing field with the EU. After this, the ECT will formally serve as the legal foundation of the common Russia-EU energy space.

The energy chapter of a new Russia-EU PA might declare that the ECT provides the legal basis for a Russia-EU common energy space. The effective date of the new PA energy chapter (entry into force) will be linked to Russia's ratification of the ECT and Transit Protocol.

Further practical improvement and adaptation of the ECT could follow once all ECT members have ratified the Treaty (today 46 of the 51 ECT Member States have already done so).¹⁰⁵ These developments might include further geographical expansion of the Charter community and expansion of substantive coverage of the Treaty to further diminish the whole spectrum of risks within the cross-border energy value chains. This development would draw upon the current policy debate (Ad Hoc Strategy Group discussions resulting in the Conclusions of the 2009 Energy Charter Policy

¹⁰³ A key component to fulfilling this task is for both Russia and the EU to send full-fledged competent delegations to all formal and informal corresponding meetings, so the process of TP finalization will not slip due to the physical absence of the persons involved.

¹⁰⁴ Russia has presented a preliminary list of its ECT-related concerns but it is not a closed one. If the new Russian initiative as of 21 April is considered as a list of Russian concerns in regard to the Energy Charter process and its instruments, it does not however present a closed list of such concerns.

¹⁰⁵ Corresponding discussions should continue within the Energy Charter Ad Hoc Strategy Group on a permanent basis. This Group should obtain from the Energy Charter Conference the mandate of the regular body, which will, once every five years, on the basis of its discussions, propose to the Energy Charter Policy Review specific recommendations on further improvements and adaptations of different facets of the Energy Charter process, including both its political and legal instruments.

Review based on ECT Art. 34.7), and on the identification of new challenges and risks in international energy markets and effective responses. This debate needs to take account of the multi-faceted dimensions of the Energy Charter organisation (including the role of the Secretariat) and the lessons learned from the most recent Russia-Ukraine gas crisis. The general agenda of this debate on specific aspects of adaptation and further improvement of the Energy Charter process might be considered as having been presented in the new Russian initiative as of 21 April.

After this chapter was written and edited, new developments stipulated to add a new segment to it.

8. Russia Between Two Margins: to Lead Energy Charter Process “Plus” – or to Withdraw From ECT Provisional Application?¹⁰⁶

On June 29, 2009, in the course of a meeting of Russian government agencies’ representatives chaired by Vice Premier Igor Sechin, its participants were informed that in spite of objections of key agencies, a political decision was taken to terminate provisional application of the Energy Charter Treaty by the Russian Federation. If it is approved by the Government, then, in accordance with Article 45 (3)(a) ECT, Russia will have to give a written notification to the charter depository (these functions are performed by the Government of Portugal) of its intention not to become a contracting party to the Treaty.

Criticism of the Energy Charter and intention to revoke the signature of the Russian Federation have been increasingly voiced during the recent months. Dmitry Medvedev said, first in Moscow on January 20, 2009¹⁰⁷ and after that in Helsinki on April 20 2009¹⁰⁸, that the document is not working and Moscow proposes to discuss creation of a new legal framework of

¹⁰⁶ Based on author’s article originally published as: Энергохартия-плюс. Россия должна возглавить процесс модернизации ДЭХ. – *«Время новостей»*, №125, 16 июля 2009, and republished afterwards in English as: Energy Charter Plus - Russia to Take the Lead Role in Modernizing ECT? - *“Oil, Gas and Energy Law” OGEI*, Vol. 7, 5 August 2009.

¹⁰⁷ Президент России: Начало рабочей встречи с председателем правления компании Газпром А.Миллером. - <http://www.kreml.ru/text/appears/2009/01/211884.shtml>.

¹⁰⁸ «Президент РФ в Хельсинки сделал серию важных заявлений о европейской безопасности». – «Первый канал», 20.04.2009, <http://www.1tv.ru/news/polit/142214>; «Медведев: Россия подготовила базовый документ, определяющий вопросы энергетического сотрудничества». – «Право ТЭК», 21.04.2009, www.lawtek.ru.

international energy security. On April 29, 2009, Vladimir Putin came to the fore, declaring in Sofia that “*the Energy Charter has not worked*” and this may be the reason why “*Russia finds no sense in preserving its signature under the Energy Charter*”.¹⁰⁹ On June 5, 2009 in St. Petersburg, the Russian President reinforced Russia’s position that the Energy Charter is not able to cope with all problems in the international gas sphere. “*Did this Energy Charter help in the course of the recent gas conflict? Procedures which are provided for by this Charter did not work, incentives did not work either, the Energy Charter Treaty was not used. This means that we need another basis for downplaying such conflicts*”, he said.¹¹⁰ The truth is that initiatives proposed by Russia to create a new system in place of the ECT did not enthruse potential partners. To the contrary, Brussels and some individual EU members declared that abolishment of the Energy Charter is out of question.

Nevertheless, it looks like Moscow is ready to withdraw from ECT provisional application.

A. *Disadvantages resulting from withdrawal*

In the previous section the author has already pointed to the negative consequences of potential withdrawal of Russia from provisional application of the ECT. At the same time, no reasonable benefits for Russia stem from this course of action. In particular, withdrawal from the ECT’s provisional application will not help Russia in UNCITRAL (United Nations Commission on International Trade Law) arbitration proceedings against it in the UKOS case, while it looks like that it was this illusion that became one of the key motives for taking this decision. Even revocation of the signature would have no retroactive effect, since Russia, in accordance with Article 45 (3)(b) ECT, will be bound with an obligation to comply with the investment provisions of the Treaty during the next 20 years.

At the same time, a notification on Russia’s withdrawal from provisional application of the ECT filed to the depository can prevent Russia from

¹⁰⁹ «Путин: Россия не видит смысла в сохранении подписи под Энергетической Хартией». – «Право ТЭК», 29.04.2009, www.lawtek.ru.

¹¹⁰ «Медведев призывает создать институт для разрешения газовых споров». – «РИА Новости», 05.06.2009, <http://www.rian.ru/economy/20090605/173397916.html>.

implementing initiatives aimed at establishing a new global order in the energy field which were announced by Russian President on April 21, 2009 (“Concept of a New Legal Framework for International Cooperation in the Energy Field. Goals and Principles”). My country will be regarded as a lightweight negotiations partner, which unilaterally rejects the existing international legal instruments and rules of the game and, instead of following the evolutionary (gradual) adaptation thereof, calls for revolutionary reforms at a global scale without laying down a clear and coherent action plan.

It should be admitted that some claims put forward by Russian leaders to the Energy Charter process and to the ECT as its key legally binding document are quite grounded. In particular, the fact that ECT cannot force the countries which signed and ratified it to comply with the Treaty provisions, that the ECT does not incorporate tools to oblige the Member States to perform the obligations they assumed, tools of prompt and efficient multilateral prevention and resolution of emergency issues in the energy field, prompt and efficient sanctions for the violation of ECT provisions. In my opinion, these statements are quite fair.

Furthermore, Russia can refer to the fact that in the course of the ECT negotiations back in the early 1990s the Russian delegation proposed developing a special document – “Energy Charter Protocol on Emergencies in the Energy Field of Cross-border Character”, where ways to ensure secure and continuous transit were considered. That initiative was not supported at the time, nor were the initiatives (including those of other states) aimed at developing seven other special protocols.¹¹¹ However, this is not the reason for rejecting the ECT and holding aloof from the Energy Charter process.

A requirement to reject the ECT and develop a new document to replace it is the least efficient way (if at all realizable) to satisfy grounded concerns of the Russian Federation in regard to the Energy Charter. If Russia’s leaders give a negative assessment of the Energy Charter process due to some drawbacks which have become conspicuous today, one should not torpedo

¹¹¹ А.Конопляник. «Ратификация ДЭХ Россией: прежде всего, необходимо развеять добросовестные заблуждения оппонентов». – гл. 22 в кн. *«Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада»* (под ред Т.Вальде – англ.изд. и А.Конопляника – рус.изд). – М.: Международные отношения, 2002, стр. 545-614.

the process (such attempt will fail in any case – the ECT has been part of international legal framework for 11 years now, 46 states have ratified it and will stick to their ratifications), but lead initiatives aimed at adaptation thereof, including taking account of the Russian presidential initiatives announced on April 21. The more so, because Russia’s key opponent in the Energy Charter Process – the European Union – represented by its Chairman Jose Manuel Barroso, announced during the latest EU-Russia summit in Khabarovsk, the EU’s consent to “actualize” the Energy Charter, i.e. intention of the EU to further improve the Charter process and its instruments.

B. Energy Charter process “plus”

It would be advisable for Russia to propose a scenario to the Charter community (which includes 51 countries-signatories to ECT, 23 countries and ten international organizations being observers) which might allow for implementing initiatives announced on April 21 within the framework of the Energy Charter process. Let me emphasize it once again: it is only within the framework and on the basis of this Charter process that Russia will be able not only to implement the initiatives proposed by the Russian President, but also to take the lead in implementing them, i.e. the process of building a new global order in the global energy sector. And in this case Russia will be, most probably, supported by a major part of the global community.

As well-known, for many years now, we have been holding negotiations to specify a number of provisions of the Treaty. A wider task to ensure regular updates of the Charter process is provided for by conclusions of the Energy Charter Policy Review of 2004 (held once every five years on the basis of Article 34 (7) ECT). A scenario for “reforming the Energy Charter Process” – let us call it “Energy Charter plus” – has already been informally discussed by several key figures of the process. Furthermore, the first steps in this direction have been already made by the Russian delegation in the course of a regular meeting of the Ad Hoc Energy Charter Strategy Group (Strategy Group, a working body which was specially set up in 2007 to discuss the issues of adapting the Energy Charter process to new challenges and risks on international energy markets) held on June 16 2009.

Further steps should aim to develop “a road map” on the basis of the Russian initiative announced on April 21. This “road map” is to become a part of a package solution of a regular Energy Charter Conference (superior body of the Charter process) in December 2009.

C. Road map within Energy Charter “plus” scenario

The meetings of the Strategy Group to be held this year should be used to decide which steps are to be taken to adapt the Charter process and the ECT based on the Russian initiatives of April 21 2009. The first question is: what are the uncertainties or ambiguities in the ECT which allow for a wider interpretation of its provisions (a preliminary list has been prepared by the Russian party)? The second issue is: which urgent issues are not covered by the ECT and related instruments, which issues are within the scope of the Energy Charter process and which are outside of its scope and what are efficient ways for the international community to respond to them? The third issue is: what should be the sequence of actions and how should the discussion process be arranged within the Strategy Group in 2010?

It is essential that the Conference meant to take place in December provides the Strategy Group the status of a standing body. As the work progresses, this Group can give recommendations on launching discussions on new instruments and on building new discussion groups, as well as on engaging new states as observers and members into the Charter process.

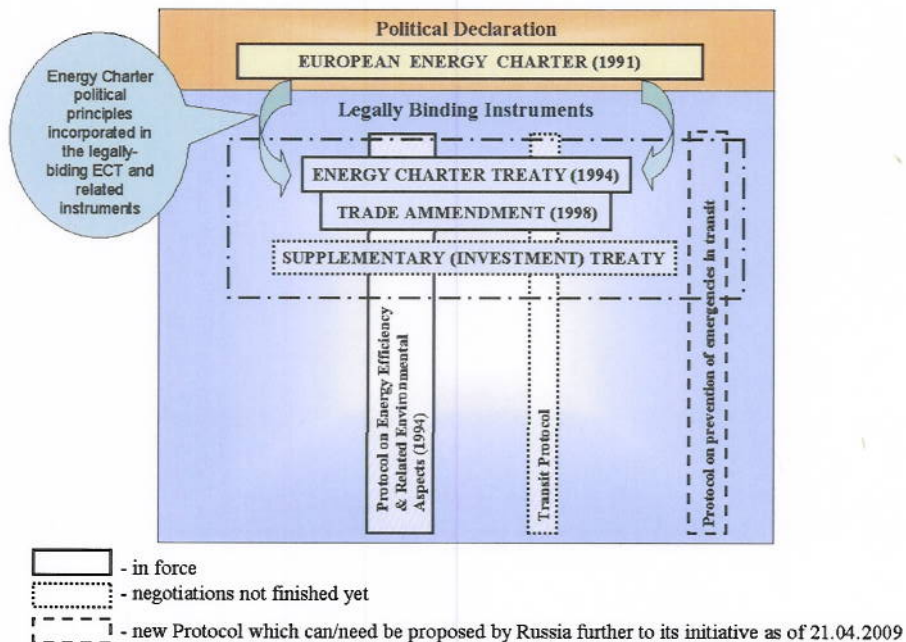
However, the issues on which other ECT Member States are to assume obligations for our country to agree to start ratification of the Treaty are to be resolved before December 2009 and legally formalized by the Conference decision. Thus, Russia will establish itself as a leader in updating the Energy Charter based on existing institutions and tools, while sparing time and political resources which will be spent if Russian initiatives are implemented outside the Charter.

D. Package solution

During the same session of the Energy Charter Conference, at the end of the year, a decision to finalize preparation of two Protocols is to be taken. First of all, on the Energy Charter Protocol on Transit (Transit Protocol / TP) –

taking full account of Russia's grounded concerns with respect to the transit provisions of ECT and the TP itself. Secondly, on a new Protocol to the Energy Charter on prevention of emergencies in transit (working title) on the basis of the draft of a relevant Russian document (see Figure 4). These Protocols are to be introduced for provisional application immediately after they are approved by the Conference. Together with the "road map" described above and counter obligation of Russia to start ECT ratification procedure, the parties to such agreement will get a balanced package solution.

Energy Charter & related instruments: evolving structure



(Figure 4: Energy Charter & related instruments: evolving structure)

By now, as already mentioned above, all open issues of the Transit Protocol, except one, have been resolved – provided the wording of relevant articles is edited. A remaining question is the disagreement between Russia and EU on the draft Article 20 of this Protocol. The nature of this disagreement is as follows: the EU's proposal to consider the territory of the EU as the territory of a Regional Economic Integration Organization (REIO) for transit purposes. By doing so the movements of energy resources within the EU

would not be classified as transit unless they cover the whole territory of the Union. This can create additional transit risks for supplies of Russian gas to Europe, because after expansion of the EU in 2004-2007 a considerable number of these supplies – up to their contractual delivery points – are delivered via the EU territory.

However, there is an important new aspect in the Energy Charter Plus scenario, which opens way for a radical solution to the “REIO issue”. This is the possibility of including a provision into the Transit Protocol following which Article 20 shall automatically be deleted from it in case the Protocol is ratified by Russia. That means that this would also happen in case Russia ratifies the ECT, because my country can only ratify the ECT and the Protocol simultaneously. The key issue for the entire Charter community will be agreement in principle on this package between Russia and the European Union.

Negotiations over the Protocol on prevention of emergencies in transit and its completion are to be held on the basis of a version of this document developed by Russia, which has already been presented to a number of countries and international organizations. However, for this purpose Russia is to officially introduce this document to the Strategy Group as part of a package of Russian proposals on upgrading the Energy Charter and its instruments (see Figure 4).

I believe that such an approach by Russia towards the reinforcement of international energy security will be supported by most of our partners. But, unfortunately, the events have developed according to a different – unfortunate - scenario.

9. Unfortunate Development - and its Consequences







On July 30th Russian Prime Minister Vladimir Putin signed Government Ordinance N 1055-r according to which Russia is to terminate provisional application of the ECT, based on its Article 45(3-a) (by stating its intention not to become ECT contracting party). As a result of this decision, Russia will remain a signatory to the ECT but now with a different status. Among the 51 ECT Member-States, only 46 have yet ratified the Treaty and 5 have not, Russia being among them. Russia together with Belarus has been

applying the ECT on a provisional basis contrarily to Norway, Australia and Iceland that are just signatories without such provisional application. In case the corresponding Russian note is transmitted to the depositary (The Government of Portugal), Russia will move into the second group of non-ratifying ECT signatories – but will stay within the ECT family, which also includes 23 observer-states which did not sign the legally-binding ECT but only the politically-binding 1991 Energy Charter political declaration. In any case investment obligations will hold Russia for 20 years after its withdrawal from provisional application of the ECT, as said in its Art. 45(3)(b).

The intention of Russia not to ratify the existing ECT (or not to become its Contracting Party) *per se* has been well-known since 2001 when Russia's State Duma stated that Russia will not start a ratification procedure until its concerns regarding possible negative interpretations of two transit provisions of the Treaty were clarified by the newly negotiated Transit Protocol. In this regard Government Ordinance N 1055-r did not, in substance, add anything new to Russia's position on ECT ratification.

I personally regret that Russia took the decision on termination of the ECT's provisional application - this will just make it more difficult to further improve the unique Energy Charter process and this will work to the competitive disadvantage of my country. But this does not prevent Russia to continue working within the Energy Charter process (as, for instance, Norway has been doing since 1994 being an "ordinary" signatory to the ECT) and to return – in some future time (hopefully rather sooner than later) – to reassessing the positive role of the Energy Charter process *per se* and, in particular, its most effective role as the legal background for the creation of the Russia-EU common energy space.

Annex: Common rules of the game in Eurasian energy & export of EU's acquis ? (legend to figures 1 & 2)

| Zone | States within the zone | Description |
|---|--|---|
|  | EU Members: 27 EU countries | EU legislation, including the energy legislation, is fully applicable |
|  | Energy Community EU-SEE Countries: Croatia, Serbia, Montenegro, Croatia, Bosnia, FYROM (Macedonia), Albania, UNMIK (Kosova); other Energy Community members are already EU members | Only EU legislation on internal electricity and gas markets is applicable |
|  | EU Candidate Countries: Turkey (Croatia is already an Energy Community member so applying the EU energy market acquis) | Still in the process of alignment to the EU legislation but full compliance not likely before membership |
|  | EU Neighbourhood Policy Countries: CIS (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine) and Northern Africa (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria, Tunisia) | Enhanced energy cooperation based on National Action Plans with Ukraine and Moldova (as well as with Israel, Jordan, Morocco, the Palestinian Authority and Tunisia); partial application of EU energy policies and legislation may be possible in the future |
| | EU-Russia Strategic Partnership: EU & Russia | Based on shared principles and objectives; applicability of the EU legislation in Russia is out of question |
|  | ECT member-states: 51 states of Europe & Asia | ECT is fully applicable within the EU as minimum standard; EU went further in liberalizing its internal energy market, BUT whether EU can demand that other ECT member-states follow same model and speed of developing their domestic markets? |
|  | ECT observer-states: 20 states of Europe, Asia (e.g. Middle East, South-, SE- & NE-Asia), Africa, North & Latin America | Shared ECT aims & principles; did not take ECT legally binding rules; not ready to take more liberal rules of EU Acquis |