

# **Russia-EU energy relations - and the role of the Energy Charter Treaty**

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# Russia-EU: towards common energy space (chronology)

- 1) **May 2003**, St.Petersburg Summit: parties agreed on creation of four “common spaces”, incl. in energy,
- 2) **May 2005**, Moscow Summit: parties agreed on “road maps” for four spaces; legal framework to be implemented within new PA to replace previous PCA-1994,
- 3) **26 May 2008**: CEC received mandate to negotiate new PA,
- 4) **June 2008**, Khanty-Mansiysk Summit: parties agreed to start negotiations on new PA,
- 5) **4 July 2008**: first round of negotiations

One of key objectives of new PA is to harmonise legislation and to develop legal framework for creation of common Russia-EU economic space, including energy

# Common energy space demands common rules

Options for Russia-EU common energy rules:

- Export of EU *acquis communautaire* ?
- New bilateral Russia-EU treaty – “based on the Energy Charter principles” or from the scratch ?
- Energy Charter Treaty !

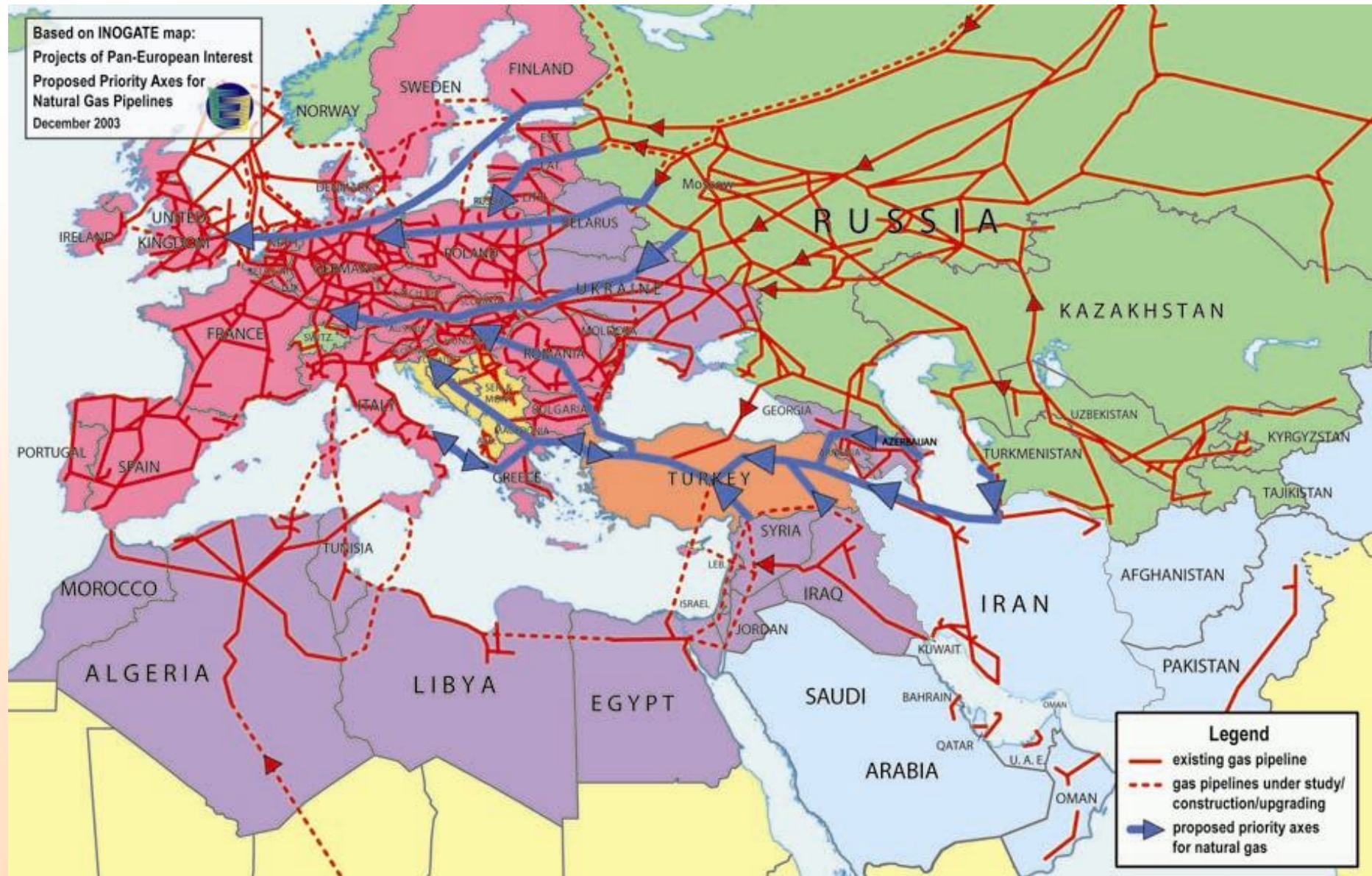
# Option 1: Export of “acquis communautaire”

- EU’s preference: for EU, harmonization of EU legislation with legal systems of thirds states means basically application of EU legislation within these third states, incl. in energy => “export of acquis”
- EU tries to expand geographical area of implementation of acquis in energy (umbrella policies => soft law => hard law):
  - Hard/overall: EU enlargement (EU15=>EU25=>EU27=>EU27+?)
  - Hard/sectoral: EU-SEE Energy Community Treaty (EU27+7) + new observers/members
  - Soft: EU Neighborhood Policy (EU27 + 10NA + 8FSU/CIS)
    - EU has even initially included Russia in this Policy => strong negative respond from DPM V.Khristenko to DG DGTREN F.Lamoureux,
  - Umbrella: EU Eastern Partnership (6CIS)

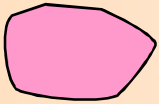
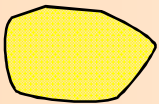
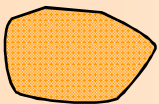
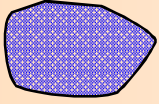
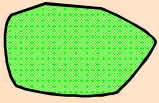
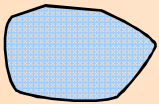
*but*

- EU acquis does not (and will not !) cover all segments of energy (gas) value chains destined for EU and originated from Russia & other key non-EU producers (Central Asia, Caucasus, Iran, etc.)

# Common rules of the game in Eurasian energy & export of EU's acquis



# Common rules of the game in Eurasian energy & export of EU's acquis ? (legend)

Zone	States within the zone	Description
	<b>EU Members:</b> 27 EU countries	EU legislation, including the energy legislation, is fully applicable
	<b>Energy Community EU-SEE Countries:</b> 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
	<b>EU Candidate Countries:</b> 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
	<b>EU Neighbourhood Policy Countries:</b> CIS (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine = <b>EU Eastern Partnership</b> ) 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
	<b>EU-Russia Strategic Partnership:</b> EU & Russia	Based on shared principles and objectives; applicability of the EU legislation in Russia is out of question
	<b>ECT member-states:</b> 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?
	<b>ECT observers:</b> 23 states of Europe, Asia (e.g. Middle East, South-, SE- & NE-Asia), Africa, North & Latin America + 10 international organisations	Shared ECT aims & principles; did not take ECT legally binding rules; not ready to take more liberal rules of EU Acquis

# Option 2: New bilateral Russia-EU treaty

New bilateral treaty: (i) “based on Energy Charter principles” or  
(ii) from the scratch

*but*

- Any bilateral Russia-EU Treaty (PA) does not cover transit states between Russia & EU (but major recent problems are there),
- To negotiate today new Russia-EU legally-binding Treaty (27+1+1 CPs) is much more difficult task than it was in early 1990’s with PCA & ECT negotiations
  - then – broad window of political opportunities, now – much more narrow =>
  - 3+2 open transit-related issues between Russia & EU in ECT & draft TP took 10 years already => when new broader Treaty can be finalized & ratified ? =>
  - risk of failure of new negotiations
- If it based on “Energy Charter principles”:
  - What does this mean operationally? Different wording of ECT provisions in new PA? =>
  - if so, possibility for two standards (under new PA & under ECT) of :
    - implementation of “provisions based on ECT principles” &
    - of their interpretation in different arbitrations =>
  - instead of diminishing legal risks, this would increase such risks & cost of capital for Russian and EU investors in energy projects of mutual interest



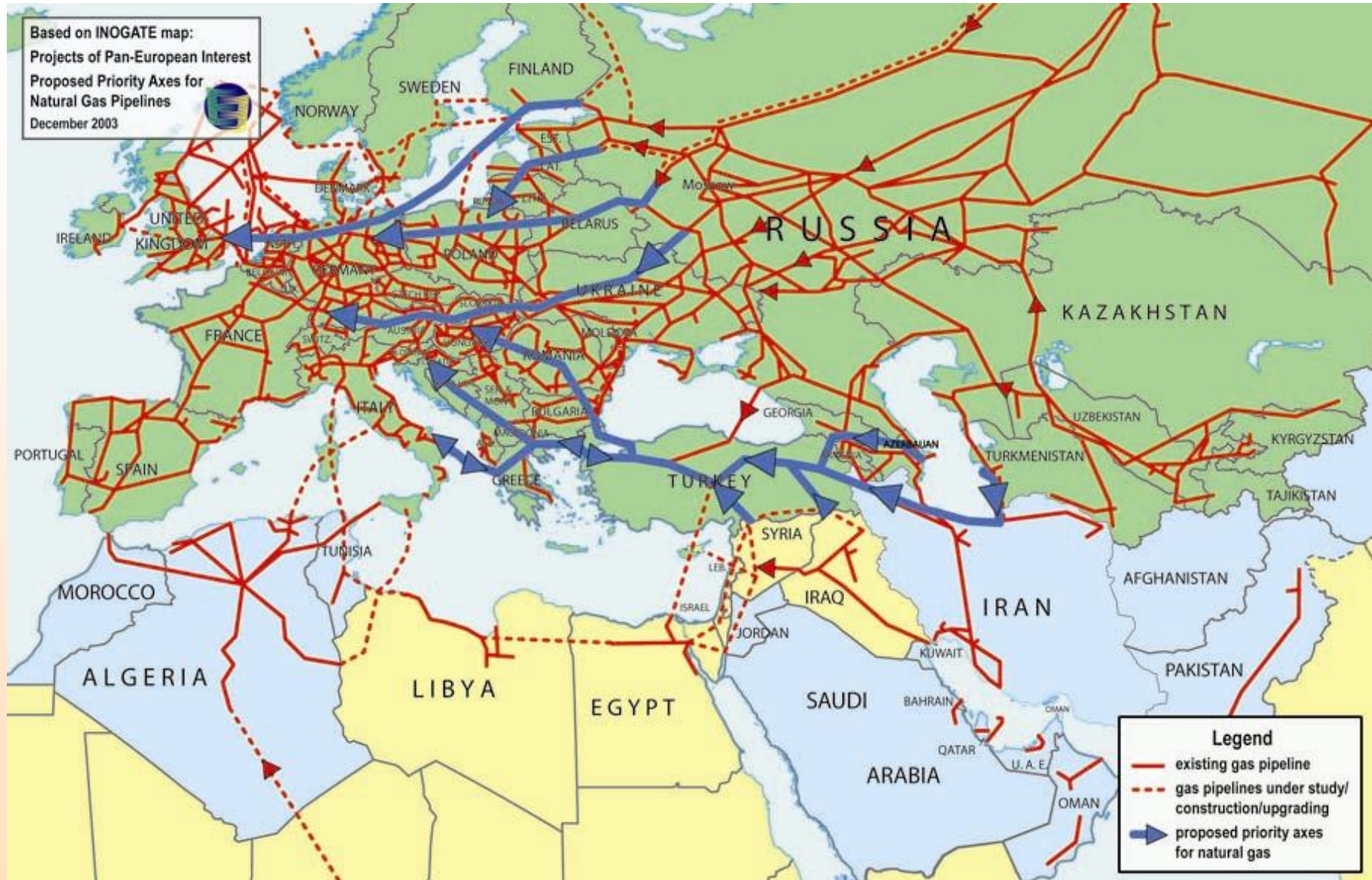
## Option 3: ECT as legal background of Russia-EU common energy space

- ECT (incl. members & observers) covers all major current & future energy (gas) value chains to EU => minimum standard of common rules in a broader area than just Russia-EU space =>
- Optimal solution: Russia-EU PA energy chapter = ECT as legal background of Russia-EU common energy space
- ECT in force since 1998; already common legal background within 51 Eurasian states, incl. Russia & EU:
  - EU: ratified by all EU member-states & by EU => ECT is already integral part of EU acquis,
  - Russia: signed & applied on provisional basis (ECT Art.45) => Russia still to ratify ECT => this is crucial if ECT to become common legal background of Russia-EU common energy space

*but*

- on October 20, 2009, Russia has terminated of ECT provisional application

# Common rules of the game in Eurasian energy & expansion of ECT



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# Russia's termination of ECT provisional application (chronology)

- **Jan.-June 2009:** crescent criticism by Russia's leaders of ECT & the whole "Energy Charter":
  - result of inaction of political leadership of ECS prior to/in course of Russia-Ukraine gas conflict of Jan. 2009 (?),
  - President Medvedev: two options – to improve Energy Charter or new treaty,
- **21 April 2009:** "Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)" published at Russian President's official website ([www.kremlin.ru](http://www.kremlin.ru)),
- **29 June 2009:** DPM I. Sechin – "Political decision on withdrawal has been taken...",
- **30 July 2009:** RF Government Ordinance N 1055-p on Russia's termination on ECT PA signed; order to MFA to act accordingly,
- **24 August 2009:** acc. to ECT Art.45 (3-a), Russia informed in writing Energy Charter depositary (Government of Portugal) on its intention not to become *a participant* of ECT [NB: *in ECT – a CP*],
- After 60 days, on **20 October 2009**, Russia terminated its provisional application of ECT and became, together with Australia, Iceland & Norway, an "ordinary" ECT signatory - a country that has signed but not – yet – ratified ECT (ECT = 51 = 46+1+4).

# Russia: Consequences of termination of ECT provisional application

- Will play into hands of anti-Russian political forces - they will repeatedly label Russia as not respecting rule of law:
  - (OGELFORUM => Guillard, FT, 18.08.09; Clark, SPB Times, 20.10.09; etc.),
- Should Russia ratify ECT, it will in course of time increasingly protect Russian investments abroad, firstly, from “liberalization risks” within EU market (ECT = minimum standard),
- Russia’s non-participation in ECT will not lead to its termination => other countries will enjoy its advantages:
  - the only one multilateral investment treaty + in the most capital-intensive industries,
  - since 1998 ECT is an integral part of international law (51+2+23+10),
  - ECT (51) = 1275 BITs,
- Russia’s repudiation from ECT does not mean that Russia will succeed in creating an alternative and more effective instrument in foreseeable future:
  - window of political opportunities is much more narrow today than at the beginning of the 1990s,
  - any bilateral treaty with EU = multilateral,
- EU has been exporting its legislation through its system of international treaties => repudiation of ECT will deny possibility for non-EU & non-ECT states to negotiate “new global energy order” with EU member-states on terms different from those provided for in EU legislation.

# Common fallacy for quit Energy Charter

- **Two provisions ECT Art.7 “Transit” (interpretations):**
  - Art.7(3): correlation of domestic transportation and transit tariffs (*settled/RF-EU experts*),
  - Art.7(6)-7(7): conciliatory procedure (correlation of temporary and final transit tariffs) (*settled/RF-EU experts*)
- **Central Asian gas - transit, tariffs, prices:**
  - *As if* under direct contracts between CA exporters and EU/CIS importers ECT would bound Russia to provide transit capacities at low domestic transportation tariffs => cheap CA gas would compete with Russian gas at EU market, *but*
  - ECT, contrary, presents 5 levels of internationally-accepted mechanisms of justified non-access to national GTS for potential (new) transit,
  - CA gas in no more “cheap”: since Jan.2009 its export price is based not on cost-plus, but on net-back EU-end-use replacement value pricing => the highest possible price for CA
- **“YUKOS case”:** (to quit ECT to escape arbitration/repetition of similar cases):
  - Acc. to ECT Art.45(3)(b), after termination of ECT provisional application:
    - its obligations on investment protection will remain in force for the next 20 years (for Russia - till 2029),
    - as well as the possibility of arbitration proceedings against Russia arising out of a breach of ECT investment provisions.

# Instead of “Energy Charter” - or to improve it ?

- “Energy Charter” is a multi-facet meaning:
  - International organization with open and expanding membership - Energy Charter Conference,
  - Long-term process with repeating life-cycle (legal negotiations => monitoring of implementation => political debate on adaptation => new legal negotiations => new cycle),
  - Expanding package of documents (both legally binding & non-binding),
  - Executive body – Energy Charter Secretariat
- “**Conceptual Approach...**” (of 21 April) can *not* be treated as alternative to Energy Charter/ECT, but it might have been accepted by international community as set of proposals on how to further improve and adapt existing Energy Charter multi-facet meaning/process:
  - ECT Art.34(7): Energy Charter Policy Review once in 5 years: 1999, 2004, 2009, ...,
  - 2004 Policy Review Conclusions (item 3) => regular adaptation of Energy Charter process,
  - “**Mail principles...**” (bullet points, mostly consist of ECT-related provisions) – to discuss at Ad Hoc Strategy Group (began on 16.06.09) & within Policy Review 2009
  - **Annex 1 “Elements of the Transit Agreement”** => draft Transit Agreement => Ad Hoc international commissions authorized to settle and prevent transit-related emergencies in case of risk of its occurrence (*novelty !*):
    - was prepared (by Gazprom) as complimentary to ECT mechanisms and not instead of them,
    - can be developed as new Energy Charter Protocol (“On Preventing Emergences in Transit”),
    - this novelty can be easily incorporated into ECT dispute settlement procedures as second pre-arbitration mechanism, in parallel with conciliation
  - **Annex 2 “List of EMP”**: equal to Annex EM to ECT-1994 and is more narrow than Annex EM1 to Trade Amendment-1998 (EM1 = EM + energy-related equipment)

# “Energy Charter plus” – missed opportunity (today, but not forever)

- Termination from ECT provisional application would not prevent Russia to participate in implementation of “Energy Charter plus” scenario with other ECT signatories (f.i. Norway is active Charter participant),
- *but*: unlikely that Russia’s leadership will soon change radically their attitude towards Energy Charter,
- *but*: Russia remains ECT signatory => all justified Russia’s concerns remain valid as well as found draft solutions =>
- Nothing prevent Russia to return to ratification issue from its “new” status, *since*
- ECT (ECT plus) = the only available mutually-acceptable legal basis for development of Russia-EU common energy space



**Thank you for your  
attention !**

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