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## Oil, Gas & Energy Law Intelligence

### **A Common Russia-EU Energy Space (The new EU-Russia Partnership Agreement, acquis communautaire, the Energy Charter and the new Russian initiative) by A. Konoplyanik**

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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)<sup>1</sup>

By Andrey Konoplyanik<sup>2</sup>

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<sup>3</sup>. 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)<sup>4</sup> replacing the previous Partnership and Cooperation Agreement (PCA)<sup>5</sup>, signed in 1994, which lasted until the end of 2007. Energy relations are included in the road map on the common economic space<sup>6</sup> which defines the aim of cooperation and necessary actions.<sup>7</sup>

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<sup>1</sup> 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 Centre for European Reform, *Pipelines, Politics and Power: The future of EU-Russia energy relations*, ed. by K.Barysch. – CER, October 2008, 117 pp., and of his two earlier publications on this issue in Russian: (a) Обойти пункты преткновения. – «*Политический журнал*», № 6-7 (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” (2009, N2, pp. 258-291).

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<sup>3</sup> Joint Statement of the Russia-EU Summit, 31 May 2003, St Petersburg

([http://www.delrus.ec.europa.eu/en/p\\_234.htm](http://www.delrus.ec.europa.eu/en/p_234.htm) )

<sup>4</sup> 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](http://www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc) )

<sup>5</sup> 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.

<sup>6</sup> 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](http://www.delrus.ec.europa.eu/en/images/pText_pict/239/sum31.doc) )

<sup>7</sup> “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](http://www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc) )

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<sup>8</sup>. 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 has agreed to start negotiations on the new bilateral Partnership Agreement<sup>9</sup>. 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 the Commission received political backing to pursue negotiations<sup>10</sup>. 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<sup>11</sup>.

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<sup>12</sup>. 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 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<sup>13</sup>.

There are three ways to develop such a legal energy 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

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<sup>8</sup> 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&gujLanguage=en>)

<sup>9</sup> 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](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/101524.pdf))

<sup>10</sup> 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&gujLanguage=en>)

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

<sup>12</sup> 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](http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-11_2008/PFUE-14.11.2008/sommet_ue-russie))

<sup>13</sup> Analysis of the broader set of issues related to the development of new PA, other than 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? – *CEPS Policy Brief*, No 103/May 2006. This CEPS paper is a response to two articles published in the *Russia in Global Affairs* (Vol. 4, No. 2, April-June 2006): "Toward a Strategic Alliance" by T.Bordachev and "Russia-EU Quandary 2007" by N.Arbatova (<http://www.ceps.be>).

Charter principles” or a totally new agreement. This option has been preferred by Russian authorities<sup>14</sup>, but is also considered as possible avenue for moving forward by some EU officials<sup>15</sup> and even – indirectly – by the EU as a whole<sup>16</sup>. 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 unbalanced character of the ECT and the possibility of interpreting some its provisions to the detriment of energy producers<sup>17</sup>.

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<sup>18</sup>.

Criticisms of the ECT at the highest Russian level continue. For example, the President of Russia, Dmitry Medvedev during his meeting with 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<sup>19</sup>. 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 organization with its organizational 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 political declaration of 1991 and legally binding instruments of 1994, 1998, etc. as the material products of this organization’s activities and of the above-mentioned debates;

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<sup>14</sup> See, for instance, the following statement of Valery Yazev, 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)

<sup>15</sup> 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.

<sup>16</sup> “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](http://www.delrus.ec.europa.eu/en/news_1094.htm)> )

<sup>17</sup> See, for instance, 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](http://www.encharter.org/fileadmin/user_upload/Conferences/25_Oct_2006/Gorban_-_RUS.pdf).

<sup>18</sup> The ECT came in force on April 16, 1998.

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

the Secretariat as administrative body of this multilateral international organisation) was the result of multilateral compromise of almost 20 years ago and 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 to create 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 compared to the second option. And it will be practically impossible to implement the first option.

The next section examines each of the three available options in more detail<sup>20</sup>.

### ***First option: Export of *acquis communautaire* (the EU's preferred approach but a “no go” for Russia)***

A common Russia-EU economic (and thus an energy) space presuppose convergence and harmonization of the legislation and law-enforcement practices of the two parties. But the approach of Russia and of the EU to harmonization 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<sup>21</sup>. This approach extends to EU energy policy.

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

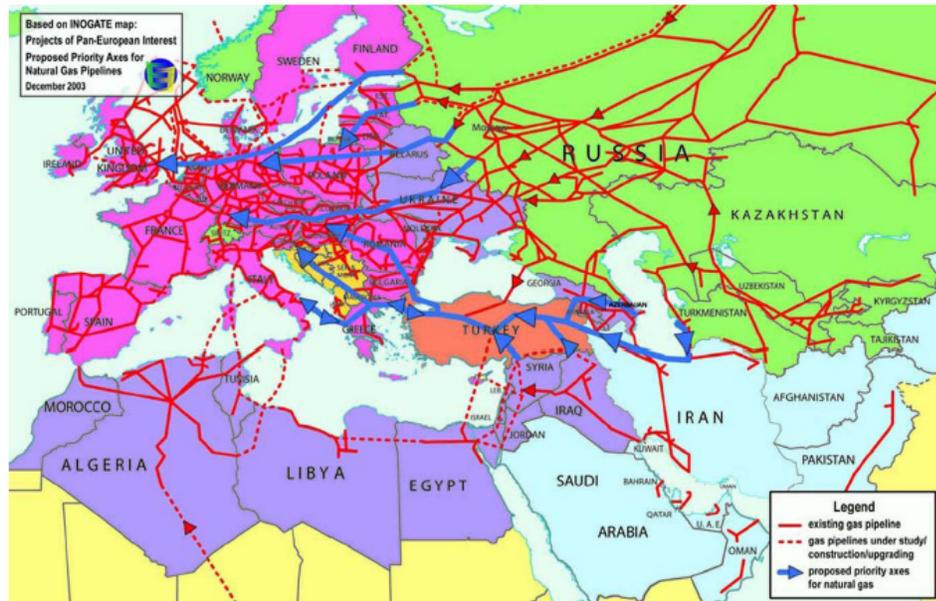
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<sup>20</sup> The author's analysis of these options is informed not only by his understanding of the relevant legal instruments, but also by his understanding of the geopolitical context. This, in turn, is informed by his practical experience within 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 by his long-term involvement, in different capacities, in the practical issues of international energy. Thus the analysis here is not a pure 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 creation of mutually-appropriate legal framework of the cooperation in energy between the two parties.

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

**“Direct” expansion of the acquis’ area:** There are at least three parallel, simultaneous and mutually dependent processes which expand the geographic area of implementation of the EU energy acquis (see Figure 1<sup>22</sup>).

**Figure 1. Common rules of the game in Eurasian energy & export of EU’s acquis**



Dr.A.Konoplyanik, JENRL, 2009, N 2

*(Figure 1: Common rules of the game in the Eurasian energy and export of the EU’s acquis)*

Firstly, there is the enlargement of the EU per se. Following the dissolution of the USSR, the EU membership increased in May 2003 from 15 to 25 member-states and then in January 2007 further to 27. In all these states EU legislation, including the energy legislation, is fully applicable. Other EU candidate countries (Croatia, Macedonia and Turkey) are still in the process of aligning to the 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.

<sup>22</sup> The author acknowledges that although the maps of the INOGATE program 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 portion.

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)<sup>23</sup>. 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 first stage 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 Federative Republic of Yugoslavia) membership in the Energy Community Treaty is a first step of 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” to implement the 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 has 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 1996<sup>24</sup> and 1998<sup>25</sup>) while the Energy Community Treaty is fully based on the more liberal rules of the Second EU Directives on electricity and gas (as of 2003<sup>26</sup>). 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 Neighborhood Policy<sup>27</sup>. The countries which are the objects of this policy include 8 FSU/CIS countries such as Armenia, Azerbaijan, Belarus, Georgia, Moldova,

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<sup>23</sup> The Energy Community Treaty. // *Official Journal of the European Union (OJ)*, L198/18, 20.7.2006 ([http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l\\_198/l\\_19820060720en00180037.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_198/l_19820060720en00180037.pdf))

<sup>24</sup> 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*, 1996, L27/30.

<sup>25</sup> 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*, 1998, L.204/1.

<sup>26</sup> 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*, 2003, L176/37; 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*, 2003, L176/57.

<sup>27</sup> 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](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](http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf)), etc.

Ukraine, and 10 countries of Northern Africa and Eastern Mediterranean such as 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 Plans<sup>28</sup> with Ukraine and Moldova (as well as with Israel, Jordan, Morocco, the Palestinian Authority and Tunisia). Partial application of the EU energy policies and legislation may be possible in the future<sup>29</sup>. Some countries from the EU Neighborhood 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 in a move to a higher level of integration with the EU in energy. This will lead to a higher level of acceptance of the 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 soon as in 2009.<sup>30</sup> Piebalgs also mentioned that the EU plans to start similar negotiations with Turkey in the first half of December.

Fourthly, there is the EU Eastern Partnership<sup>31</sup> 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 transit the region from Russia<sup>32</sup>. This policy will in any case try to bring its recipients closer to the EU standards, incl. in the organization of the energy markets and energy legislation based on the EU 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)

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<sup>28</sup> 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](http://ec.europa.eu/world/enp/pdf/action_plans/communication_commission_enp_action_plans.pdf))

<sup>29</sup> 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](http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf)).

<sup>30</sup> По России ударят током. Евросоюз намерен уже в 2009 г. интегрировать в свой энергетический рынок Украину и Молдову. - «Независимая газета», 28.11.2008.

<sup>31</sup> 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}.

<sup>32</sup> 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](http://ec.europa.eu/news/external_relations/090508_en.htm))

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 (formerly the Energy and Industry Minister, and now the Minister on Industry) expressed his concerns with respect to the European Neighborhood Policy in a letter to the then CEC DG TREN Director General Francois Lamoreaux immediately after publication of the Policy which initially mentioned Russia as a possible recipient country<sup>33</sup>. It was only after this letter that Russia was excluded from the Policy and therefore as a potential recipient of the 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.

**“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<sup>34</sup>. 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 force<sup>35</sup>, 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 aquis is a subject of “hidden” export by 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 harmonization of legal systems since PCA establishes a soft obligation for the convergence of Russian law with European law. Article 55(1) of the PCA

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<sup>33</sup> 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](http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf)).

<sup>34</sup> 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.

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

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

The Road Map 2005 for the Common Economic Space<sup>36</sup> does not require convergence of the 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<sup>37</sup>. But another view is that 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 harmonization (or convergence) on the basis of reciprocity<sup>38</sup>. But this reciprocal approach is understood differently by Russia and by the EU<sup>39</sup>. 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<sup>40</sup>. Under this approach to “reciprocity” the organizational 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 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.

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<sup>36</sup> 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](http://www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc))

<sup>37</sup> И.В.Гудков, *op.cit.*, с. 245.

<sup>38</sup> 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*, Hart Publishing, Oxford and Portland, Oregon, 2007, p.341-358.

<sup>39</sup> 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).

<sup>40</sup> 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 favour 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).

So, from my view, the “reciprocity” approach to energy cooperation, and in particular to 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 ground to implement 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 the Russian officials that Russia would not want to implement the *acquis*<sup>41</sup>. 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 EU’s *acquis communautaire* as a legal basis for creation of the common Russia-EU energy space (or of any multi-lateral 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.

### ***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 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

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<sup>41</sup> 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](http://www.lawtek.ru), 05.11.2008).

Charter<sup>42</sup>. 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 ECT 1994 were used (sometimes verbatim<sup>43</sup>) in the documents of the St.Petersburg’s G-8 2006 Summit on energy security<sup>44</sup>.

However, more recently, and following the Russia-Ukraine gas crisis of January 2009, there is less reference to the Charter principles as the basis for the new international treaty in energy, at least from Russian side<sup>45</sup>. 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 above-mentioned 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 Moscow<sup>46</sup> the main position that I have voiced was brought even not

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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](http://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.Конопляник. “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),

43 А.Конопляник. Energy Security: The Role of Business, Government, International Organisations and the International Legal framework. – “International Energy Law & Taxation Review”, 2007, N 6, p. 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 Treaty” (<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,

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 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”<sup>47</sup>.

Alexey Miller, the CEO of Gazprom has taken the same approach<sup>48</sup> as have other officials. For example, Nikolai Tokarev, the President of Russia's Transneft company, told the Czech

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

<sup>48</sup> 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

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 is currently presiding over the European Union, could initiate work to draft new treaties on European energy security<sup>49</sup>. 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”<sup>50</sup>.

What would be the possible consequences of developing a totally new bilateral Russia-EU treaty, based “on the Energy Charter principles”? This will be easier than developing a totally new, but not linked with the Energy Charter, multilateral instrument for the future Russia-EU common energy space - but still challenging.

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 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 interests.

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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”.

<sup>49</sup> Transneft Calls for New Oil Treaty. - January 22, 2009

(<http://www.istockanalyst.com/article/viewiStockNews/articleid/2975898>)

<sup>50</sup> 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>>)

Thirdly, it would be more difficult to negotiate a new Russia-EU legally-binding Treaty today than it was in early 1990s when the former PCA 1994 and the Energy Charter Treaty 1994 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 liberalized then today. It is evident that the “liberalization gap” between the EU and Russian legal systems has increased, and with it the scope of potential derogations from the *acquis*, which might be needed to reach a compromise. This makes the task much more legally difficult;

- *Politically*: today, in 2009, the window of political opportunity is much narrower than it was in 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 changes 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 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.<sup>51</sup> Given that, when could we expect a new and broader Treaty to be finalized and ratified?

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<sup>51</sup> On the debate on the Energy Charter Protocol on Transit and its evolution – see the author’s publications (all available from [www.konoplyanik.ru](http://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” (OGEL), Vol.1 - issue 2, 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 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. – “Oil & Gas Journal”, October 20, 2003, vol. 101, N 40, p. 60-64; Russian Gas to EU Markets - 2: Compromise is best course for Russia, EU in Protocol negotiations. – “Oil & Gas Journal”, October <http://www.kremlin.ru/text/appears/2009/01/211884.shtml> 27, 2003, vol. 101, N 41, p. 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” (OGEL), Vol.2 - issue 1, February 2004; Stiff Competition Ahead – As Russia moots Ways to increase Presence on European gas Market. - “Oil, Gas & Energy Law Intelligence” (OGEL), Vol.2 - issue 1, 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

In sum, the prospects of finalizing a totally new legally-binding Treaty (whether based on the Charter principles or not) are very foggy and the risk of failure very high<sup>52</sup>.

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 criticisms of the Energy Charter<sup>53</sup> 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 it will be shown further.

### ***Third option: a new PA energy chapter based on the ECT 1994***

The Energy Charter Treaty, signed in 1994, includes 51 member-states of Eurasia, including all countries of the EU and the FSU/CIS, including Russia, plus the EU and EURATOM as two Regional Economic Integration Organisations<sup>54</sup>. 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<sup>55</sup>. A further 20 states from Europe, Asia (e.g. Middle East, South, South-Eastern

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transit agreement: a road ahead. - "Oil, Gas & Energy Law Intelligence" (OGEL), Vol.2 - issue 3, July 2004; Russia-EU Summit: WTO, the Energy Charter Treaty and the Issue of Energy Transit. - "International Energy Law and Taxation Review", 2005, N2, p. 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. - "Russian/CIS Energy & Mining Law Journal", 2006, N3 (Volume IV), p. 9-12;

<sup>52</sup> 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.

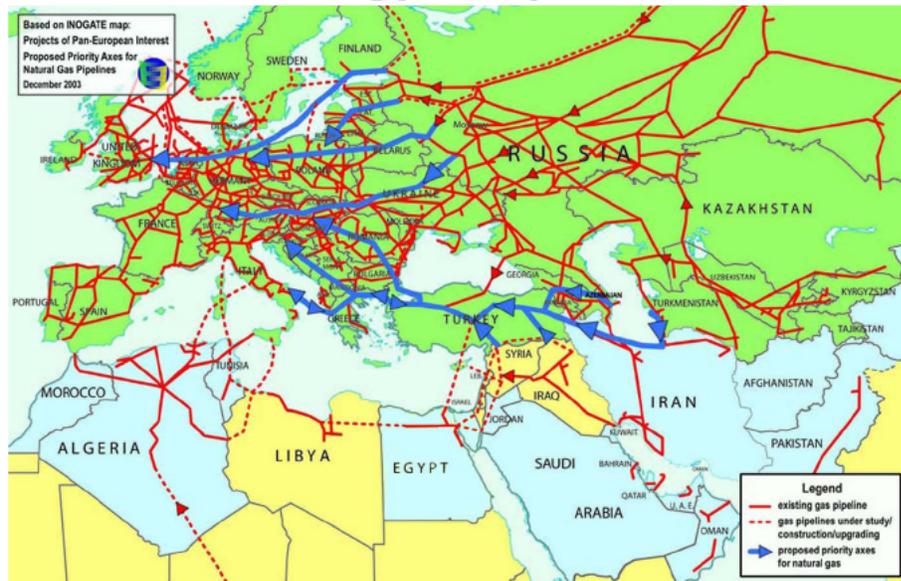
<sup>53</sup> See, for instance, publications of long-standing regular opponent of ECT in Russia, current Deputy Chairman of the State Duma Valery Yazev (В.Язев. Своей трубы не отдадим ни пяди. Почему Россия отказывается ратифицировать Договор к Энергетической Хартии. - «Труд», 1 февраля 2002 г.; «Россия 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 O.Fomenko (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; T.Shtilkind. Energy Charter Treaty: A Critical Russian Perspective. - "Oil, Gas & Energy Law Intelligence" (OGEL), Vol.3 - issue 1, March 2005, and the author's publications, mentioned in footnote 40, addressing much of this criticism.

<sup>54</sup> See footnote 66.

<sup>55</sup> The most detailed explanation and analysis of the ECT and the Energy Charter process is presented in the: T.Walde (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

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

**Figure 2. Common rules of the game in Eurasian energy & expansion of ECT**



Dr.A.Konoplyanik, JENRL, 2009, N 2

*(Figure 2: Common rules of the game in Eurasian energy and expansion of the Energy Charter Treaty)*

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.<sup>56</sup> But it is also necessary to assess whether or not other parties have concerns with the current treaty. I will try

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Charter see: A.Konoplyanik, T.Waelde. Energy Charter Treaty and its Role in International Energy. – “*Journal of Energy and Natural Resources Law*”, November 2006, vol. 24, No 4, p. 523-558.

<sup>56</sup> 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 40 and 48) and consistently implemented them in practice during his tenure with the Energy Charter Secretariat.

to show below that (it seems that) the EU is not as interested in the Charter as it was in the 1990s. From 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 Directives<sup>57</sup> which went much further in liberalizing the EU internal market compared to 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<sup>58</sup>. 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 common goal of both parties).

## Russia and the ECT

Russian concerns regarding the ratification of the ECT are well known<sup>59</sup>. We can divide them 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 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 heard for a long time from the EU side from the highest political level (within the current Commission - from Barroso, Solana and less senior representatives) as well as from 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 will not consider ECT

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<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> See footnotes 40 and 50.

ratification before the TP is finalized with full consideration of Russian concerns<sup>60</sup>. The Duma's operational approach would have provided Russia with opportunity to clarify in the text of Transit Protocol its substantiated concerns regarding 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 leadership<sup>61</sup> about the impossibility of a fast-track and separate ratification of the ECT, about the non-balanced 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 unbundling of Gasprom", or "requests cancellation of long-term gas export contracts", etc.<sup>62</sup>. Sometimes politicians even allege that ECT contains the opposite of what it in fact stands for. 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 long (repeating the earlier similar official statements of the former Gazprom CEO Rem Vyakhirev<sup>63</sup>)

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<sup>60</sup> 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.Буякевич. «Троянский конь» по имени ДЭХ. – *«Мировая энергетика»*, сентябрь 2007 г., № 9 (45).

<sup>61</sup> 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.

<sup>62</sup> For instance, see the author's debate on this in: 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; 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.

<sup>63</sup> See 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. 564-565.

that the ECT provides for mandatory third party access (MTPA) to the energy infrastructure, sometimes he stated that “the Treaty does not say on MTPA to pipelines, but it creates the basis for discussing this topic”,<sup>64</sup> 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”.<sup>65 66</sup>

A second group of concerns relates to what I will call “*negotiating tools*”. There is a quite commonly used negotiating technics when one of the negotiating parties at first presents a broader list of its concerns compared to negotiating issue itself, and later on, usually at the final stages 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 it (they) will pay-back such good-will by counter (reciprocal) concessions as a part of the commonly used “package deals”. The argument here is that it can be expected that Russia has raised a number of “artificial” concerns in different areas non-directly-related to the current ECT (e.g. addressed to something that current ECT does not cover) in order to give them up on a later stage of negotiations as “concessions” to the EU and other member-states in a trade-off for ECT ratification. One illustrative example of such concerns, from 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, from my view) argument preventing ECT ratification.<sup>67</sup> Under such approach it does not matter at all what issues does the ECT cover – concerns can be presented in the manner that “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). So the usual criteria of what I will call “negotiating tools” is that concern of this group will relate to something that ECT does *not* cover. Such approach ignores the fact that the ECT, as any other multilateral treaty, is a product of multilateral compromise – and will always be such a compromise, non dependent 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 these issues on which the negotiating parties have managed to agree upon. And in order to insert a new clause into the multilateral treaty the country which initiates

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

<sup>65</sup> [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf), p.25.

<sup>66</sup> Based on this 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).

<sup>67</sup> 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.Yazev presentation at Press-conference “Russia’s Energy Dialogue with European and CIS states: recent events”, RIA “Novosti”, 17 May 2007)

this proposal need to persuade all other member-states that this clause is really vitally needed, which means to use its “force of arguments” 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 are the controversial interpretations of two provisions of ECT Article 7 dealing with “Transit”:

- (1) The correlation of the levels of transit tariffs and of tariffs for domestic transportation (ECT Art. 7.3), and
- (2) 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).

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 remain three open issues within the draft Transit Protocol itself<sup>68</sup>:

- (1) There is an issue as to 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 might be used as one of the available capacity allocation mechanisms though cost-based tariffs are by definition inapplicable in the case of an auction.
- (2) There is an issue as to the appropriate mechanism for resolving the so-called “contractual mismatch” problem. This problem arises when the duration and volume of long-term export supply contract do not match the duration and volume of the transit agreement provided to the shipper by the owner/operator of transportation system within unbundled energy systems (draft TP Art.8); and
- (3) There is an issue as to the application of the Transit Protocol within the EU (based on the version of the “REIO<sup>69</sup> clause” proposed by the EU) (draft TP Art.20)<sup>70</sup>. Under the EU

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<sup>68</sup> 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 48, see also: T.Shtilkind. Energy Charter Treaty: A Critical Russian Perspective. - “*Oil, Gas & Energy Law Intelligence*” (OGEL), Vol.3 - issue 1, March 2005; М.Буякевич. «Троянский конь» по имени ДЭХ. – «*Мировая энергетика*», сентябрь 2007 г., № 9 (45).

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 disagreement between Russia and the EU<sup>71</sup>. For the EU this raises an internal issue as to the consistency between the ECT and the *acquis* within the EU. This suggests that the key to ECT ratification by Russia is in the EU hands.

In summary Russia has five well substantiated transit-related issues:<sup>72</sup> 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 2008<sup>73</sup> 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 ECT following which the Energy Charter community will finalize 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.

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<sup>69</sup> Regional Economic Integration Organisation (see definition in ECT Art. 1.3).

<sup>70</sup> [http://www.encharter.org/fileadmin/user\\_upload/document/CC251.pdf](http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf).

<sup>71</sup> See, for instance, publications mentioned in the footnote 50.

<sup>72</sup> 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. «Гроянский 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.

<sup>73</sup> Detailed analysis of the above-mentioned transit issues will be 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 forthcoming *JENRL* special-double issue in memory of the late Prof. Thomas Waelde.

**Option 2:** The parties must first finalize and ratify the draft Transit Protocol giving full consideration to valid Russia's concerns, following which Russia will ratify the ECT. However, under ECT rules no state can ratify an Energy Charter Protocol unless it has first ratified the ECT.

This leaves **Option 3** according to which Russia will ratify ECT and draft Transit Protocol simultaneously. This requires the multilateral Energy Charter community to concentrate on practical ways to make this happen.

One requirement is that Russia needs to present the international community with a closed list of its concerns. The best way is to do so 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)<sup>74</sup>, the new challenges and risks in the 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).

## **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<sup>75</sup>. 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

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<sup>74</sup> [http://www.encharter.org/fileadmin/user\\_upload/document/Final\\_Review\\_Conclusions.pdf](http://www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf)

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

the EU proposed Art. 20), but on 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<sup>76</sup>.

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<sup>77</sup>.

Fortunately, the parties seem finally in October 2008 to have identified a way to a mutually acceptable compromise to be further discussed by the multilateral Charter community in February 2009.<sup>78</sup>

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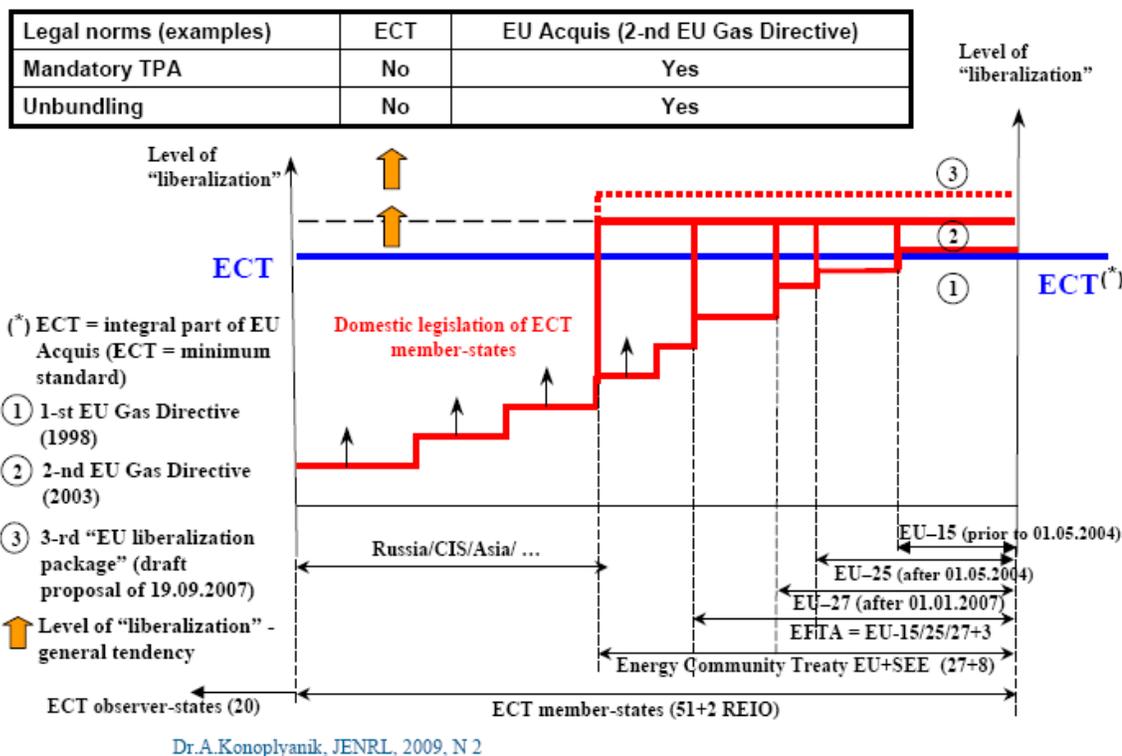
<sup>76</sup> For more details, see, for instance the above-mentioned author’s article in the forthcoming *JENRL* special double-issue in memory of the late Prof. Thomas Waelde. See also: A.Konoplyanik. Russian Gas to Europe: From Long-Term Contracts, On-Border Trade, Destination Clauses and Major Role of Transit to ...? – *Journal of Energy and Natural Resources Law*, 2005, vol.23, N 3, p. 282-307.

<sup>77</sup> 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.

<sup>78</sup> Proposals made by the EU at the special seminar, held in Brussels on February 11, 2009, in respond 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 the

Another long-standing conflict between the EU acquis and the ECT is the increasing gap between the growing level of liberalization in the individual energy markets of EU member states and the emerging internal EU energy market and the relatively “fixed”<sup>79</sup> multilateral minimum standard for the broader Eurasian community as prescribed by the ECT (see Figure 3).

**Figure 3. ECT & EU acquis: “minimum standard” within evolving Eurasian common energy space vs. more “liberalized” model**



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

The “level of liberalization” 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 finalized in 2009). In addition, the geographic area of implementation to which these more-and-more liberalized 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”.

President Medvedev's proposal as of 21 April either to re-write the Energy Charter (Treaty?), or to prepare a totally new document.

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

When the ECT 1994 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 liberalization 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 “liberalization level” of its domestic energy market at its own discretion but ECT does not require it. Thus the ECT 1994 can be seen as an instrument that protects non-EU and EU companies against “excessive” liberalization of internal EU energy space.

At the beginning, the EU perhaps saw the ECT as an instrument of 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 investment climate and market structure, energy efficiency, etc.) helped EU candidate states to adapt to the (then similar with 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 grows in importance for the EU<sup>80</sup>.

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<sup>80</sup> 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

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<sup>81</sup>. 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).

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

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); <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)*

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Community Treaty to include Russia’s neighbors Ukraine, Moldova and Turkey.” (Europe Offers Russia a New Energy Deal, [www.kommersant.com](http://www.kommersant.com), Jan. 22, 2007 )

<sup>81</sup> 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", *Journal of International Arbitration*, 24, issue 5, 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 that others are better equipped to explore it in relevant publications which is not the case of this particular one.



Presidential level, etc. This “action gap” has been clearly and undoubtedly interpreted by broad international community that it is Russia, not the EU, who is not interested in the Charter since it is Russia that has not been willing to move forward towards ECT ratification.

### ***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 criticisms of the role of the Energy Charter during and immediately after the January 2009 Russia-Ukraine gas crisis. Do these criticisms effectively closing 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)”<sup>85</sup>. These comments correspond to the adaptation of the Energy Charter process (including both its political and legal components)<sup>86</sup> 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 Review<sup>87</sup> where the Contracting Parties and other Signatories to the Energy Charter Treaty “consider that the work of the Charter process must evolve to reflect new developments and challenges in international energy markets, and also recognize and respond to the implications of broader changes across its constituency...” (conclusion N 3)<sup>88</sup>.

The Energy Charter framework contains a number of different facilities:

- (i) The Charter as a policy forum: transparency, reporting, discussions, etc.;
- (ii) Non-binding instruments: guidelines, benchmarking, recommendations, policy coordination, model agreements, declarations;

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

<sup>86</sup> 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 [www.encharter.org](http://www.encharter.org) and [www.konoplyanik.ru](http://www.konoplyanik.ru).

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

<sup>88</sup> [http://www.encharter.org/fileadmin/user\\_upload/document/Final\\_Review\\_Conclusions.pdf](http://www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf).

(iii) Legally-binding instruments: protocols, amendments to the Treaty, association agreements.

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 evolving mechanisms of energy investment protection and stimulation<sup>89</sup>.

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 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 in the course of this or any other crisis, three components need to be available:

- (1) The availability of relevant instruments of the “Energy Charter” and appropriate triggering procedures,
- (2) The willingness of the parties in dispute and/or touched by the consequences of this dispute to trigger and use the relevant instruments,
- (3) 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 put them into operation in the 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 to escape the conflict<sup>90</sup>. And it is here that

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<sup>89</sup> 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. – *“International Energy Law & Taxation Review”*, 2007, No 6, p. 85-93; A.Konoplyanik, T.Waelde. Energy Charter Treaty and its Role in International Energy. – *“Journal of Energy and Natural Resources Law”*, November 2006, vol. 24, No 4, p. 523-558; A.Konoplyanik. Energy Security and the Development of International Energy Markets (pp. 47-84). – in: *Energy security: Managing Risk in a Dynamic Legal and Regulatory Environment*. /Ed. by B.Barton, C.Redgwell, A.Ronne, D.N.Zillman. – International Bar Association/Oxford University Press, 2004, 490 pp.

<sup>90</sup> In his “A Word from the Secretary General on the Energy Crisis of Early 2009” added to the Energy Charter website on 13 February 2009 ([http://www.encharter.org/index.php?id=21&id\\_article=171&L=0](http://www.encharter.org/index.php?id=21&id_article=171&L=0)), Secretary General denied the very possibility of advanced action on his part saying that “Only the Member States have the right to

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 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 the 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 details) and to the proposed conciliator, though this procedure was not finally used because the parties in dispute managed to reach a bilateral solution<sup>91</sup>. 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 9<sup>92</sup> – e.g. only after transit to the EU was fully broken on January 7. 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" organization as a whole - within the whole spectrum of its multi-facet activities and dimensions.

It is important that the member states reflect constructively on this negative experience. One possible forum for such constructive actions is the next regular Energy Charter Policy Review

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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 spirit and letter of the Energy Charter also needs to take advanced proactive actions. 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 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](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.

<sup>91</sup> See: Андрей Конопляник: «Единственным вариантом обеспечения предсказуемости и прозрачности ценообразования между «Газпром» и «Нефтегаз» может быть только формульный подход». – «*Экономические Известия*» (Украина), 24 ноября 2008 г., № 212 (975), с.1, 3; Андрей Конопляник: «Газотранспортная система Украины и России всегда была единой». – «*Экономические Известия*» (Украина), 24 декабря 2008 г., № 234 (997), с.1, 3, to be republished in English in this *OGEL Special Issue on Russia-EU energy*.

<sup>92</sup> [http://www.encharter.org/index.php?id=21&id\\_article=167&L=0](http://www.encharter.org/index.php?id=21&id_article=167&L=0).

which takes place in 2009 and will culminate at the next Energy Charter Conference at the end of this year. Member-states may wish to pay more attention to the organizational aspects of the Energy Charter process including the role of the Secretariat and, in 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 to prevent 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<sup>93</sup>. If not used to prevent conflict (and this is the most important role of the ECT aimed 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 through it. 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.

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<sup>93</sup> 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 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 organizations like International Atomic Energy Agency, Organisation for the Prohibition of Chemical Weapons, or Treaty on Conventional Armed Forces in Europe, whose aims and methods of operation are quite different from that of the Energy Charter).

## ***New Russian energy initiative and the Energy Charter***

On April 20, 2009, Russian President Dmitry Medvedev declared in Helsinki that Russia “did not ratify 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.<sup>94</sup> The next day “Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)” in five pages was published on the official Kremlin’s website<sup>95</sup>.

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 substitute 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<sup>96</sup>.

### **Russia is bound by the ECT**

Unfortunately, these assertions appear vulnerable and they may be disputed. 51 countries and two collective organizations (EU and Euratom) have signed the legally binding Energy Charter Treaty (ECT). Meanwhile, Russia and four other countries did not in fact ratify 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, constitutes an integral part of international law, for Russia as well. As a matter of

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

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

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

fact, Russia is bound by the ECT, but only to the extent its provisions do not come into inconsistency with national legislation.

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

- (1) an expanding package of multilateral documents such as basic political (and thus legally non-binding) declaration of the 1991 "The European Energy Charter", and set of existing legally-binding documents such as foundational 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 existed and future documents: Protocols (like draft Transit Protocol), Understandings, Decisions, Declarations, Statements, Model Agreements, etc.;
- (2) 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 new realities at the international energy markets; new multilateral negotiations on adaptation of existing instruments and/or development of new ones<sup>97</sup>;
- (3) international organization – the Energy Charter Conference with its specific competitive niche within the group of international energy organizations; within the Conference activities of its different Working Groups take place;
- (4) Energy Charter Secretariat as an administrative body of this international organization.

Only legally binding documents need to be ratified. It is not possible to sign and ratify any Charter document if the ECT is not signed and not ratified by this member-state, and prior to this if the country did not sign 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 Energy Charter multilateral community in 2005

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<sup>97</sup> 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 ([www.encharter.org](http://www.encharter.org), [www.konoplyanik.ru/presentations/2004](http://www.konoplyanik.ru/presentations/2004)).

in the course of selection of the new Secretary General on whether the ECT signatories (i.e. those countries that have signed but not yet ratified the ECT) have the right to vote, have shown, that in the decision-making within the Energy Charter process all the ECT signatories (both that ratified and not yet ratified the ECT) have the right to vote.

On April 29, Russian Prime-Minister Vladimit Putin stated in Sofia that “Russia does not see sense in keeping its signature under Energy Charter”.<sup>98</sup> Let us suppose that Russia is really debating internally the possibility of declaring the termination of the provisional application under Article 45(3)(b) of the ECT, in other words, about the intention not to become 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 favor of it, in my opinion.

## **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 rule 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 increasingly protects not only foreign investments in Russia, but also Russian investments abroad (in case of ECT ratification by the Russian Parliament), in the first place, from “liberalization risks”, aggravating in the EU market in the context of certain considered to be anti-Russian provisions of the Third Liberalization Package, adopted recently by the European Parliament in its second reading<sup>99</sup>.

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<sup>98</sup> Путин: Россия не видит смысла в сохранении подписи под Энергетической хартией. – «ПравоТЭК», 29.04.2009, [www.lawtek.ru](http://www.lawtek.ru).

<sup>99</sup> 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

Thirdly, the ECT is an integral part of international law since 1998. Russia's non-participation in the Treaty will not lead to its termination. It's only that other countries will enjoy its advantages due to a reduction of the costs of financing of their energy projects against Russian ones and thus increased competitiveness of their energy projects against Russian ones.

Fourthly, Russia's repudiation from ECT does not mean that my country 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 most possible and necessary to work, consistently and on 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 resolver mechanisms in the ECT (this is a justified statement), along with the inaction of the Energy Charter Secretariat political leadership at the threshold of the January 2009 Russia-Ukraine gas crisis, provide a basis for initiating modernization 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.

Finally, the EU system of international treaty-making with the 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 gives 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 liberalization of the "open and competitive markets" will increase dramatically. This being the case, the ECT is an integral part of the EU legislation.

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gas, access to the transmission networks (repeal. Regulation (EC) No 1775/2005)  
(<http://www.europarl.europa.eu/oeil/file.jsp?id=5533272>).

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, liberalization and non-discrimination levels, but cannot require the same from other member-states of the ECT, based on ECT provisions. Repudiation of the ECT under these circumstances will deny the possibility of non-member countries negotiating a “new global energy order” with European countries on the terms different from those provided for in the EU legislation.

### **Transit: common fallacy**

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

As was shown above, in 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 on which started in 2000). During bilateral consultations on the draft Transit Protocol, Russia’s and EU’s 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 non-participation in the ECT will block the completion of the Transit Protocol without prospects of resumption. 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 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 for 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 for 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 the country, applying the ECT provisionally, national legislation has priority over the ECT in case of conflict of laws. The transit country which is the party to the Treaty shall not be obliged to permit the construction or 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 stipulates five levels of proved protection for the transit country of its interests if it does not want to allow new transit through its territory for the third states.

Thus, the ECT does not state as mandatory the granting of access to Gazprom’s 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 correlation of transit tariffs and domestic transportation ones 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 be remembered also 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 is based on the net back to delivery points from replacement value of gas at the EU market. Selling Central Asian gas at a formula price at their external borders is a more profitable export scenario for these countries compared to transit by themselves of their gas to Europe. In the former case, the Central Asian exporters receives at their external border the highest marketable price (based on the EU values); and there is no need in transit/transportation through Russia. Moreover, it is Gazprom who transits the gas purchased in Central Asia through the territories of Uzbekistan and Kazakhstan and who faces corresponding costs and risks. In the latter case, Central Asian countries will have to bear costs and risks related to transit without having additional benefits<sup>100</sup>.

There was also criticism of the ECT because of the YUKOS case: allegedly, the Energy Charter

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<sup>100</sup> 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](http://www.konoplyanik.ru)).

gave grounds for lodging a claim against Russia arising out of the YUKOS case and supported by the provisions of the ECT, and we should eliminate such a possibility in the future by withdrawing from the 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.

### **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 my opinion, it may be accepted by the international community as a proposal on 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 principle difference 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 with the aim to analyze the efficiency of the multi-facet directions of its activity. This will allow a reduction to the negative effects of declarations and proposals made by the Russian party and will turn the discussion of the matter into something constructive and positive.

The fact is that once every five years the Energy Charter Policy Review, based on Art.34(7) of the ECT, takes place. 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 new challenges and risks at 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 proved 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 full-fledged participation of the Russian delegation in all Energy Charter meetings and proper preparation for 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 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 ECT and 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.

### ***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 operationalize this option:

- (1) Finalize and sign Transit Protocol giving full consideration to Russia's substantiated concerns on transit both in the draft TP and in the ECT<sup>101</sup>.
- (2) Address a closed list of Russia's other substantiated concerns with respect to the ECT.

Russia might present this closed list to the ECT community within the framework of the

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<sup>101</sup> A key component to fulfill this task is for both Russia and the EU to send full-fledged competent delegations to all the formal and informal corresponding meetings, so the process of TP finalization will not slip due to the physical absence of the persons involved.

Energy Charter Ad Hoc Strategy Group<sup>102</sup>. The conclusions of any discussions might be adopted within the 2009 Energy Charter Policy Review. Items (1) and (2) can be developed in parallel.

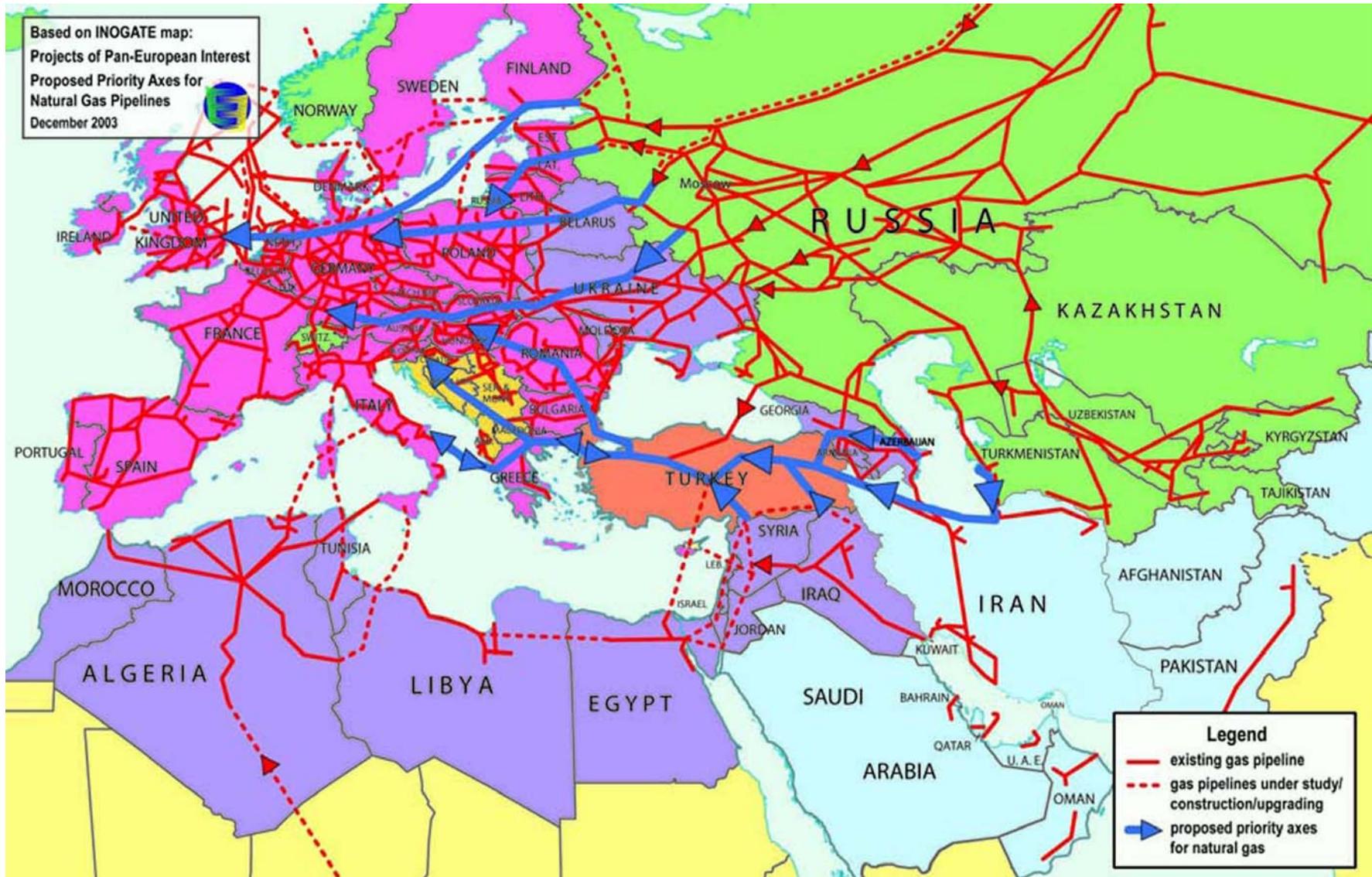
- (3) After aims of items (1) and (2) are achieved, Russia should simultaneously ratify the ECT and the Transit Protocol, thus achieving in full the level playing field with the EU. After this ECT will formally serve as the legal foundation of the common Russia-EU energy space.
- (4) The energy chapter of a new Russia-EU PA might declare that the ECT provides the legal basis of 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.
- (5) Further practical improvement and adaptation of the ECT could follow once all ECT members have ratified the Treaty (today 46 of 51 ECT member-states have already done so)<sup>103</sup>. 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 to be resulted in the Conclusions of the 2009 Energy Charter Policy 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 organization (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 particular issues of adaptation and further improvement of the Energy Charter process might be considered as presented in the new Russian initiative as of 21 April.

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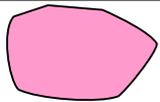
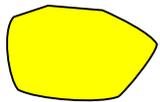
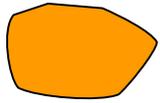
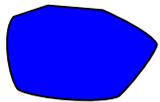
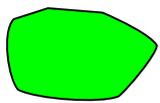
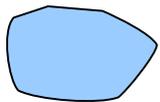
<sup>102</sup> Russia has presented a preliminary list of its ECT-related concerns but it is not a closed one. If the new Russian initiative as of 21 April would be considered as a list of Russian concerns in regard to the Energy Charter process and its instruments, it does not present as well a closed list of such concerns.

<sup>103</sup> 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 in 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.

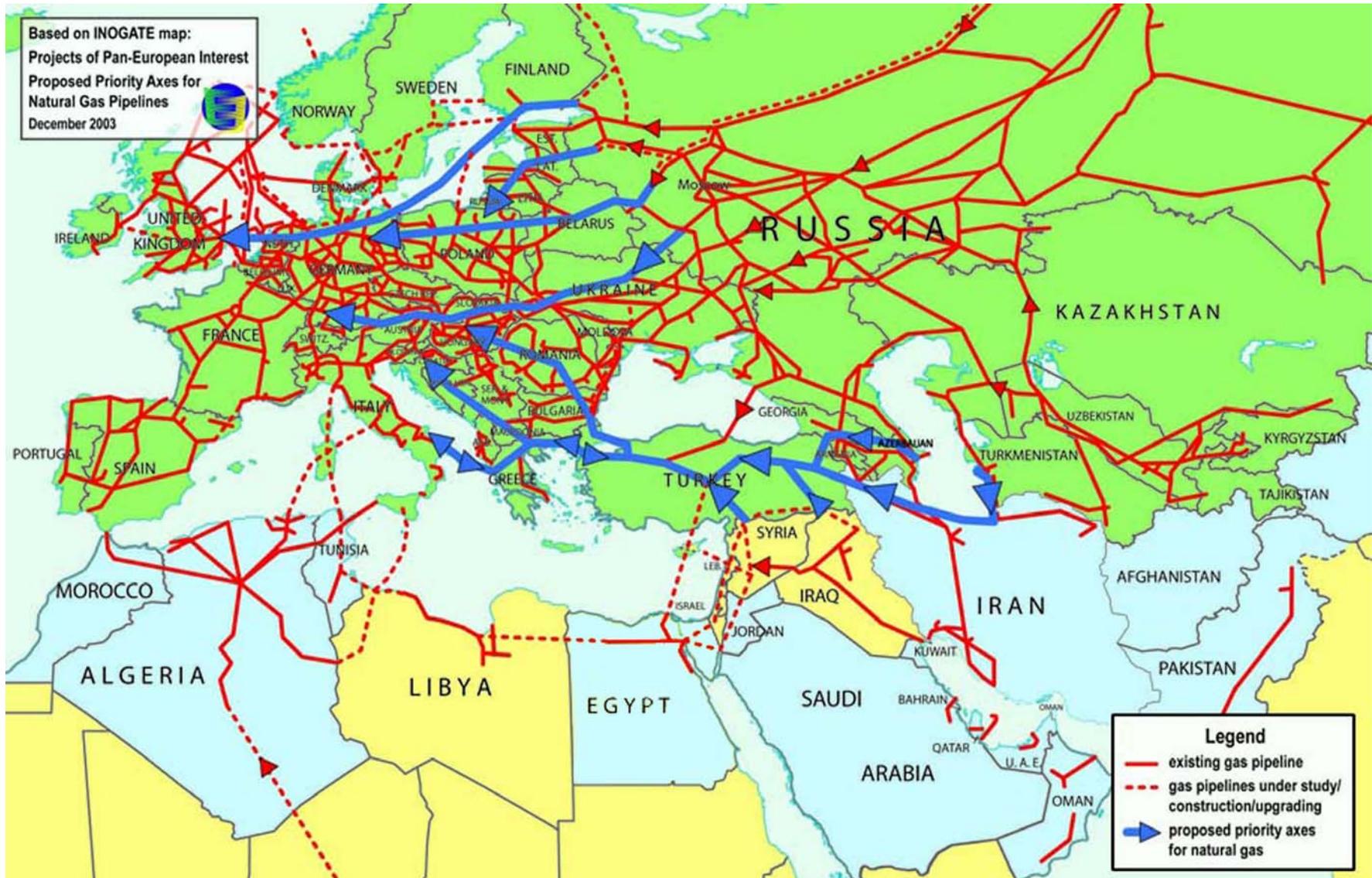
# Figure 1. Common rules of the game in Eurasian energy & export of EU's acquis



## Common rules of the game in Eurasian energy (legend to figures 1 & 2)

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) 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 observer-states:</b> 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

# Figure 2. Common rules of the game in Eurasian energy & expansion of ECT



# Figure 3. ECT & EU acquis: “minimum standard” within evolving Eurasian common energy space vs. more “liberalized” model

