

A Common Russia–EU Energy Space: The New EU–Russia Partnership Agreement, Acquis Communautaire and the Energy Charter[†]

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*It seems likely that the new Russia–EU Partnership Agreement (replacing the previous Partnership and Cooperation Agreement (PCA) between the two parties) will contain an energy chapter. The architecture of the chapter is still to be determined and the previous PCA 1994 did not include an energy chapter. This article outlines the principles and legal framework for such a common energy space. It considers three different options. The first avenue (clearly preferred by the European Union) is to export the Union's emerging *acquis communautaire* (ie, the common internal legislation of the enlarging European Union) to the countries outside the Union. The second avenue is to prepare a new bilateral Russia–EU Partnership Agreement, either 'on the basis of the Energy Charter principles' or a totally new agreement. This option has been preferred by Russian authorities, but is also considered as a possible avenue for moving forward by some EU officials and even indirectly by the European Union as a whole. 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 approach may be practical in spite of Russian concerns as to the unbalanced character of the ECT and the possibility of interpreting some of its provisions to the detriment of energy producers. This article argues that the first two avenues are counter-productive. The third avenue presents the most (if not the only) effective practical way to create a mutually beneficial legal framework for the*

common Russia–EU energy space (if fair and well-substantiated concerns of both parties are addressed to the mutual benefit of the whole multilateral ECT community). The option takes advantage of a multilateral legal foundation that has already been in force for more than ten years.

At their St Petersburg Summit in May 2003, the European Union 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.¹ 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)² replacing the previous Partnership and Cooperation Agreement (PCA),³ signed in 1994, which lasted until the end of 2007. Energy relations are included in the road map on the common economic space,⁴ which defines the aim of cooperation

† This article draws on the author’s presentation, ‘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?’ in Centre for European Reform, *Pipelines, Politics and Power: The future of EU–Russia Energy Relations* (K Barysch ed, CER, October 2008), pp 103–115 and of his two earlier publications on this issue in Russian: (1) ‘Обойти пункты преткновения’, *Политический журнал*, Nos 6–7 (183–184), 21 апреля 2008 г, с 40–44, and (2) ‘Россия, ЕС и Энергетическая хартия: что дальше?’ *Время новостей*, No 210 (2092), 13 ноября 2008 г, с 8.

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

2 15th EU–Russia Summit Moscow, 10 May 2005, press release, 8799/05 (Presse 110), www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc.

3 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 – No 16 – Ст 1802.

4 Russia and the European Union 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’, www.delrus.ec.europa.eu/en/images/pText_pict/239/sum31.doc.

and necessary actions.⁵

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.⁶ At the Russia–EU Summit held in Khanty-Mansiysk (the oil capital of Russia’s Western Siberia) at the end of June 2008, the parties had agreed to start negotiations on the new bilateral Partnership Agreement.⁷ 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.⁸ 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.⁹

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 14 November 2008.¹⁰ 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

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- 5 ‘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.
- 6 EU–Russia Summit in Nice on 14 November, IP/08/1701, Brussels, 13 November 2008, europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1701&format=HTML&age=d=0&language=EN&guiLanguage=en.
- 7 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.
- 8 EU–Russia Summit n6 above.
- 9 The author earlier expressed his views on the common rules for common spaces in, eg, А Конопляник, ‘Единые пространства: единые правила’, *Ведомости*, 20 августа 2004 г, No 149 (1189), с А4.
- 10 Substantial debate or progress on a new PA was unlikely given that only 45 minutes were reserved for the plenary meeting within a 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).

for such a common energy space.¹¹

There are three ways to develop such a legal energy framework. The first avenue (clearly preferred by the European Union), is to export the Union's emerging *acquis communautaire* (ie, the common internal legislation of the enlarging European Union) to the countries outside the European Union. The second avenue is to prepare a new bilateral Russia–EU Partnership Agreement, either 'on the basis of the Energy Charter principles' or a totally new agreement. This option has been preferred by Russian authorities,¹² but is also considered as a possible avenue for moving forward by some EU officials¹³ and even – indirectly – by the European Union as a whole.¹⁴ 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 of its provisions to the detriment of energy producers.¹⁵

In the author's view, the first two avenues are counter-productive. The

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- 11 Analysis of the broader set of issues related to the development of a new PA, other than development of the common energy space, goes beyond the scope of this article. There is a significant body of literature, both in Russia and Europe, on this topic including: M Emerson, F Tassinari and 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 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, www.ceps.be.
- 12 See, for instance, the following statement of Valery Yazev, Deputy Chairman of the Russian State Duma, to the press early in April 2008, which reflects his long-standing views: 'My view of the situation is that it is impossible to modify the Energy Charter [Treaty – AK] to the extent which could make it possible for the State Duma to ratify it. A different, seriously thought-through document is required.' '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, 9 April 2008).
- 13 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 31 January–1 February 2008 in Palais d'Egmont, Brussels, Belgium.
- 14 '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, www.delrus.ec.europa.eu/en/news_1094.htm).
- 15 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 www.encharter.org/fileadmin/user_upload/Conferences/25_Oct_2006/Gorban_-_RUS.pdf.

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 that has already been in force for more than ten years.¹⁶

Criticisms of the ECT at the highest level in Russia continue. For example, the President of Russia, Dmitry Medvedev, during his meeting with the CEO of Gazprom, Alexei Miller, on 20 January 2009 criticised the ECT for its inability to play a constructive role prior to and during the Russia–Ukraine gas crisis of January 2009.¹⁷ Some of this broader criticism is well-substantiated and is based on the fact that the Charter in its different facets (multilateral documents such as the political declaration and legally binding instruments, the long-term process and political forum, and the Secretariat as an administrative body of a multilateral international organisation) was the result of a multilateral compromise of almost 20 years ago, which reflects the realities of that time. This means that it will be essential to address Russian concerns regarding the ECT. Thus, this third avenue is not a cost-free way of creating the legal framework of the Russia–EU common energy space. Nevertheless, this author suggests 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 of this article examines each of the three available options in more detail.¹⁸

First option: export of *acquis communautaire* (the European Union’s preferred approach but a ‘no go’ for Russia)

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

16 The ECT came into force on 16 April 1998.

17 See www.kremlin.ru/text/appears/2009/01/211884.shtml.

18 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 European Union 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 the creation of a mutually appropriate legal framework for cooperation in energy between the two parties.

European Union to harmonisation differs.

For the European Union, the *acquis communautaire* is supranational. The European Union sees the *acquis* as the product of the convergence process of EU Member States and proposes it for external use. Thus, for the European Union, the convergence of EU law with the legal systems of third states (ie, non-EU states) means the adoption of the *acquis* by such legal systems.¹⁹ This approach extends to EU energy policy.

The European Union has implemented this approach through the ‘direct’ and ‘indirect’ expansion of the geographical area of the zone of practical implementation of *acquis*.

*‘Direct’ expansion of the *acquis*’ area*

There are at least three parallel, simultaneous and mutually dependent processes that expand the geographical area of implementation of the EU energy *acquis* (see Figure 1).²⁰

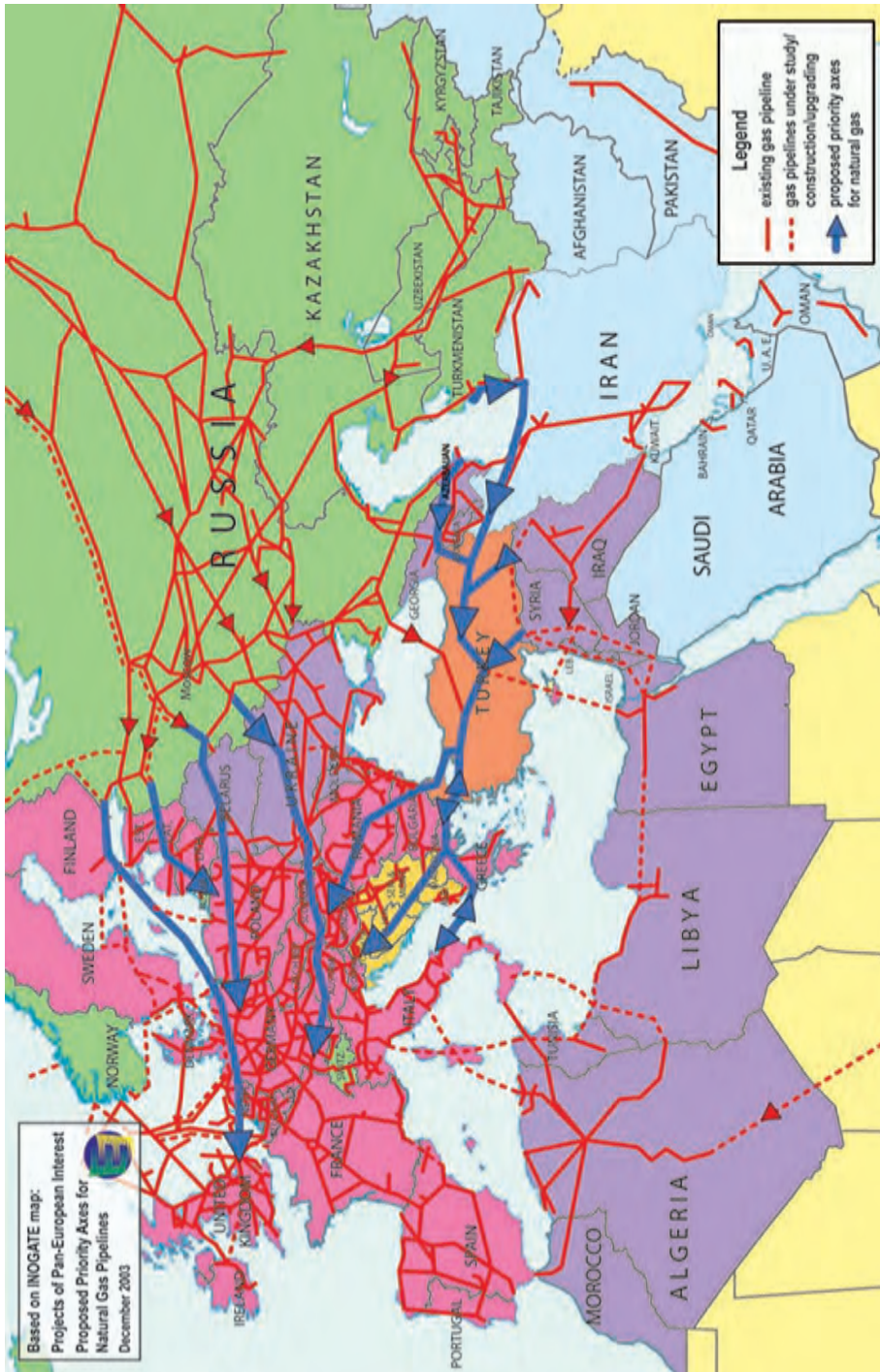
First, there is the enlargement of the European Union per se. Following the dissolution of the USSR, EU membership increased in May 2004 from 15 to 25 Member States and then in January 2007 to 27. In all these states, EU legislation, including energy legislation, is fully applicable. Other EU candidate countries (Croatia, Macedonia and Turkey) are still in the process of aligning to EU legislation but full compliance is not likely before membership. Serbia and other Balkan countries hope to obtain candidate status. As the European Union enlarges, so too does the geographical area of implementation of the full *acquis*.

Secondly, there is the Energy Community Treaty between the European Union and seven countries of south-east Europe (Croatia, which is already an EU candidate, Serbia, Montenegro, Bosnia, the former Yugoslav Republic of

19 Энтин М Л, *В поисках партнерских отношений: Россия и Европейский Союз в 2004–2005 годах* – СПб: СКФ ‘Россия-Нева’, 2006, с330.

20 The author acknowledges that although the maps of the INOGATE programme are used as the background for Figures 1 and 2, there is no further mention here of the later Baku Initiative and some other pipeline projects promoted (facilitated) by the European Union, and/or the role played by the integration (actively promoted by the European 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 the author to present in different colours the different groups of countries (according to his 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.

Figure 1: Common rules of the game in Eurasian energy and export of the European Union’s *acquis* (see also Table 1, p285)



Macedonia, Albania and Kosovo – see Figure 1).²¹ Under this treaty only the emerging EU legislation on internal electricity and gas markets is applicable within these states. The aim is to create a 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 geographical area of implementation of the energy *acquis* (not the full *acquis* at first but still in a very significant energy sphere) with the aim of creating a common internal energy market composed of the European Union and south-east Europe.

For the non-EU Balkan countries (parts of the former Socialist Federative Republic of Yugoslavia), membership of the Energy Community Treaty is a first step in internal implementation of the EU rules prior to joining the European Union at a later stage. 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 Union. The difference between the two ECTs (and it is somehow symbolic that both treaties have the same abbreviation) is that the Energy Charter Treaty is based on the rules of the first EU directives on electricity and gas (of 1996²² and 1998)²³ while the Energy Community Treaty is based on the more liberal rules of the second EU directives on electricity and gas (as of 2003).²⁴ 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 *acquis communautaire*.

Thirdly, there is the EU Neighbourhood Policy.²⁵ The countries that are the subject of this policy include eight FSU/CIS countries such as Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, and ten countries of

21 Energy Community Treaty, OJ 2006 L 198/18, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_198/l_19820060720en00180037.pdf.

22 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 L 27/30.

23 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.

24 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 L 176/37; 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 L 176/57.

25 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 March 2003, COM(2003) 104 final, http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf; Communication from the Commission, ‘European Neighbourhood Policy. Strategy Paper’ (SEC(2004) 564, 565, 566, 567, 568, 569, 570), Brussels, 12 May 2004, COM(2004) 373 final, http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf, etc.

Northern Africa such as Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria and Tunisia (see Figure 1). Enhanced energy cooperation with these countries is based on national action plans²⁶ - 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.²⁷ Some countries from the EU Neighbourhood Policy, such as 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 European Union 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 European Union plans to bring Ukraine and Moldova into the Energy Community Treaty as soon as 2009.²⁸ Piebalgs also mentioned that the European Union planned to start similar negotiations with Turkey in the first half of December.

The approach of direct expansion of the *acquis* area through enlargement of the European Union or through multilateral treaties based on implementation of the EU law in full or in relation to a particular segment of economic activity (eg, energy in the case of the EU–SEE Energy Community Treaty) may be realistic for some transit states and a few energy producing states within the spectrum of energy supply chains destined for the European Union, but as EU energy dependence grows, especially in gas, one can expect that key gas exporters, in particular those that are part of the integrated Eurasian (EU plus 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 of Industry) expressed his concerns with respect to the European Neighbourhood Policy in a letter to the then CEC DG TREN Director General François Lamoureux immediately after publication of the policy which initially mentioned Russia

26 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.

27 Communication from the Commission to the Council and the European Parliament 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', Brussels, 11 March 2003, COM(2003) 104 final, pp 5, 10, etc, http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf.

28 По России ударят током. Евросоюз намерен уже в 2009 г интегрировать в свой энергетический рынок Украину и Молдову – *'Независимая газета'*, 28 November 2008.

as a possible recipient country.²⁹ 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 European Union through fixed infrastructure) or other Islamic gas producers adopting the EU acquis (or at least the EU energy acquis) however far into the future one looks.

‘Indirect’ expansion of the acquis’ area

The whole system by which the European Union signs international treaties with third countries makes it very difficult to reach agreement with the European Union (through the European Commission) except on the basis of compatibility with the acquis.³⁰ 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 a treaty will have to be ratified by all EU Member States. This significantly diminishes the practical possibility of such a treaty entering into force,³¹ especially within the enlarging European Union.

This means that EU international treaties with third states de facto function to expand the geographical area of the acquis (the acquis is a subject of ‘hidden’ export by such treaties). The European Union has tried to use this approach with Russia. The PCA of 1994 is based on a concept that is very close to the European Union’s concept of the harmonisation of legal systems since it establishes a soft obligation for the convergence of Russian law with European law. Article 55(1) of the PCA acknowledges that the convergence of legal systems is an important condition for the improvement of economic ties between Russian and the European Union. 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.

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

30 This was clearly demonstrated by the (over six years’) long process of Russia–EU bilateral consultations on the (three) open issues of the Energy Charter Protocol on Transit.

31 И В Гудков, *Газовый рынок Европейского Союза. Правовые аспекты создания, организации, функционирования*. – М: ООО ‘Издательство “Нестор Академик”’, 2007, 244–245.

The Road Map 2005 for the Common Economic Space³² does not require convergence of Russian and European laws on the basis of the *acquis*. According to I Gudkov, this confirms the intention to upgrade the principle of equality in Russia–EU relations.³³ 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 European Commission to Russia has shifted towards harmonisation (or convergence) on the basis of reciprocity.³⁴ But this reciprocal approach is understood differently by Russia and by the European Union.³⁵ For Russia, ‘reciprocity’ means an exchange mostly by *quantitative* parameters, ie, ‘volumes-by-volumes’ types of exchange, for example, the preparedness of Russian authorities to exchange assets in Russia for adequate assets in the European Union.³⁶ Under this approach to ‘reciprocity’, the organisational structure and governing rules of energy markets in both parties could still be different. For the European Union (and especially the Commission), reciprocity means first and foremost an exchange by *qualitative* parameters of cooperation (a ‘values-by-values’ type of exchange). This means (at least for the European Union) an exchange of equal/same (European) values. So reciprocity in the ‘rule of law’ area would finally mean, from the European Union’s view, the rule of European

32 15th EU–Russia Summit Moscow, 10 May 2005, press release, 8799/05 (Presse 110), www.delrus.ec.europa.eu/en/images/pText_pict/465/Press%20release.doc.

33 И В Гудков, *op cit*, c 245.

34 In the energy field, this position has, for instance, been stated in European 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 European Union 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), pp 341–358.

35 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).

36 This approach stimulated a 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 European Union). 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*, 29 January 2009).

law within the common space/area between the two parties. So, from the author's view, the 'reciprocity' approach to energy cooperation, and in particular to the creation of the common energy space between the two parties, is considered by 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 European Union. Moreover, it has been clearly stated by Russian officials that Russia would not want to implement the *acquis*.³⁷ 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 European Union's *acquis communautaire* does not currently cover and will not in the future cover the full length of all major energy supply chains destined for 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 European Union's *acquis*. This is why it is counter-productive and impractical to try to use the *acquis communautaire* as a legal basis for the creation of the common Russia–EU energy space (or for any multilateral common area in energy).

In sum, while the first option (the export of *acquis*) is definitely the European Union'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

37 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, 5 November 2008).

and non-substantiated) Russian criticism of the Energy Charter.³⁸ 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 G8. This declaration and even some segments of the legally binding ECT 1994 were used (sometimes verbatim)³⁹ in the documents of the St Petersburg’s G8 2006 Summit on energy security.⁴⁰

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. This is because the Russian side believes that 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-

38 For discussion of Russian criticisms of the Energy Charter Treaty and critical analysis see the following publications of the author (all available at www.konoplyanik.ru): А Конопляник, ‘Ратификация ДЭХ Россией: прежде всего, необходимо развеять добросовестные заблуждения оппонентов’, гл 22 (стр 545–614) в кн, ‘Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада’ (под ред Т Вальде – англ.изд. и А.Конопляника – рус изд) – М: Международные отношения, 2002; А Конопляник Договор к Энергетической Хартии, ‘Ратифицировать надо, но не сегодня...’, *Промышленный мир*, 2001, No 2, с 44–48; Он же, Есть только один путь к ратификации ДЭХ. Чтобы договориться, надо понять возражения противной стороны., *Нефть и капитал*, 2001, No 3, с 8–10; А Konoplyanik, ‘We must ratify Energy Charter Treaty – but not yet’, *Oil & Capital. Russia & CIS Energy Magazine*, April 2001, pp 6–8; Трудный путь к ДЭХ. Развитие энергетических рынков, Договор к Энергетической Хартии и законодательные приоритеты Президента Владимира Путина, *Нефть России*, ноябрь 2002, No 11, с 48–51; Развитие рынков газа, долгосрочные контракты и Договор к Энергетической Хартии, *Нефтегаз*, 2002, No4, с 25–33; Сила аргумента или аргумент силы. Что дает России Энергетическая Хартия? *Мировая энергетика*, июнь 2004 г, No 6, с 50–53; Россия, ‘восьмерка’ и ратификация ДЭХ, *Мировая энергетика*, май 2006, No 5, с 60–61; ‘Энергетическая хартия: Мифические угрозы’, *Ведомости*, 5 июня 2006 г, No 100 (1627), с А4; ‘Борьба с мифами. О мнимых выгодах и угрозах Договора к Энергетической Хартии’, *Политический журнал*, 13 июня 2006 г, No 21 (116), с 32–36; ‘EU/Russia must meet half way’, *Petroleum Economist*, September 2006, pp 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, No 3/4 (146/147), с 42–45; ‘Энергетическая Хартия: проигравших не будет’, *Нефтегазовая Вертикаль*, 2007, No 3, с 26–29 (совместно с А Мернье); ‘Когда один договор стоит тысячи’, *Нефть России*, апрель 2007, No 4, с 7–10, No 5, с 10–13; ‘Энергетическая Хартия: О понимании и доверии’, *Ведомости*, 07 декабря 2007, No 232 (2006).

39 А Konoplyanik, ‘Energy Security: The Role of Business, Government, International Organisations and the International Legal Framework’ (2007) 6 *International Energy Law & Taxation Review* 85–93.

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

known meeting in Moscow⁴¹ the main position that I have voiced was brought even not to overcoming of the consequences of this crisis..., but to the preventing of the similar events in the future... We should consider what international agreements – multilateral international agreements – are able to provide for the interests of sellers, transit countries, and consumers. Why do I mention this?

Everyone knows about the so-called “Energy Charter”, which was developed to a large extent with a view to protecting the interests of consumers – which is not a bad thing. One should not forget, though, that sellers are equally parties in any contractual relations and their interests should also be protected to the same extent as the interests of transit states.

To make this protection effective, one needs new international mechanisms. I believe, we could think about either 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 G8 Summit. I ask you to get involved into this process.’⁴²

Alexey Miller, CEO of Gazprom, has taken the same approach,⁴³ as have other officials. For example, Nikolai Tokarev, President of Russia’s Transneft company, told the Czech Republic’s energy envoy Vaclav Bartuska that ‘a new international treaty on the protection of the rights of oil consumers and oil exporters and obligations of transit nations is necessary’. And Transneft

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

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

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

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.⁴⁴ A few days later, Russia’s ambassador to the European Union Vladimir Chizhov repeated that ‘the Energy Charter Treaty has lost a lot of credibility’ and thus that ‘the ECT should be revised or be completely replaced’.⁴⁵

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 new multilateral instrument’ for the future Russia–EU common energy space but still challenging.

First, a bilateral Russia–EU treaty will exclude (and thus not bind) any transit states between the European Union 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 European Union. 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 1994. But this might lead to two different standards, which would increase (rather than diminish) the legal risks and the cost of raising capital for Russian and EU investors in energy projects of mutual interest.

Thirdly, it would be more difficult to negotiate a new Russia–EU legally binding Treaty today than it was in the early 1990s when the former PCA 1994 and the Energy Charter Treaty 1994 were negotiated. This is because of the following reasons:

- *Technically*: although in name ‘bilateral’, in reality a new PA would be a multilateral treaty with 29 members (27 Member States plus the European Union 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.

44 ‘Transneft Calls for New Oil Treaty’, 22 January 2009, www.istockanalyst.com/article/viewiStockNews/articleid/2975898.

45 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*, 4 February 2009, www.europeanvoice.com/article/2009/02/chances-of-russia-signing-energy-charter-are-minimal-/63821.aspx.

- *Legally*: in the early 1990s the Russia–EU PCA was negotiated mostly on the basis of the then existing *acquis*, which was much less liberalised than today. It is evident that the ‘liberalisation gap’ between the European Union 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 difficult in legal terms.
- *Politically*: in 2009, the window of political opportunity is much narrower than it was in the early 1990s immediately 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 is likely to have narrowed (hopefully just temporarily) dramatically.
- *Operationally*: it took almost six years for the delegations of two parties (Russia and the European Union) 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 yet.⁴⁶ Given that, when could we expect a new and broader treaty to be finalised and ratified?

46 On the debate on the Energy Charter Protocol on Transit and its evolution, see the author’s publications (all available from www.konoplyanik.ru): ‘Три вопроса по Протоколу’, *Нефтегазовая Вертикаль*, 2002, No 16, с 46–49; ‘Протокол по транзиту к ДЭХ: проблемы, вызывающие озабоченность России, и возможные пути их решения’, *Нефть, газ и право*, 2002, No 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, No 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, No 3, с 56–60; ‘В условиях высокой конкуренции. О возможностях России по расширению своего присутствия на европейском газовом рынке’, *Мировая энергетическая политика*, май 2003, No 5, с 62–67; ‘Russian Gas to EU Markets – 1: Thorny issues impede progress toward final Transit Protocol’, *Oil & Gas Journal*, 20 October 2003, vol 101, no 40, pp 60–64; ‘Russian Gas to EU Markets – 2: Compromise is best course for Russia, EU in Protocol negotiations’, *Oil & Gas Journal*, October 2003, vol 101, no 41, pp 68–75; ‘Energy Charter Protocol on Transit: On the way to Agreement – What Kind of Treatment will be Accorded to Russian Gas in EU Countries’, *Oil, Gas & Energy Law Intelligence (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, No 26 (29), с 36–38; ‘Transit Protocol progress’, *Petroleum Economist*, July 2004, p 34; ‘From Russia–EU Summit to multilateral transit agreement: a road ahead’, *Oil, Gas & Energy Law Intelligence (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, No 2, pp 30–35; ‘Эффект матрицы’, *Нефтегазовая Вертикаль*, 2005, No 7, с 18–22; ‘Транзитный узел’, *Нефтегазовая Вертикаль*, 2005, No 8–9, с 112–114, 116; ‘Russia–EU, G-8, ECT and Transit Protocol’, *Russian/CIS Energy & Mining Law Journal*, 2006, No 3 (Volume IV), pp 9–12.

In sum, the prospects of finalising a totally new legally binding treaty (whether based on the Charter principles or not) are dim and the risk of failure very high.⁴⁷

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 European Union – the multilateral Energy Charter Treaty. This author argues for this position despite the long-standing Russian criticisms of the Energy Charter⁴⁸ and the most recent sharp criticisms from the highest Russian level, as shown above.

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 European Union and the FSU/CIS, including Russia, plus the European Union and EURATOM as two Regional Economic Integration Organisations (REIOs).⁴⁹ 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.⁵⁰ A further 20 states from Europe, Asia (eg, the Middle East, South, South-Eastern and North-Eastern Asia), Africa, North and Latin America are observers in the Charter process.

47 The author has not analysed the discussion on the EU–Russia energy dialogue and the work carried out by the thematic groups. Such a detailed analysis is unnecessary for the purposes of this article.

48 See, for instance, publications of the long-standing regular opponent of the ECT in Russia, current Deputy Chairman of the State Duma Valery Yezev (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, No 3; Риски нас останавливают, Госдума не спешит с ратификацией Энергетической хартии, *Независимая газета (НГ-ЭНЕРГИЯ)*, 9 August 2006; Россия-ЕС: Вопросы энергетической политики, выступление В Язева на пресс-конференции, ‘ЭнергодIALOG России’ со странами Европы и СНГ: последние события» в информационном агентстве РИА, ‘Новости’ 17 мая 2007 г) and О Fomenko (О Фоменко. К позиции России по ДЭХ, *Нефтегазовая Вертикаль*, 2004, No 18, с 30–31; Энергетическая Хартия вредит России, ‘Нефтегазовая Вертикаль’, 2005, No 5, с 40–41). See also: Российский дипломат: Россия не обещала ратифицировать Энергохартию, РИА Новости, 22 November 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, n 38 above, addressing much of this criticism.

49 See n 46 above.

50 The most detailed explanation and analysis of the ECT and the Energy Charter process is presented in T Wälde (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 pp, and in *Договор к Энергетической Хартии – путь к инвестициям и торговле для Востока и Запада* (под ред Т Вальде – англ.изд. и А Конопляника – рус.изд.) – М: Международные отношения, 2002, 632 стр. For the most recent, shorter and updated overview of the Energy Charter see A Konoplyanik and T Wälde, ‘Energy Charter Treaty and its Role in International Energy’ (2006) 24 *JENRL* 523–558.

Figure 2: Common rules of the game in Eurasian energy and expansion of the Energy Charter Treaty (See Table 1, p285)



This means that the ECT (through its members and observers) covers all major current and future energy (gas) value chains destined for the European Union (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 the new PA should declare that the ECT is the legal background of the Russia–EU common energy space.

What are the practical obstacles to this?

Although Russia has yet to ratify the ECT 1994, it has been applying it on a provisional basis (ECT Article 45). In order to make the ECT 1994 the 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.⁵¹ But it is also necessary to assess whether or not other parties have concerns with the current treaty. This article will try to show below that (it seems that) the European Union is not as interested in the Charter as it was in the 1990s. From my view, the European Union 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,⁵² which went much further in liberalising the EU internal market compared to the minimum-standard provisions of the Energy Charter Treaty. Since then, the European Union 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.⁵³ But this author's 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 European Union, there is no other practical way for the two parties effectively, and at least cost, to develop a universal legal foundation for the common Russia–EU energy space (provided of course that this remains a mutual goal of both parties).

51 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 nn 38 and 46) and consistently implemented them in practice during his tenure with the Energy Charter Secretariat.

52 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.

53 See, for example, the EU-proposed wording of Art 20 of the draft Transit Protocol (TP) (the so-called 'REIO clause' – see discussion below). Insisting on this clause means, in operational terms, that the TP will never be finalised since Russia and some other countries have clearly expressed their disagreement with the proposal (according to which TP will not to be implemented within the EU as a REIO) since it carries the implication that the European Union will negotiate multilateral rules that it will not apply within its own territory.

Russia and the ECT

Russian concerns regarding the ratification of the ECT are well known.⁵⁴ They can be divided into three groups.

Political concerns

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 have not yet been finalised. This demand has existed 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 G8 St Petersburg Summit. The pressure has continued despite the fact that as long ago as 2001 the Russian State Duma stated that it would not consider ECT ratification before the TP is finalised with a full consideration of Russian concerns.⁵⁵ The Duma's operational approach would have provided Russia with an opportunity to clarify in the text of the TP its substantiated concerns regarding transit provisions of the Treaty.

The attempts of the European Union to push this agenda (de-packaging of ECT ratification and TP finalisation) are counter-productive. For example, EU efforts on the eve of the 2006 G8 Summit in St Petersburg to achieve Russian ratification without first finalising the TP led to tough talk from the Russian leadership⁵⁶ 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.

⁵⁴ See nn 38, 46 and 48.

⁵⁵ Стенограмма Парламентских слушаний на тему, 'О ратификации Договора к Энергетической хартии', Государственная Дума Федерального Собрания Российской Федерации, 26 января 2001 г. See also, eg, М Буякевич, 'Троянский конь', по имени ДЭХ, *Мировая энергетика*, сентябрь 2007 г, No 9 (45).

⁵⁶ To mention just few (positions mentioned as of the date of the 2006 G8 Summit): Valery Yazev, Head of the Energy Committee, State Duma, Konstantin Kosachev, Head of the 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 G8, Victor Khristenko, Minister of Industry and Energy, and others including, finally, Vladimir Putin, the then President of Russia.

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 Gazprom’, or ‘requests cancellation of long-term gas export contracts’, etc.⁵⁷ Sometimes politicians even allege that the 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 currently the Deputy Chairman of the Russian State Duma, Valery Yazev, contended for a long time (repeating the earlier, similar official statements of the former Gazprom CEO Rem Vyakhirev)⁵⁸ that the ECT provides for mandatory third party access (МТРА) to the energy infrastructure, sometimes he stated that ‘the Treaty does not say on МТРА to pipelines, but it creates the basis for discussing this topic’,⁵⁹ while ECT Understanding IV.1 (b) (i)⁶⁰ clearly states instead that ‘the provisions of the Treaty do not oblige any Contracting Party to introduce mandatory third party access’.⁶¹

Concerns as ‘negotiating tools’

A second group of concerns relates to what this author will call ‘negotiating tools’. The argument here is that it can be expected that Russia will raise ‘artificial’ concerns in another area (eg, addressed to something that the

57 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, No 6, с 50–53; Энергетическая хартия: Мифические угрозы, *Ведомости*, 5 июня 2006 г, No 100 (1627), с А4; Борьба с мифами. О мнимых выгодах и угрозах Договора к Энергетической Хартии, *Политический журнал*, 13 июня 2006 г, No 21 (116), с 32–36.

58 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.

59 В Язев, ‘Своей трубы не отдадим ни пяди. Почему Россия отказывается ратифицировать Договор к Энергетической Хартии’, *Труд*, 1 февраля 2002 г.

60 See www.encharter.org/fileadmin/user_upload/document/EN.pdf, p.25.

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

ECT does not cover) in order to give them up at a later stage of negotiations as ‘concessions’ to the European Union in a trade-off for ECT ratification. One illustrative example of such concerns, from the author’s view, might be the ‘problem of the Turkish and Danish straits’ mentioned frequently by Mr Yazev as a (rather weak if valid at all) argument preventing ECT ratification.⁶² A list of such provisions, that lies outside the area of mutually accepted compromise, can be endless. But it would never happen in multilateral international negotiations that one country would expect to reach all of its initial demands within the multilateral debate. To claim on this basis that agreement which has been reached on a broad number of issues is ‘outdated’ is at least a non-professional approach.

Well-founded concerns

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 tariffs for domestic transport (ECT Article 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 Article 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, ie, the Energy Charter Protocol on Transit. The Russian State Duma clearly prefers (see above) this way of proceeding. This operational approach was always consistently and clearly articulated by the then Minister of Industry and Energy, Victor Khristenko (now the Minister of Industry).

There remain three open issues within the draft TP itself:⁶³

62 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 Azeri 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).

63 On the debate on transit-related concerns of Russia in regard to the ECT and draft TP see the author’s publications mentioned in n 46 above; 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, No 9 (45).

- (1) There is an issue as to the basis for setting transit tariffs (draft TP Article 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 European Union 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 the transport system within unbundled energy systems (draft TP Article 8); and
- (3) There is an issue as to the application of the TP within the European Union (based on the version of the 'REIO⁶⁴ clause' proposed by the European Union) (draft TP Article 20).⁶⁵ Under the EU proposal for Article 20, 'transit' would mean the flows of energy that would cross *only* the territory of the European Union 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 European Union as a whole *and* of the individual EU Member State. This issue is a key point of disagreement between Russia and the European Union.⁶⁶ For the European Union, this raises an internal issue as to the consistency between the ECT and the *acquis* within the Union. This suggests that the key to ECT ratification by Russia is in EU hands.

In summary, Russia has five well-substantiated transit-related issues:⁶⁷ two of them stem from the ECT and three from the draft TP. Technical solutions to all these issues except the 'REIO clause' have been informally agreed on in principle at the multilateral level within the Energy Charter community including a draft new article on congestion management (TP Article 10bis).

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

65 See www.encharter.org/fileadmin/user_upload/document/CC251.pdf.

66 See, for instance, publications mentioned in nn 46 and 48.

67 This author does not regard Russia's other concerns (including those on trade in nuclear fuels and on the supplementary investment treaty) as equally well-substantiated. For more details with respect to these other concerns see: Российский дипломат: Россия не обещала ратифицировать Энергохартию. РИА Новости 22 November 2006; М Буякевич, 'Троянский конь' по имени ДЭХ, Мировая энергетика сентябрь 2007 г, No 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, No 3, с 26–29.

A way forward on the ‘REIO clause’ was agreed multilaterally (with major input from Russia and the European Union) in October 2008 with the hope to move another step forward at the meetings in February and May 2009.⁶⁸

In light of this how might the countries proceed?

- *Option 1.* Russia must first ratify the ECT, following which the Energy Charter community will finalise and ratify the TP. This has long been the demand of the European Union but it has been unacceptable to Russia since the outcome of the TP negotiations was unpredictable.
- *Option 2.* The parties must first finalise and ratify the draft TP giving full consideration to Russia’s valid 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.
- *Option 3.* This leaves a third option, according to which Russia will ratify the ECT and draft TP 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 final list of its concerns. The best way to do so is within the framework of the Energy Charter Ad Hoc Strategy Group, established in 2007, to discuss, in line with the conclusions of the 2004 Energy Charter Policy Review (based on ECT Article 34.7),⁶⁹ 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).

European Union and the ECT

The application of the draft TP within the European Union has been an issue within the energy charter community since 2002.⁷⁰ This much-debated issue is related in part to the correlation between the *acquis communautaire* and international treaties to which the European Union is a party and is also related to the signing and ratification of the ECT by the European Union and its Member States.

68 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 Professor Thomas Wälde.

69 See www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf.

70 This was when the EU delegation first proposed the new Art 20 of the draft TP.

'Transit' and 'REIO clause'

The European Union and its Member States have ratified the ECT in two capacities:

- (1) as each EU Member State; and
- (2) as the European Union as a whole (as a REIO).

This 'double-capacity ratification' created a set of internal EU problems in regard to the ECT not only related to transit (eg, the factual difference in the term 'transit' according to its definition in the ECT and its practical meaning in the draft TP if the latter comes into force with the EU proposed Article 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' (Article 7.10). This includes carriage that crosses the area of the European Union 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 Article 20) is designed to limit the definition of 'transit' *only* to carriage across the territory of the European Union as a whole (since the EU has been creating its common internal energy market), 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 the negative economic consequences of this 'editorial change' (narrowing the term 'transit') for export flows, destined for the European Union and originating in non-EU states, first in Russia. After EU enlargement in 2004 and 2007, the delivery points for Russian export gas flows were placed deep inside EU territory.⁷¹

There is also a second aspect since the effect of implementing the proposed EU wording of the 'REIO clause' will mean that the European Union 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

71 For more details, see, for instance, the author's article in the forthcoming *JENRL* special issue, n 68 above. See also A Konoplyanik, 'Russian Gas to Europe: From Long-Term Contracts, On-Border Trade, Destination Clauses and Major Role of Transit to...?' (2005) 23 *JENRL* 282–307.

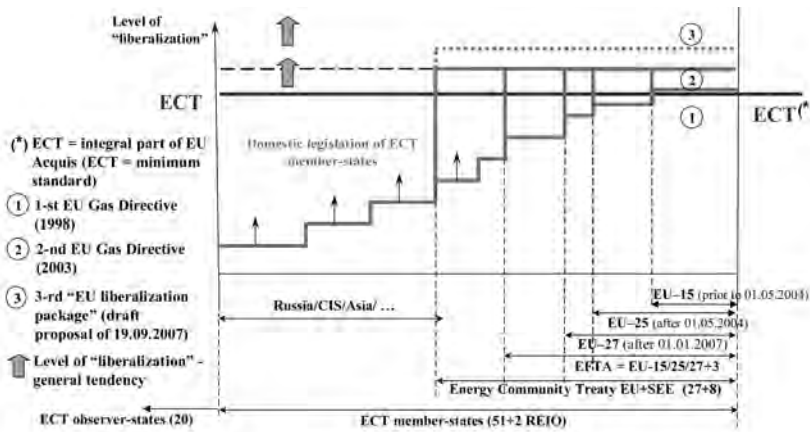
enlarging territory.⁷²

Fortunately, in October 2008, the parties seem finally to have identified a way to a mutually acceptable compromise to be further discussed by the multilateral Charter community in February and May 2009.⁷³

‘Liberalisation gap’ between EU acquis and ECT

Another long-standing conflict between the EU acquis and the ECT is the increasing gap between the growing level of liberalisation in the individual energy markets of EU Member States and the emerging internal EU energy market and the relatively ‘fixed’⁷⁴ multilateral minimum standard for the broader Eurasian community as prescribed by the ECT (see Figure 3).

Figure 3: ECT and EU acquis: ‘minimum standard’ within evolving Eurasian common energy space vs ‘more liberalised’ model



72 This has been a long-standing and well-substantiated argument 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 TP, they will have no practical sense for Russia if the TP is not to apply within the EU territory since a number of Russian concerns have particularly addressed the issue of securing transit flows within the EU territory, which is now (since 2004), a pure practical issue for Russian gas supplies to Europe.

73 Proposals made by the European Union at the special seminar, held in Brussels on 11 February 2009, in response to Russian concerns regarding Art 20 of the draft TP, still need to be examined by the Energy Charter community.

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

The 'level of liberalisation' of the EU energy acquis has been upgraded step-by-step from the first electricity (1996) and gas (1998) directives, to the second directives for electricity and gas in 2003 and now to the third directives (expected to be finalised in 2009). In addition, the geographical area of implementation to which these more-and-more liberalised EU rules apply has been expanding over the same time frame from the EU-15 to the EU-27, plus the additional eight members of the Energy Community Treaty, thereby creating the de facto 'EU-35 in energy'.

When the ECT 1994 was being negotiated and drafted in the early 1990s, the European Union 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 (EU directives and ECT) entered into force at the same time (in 1998) and thus reflected similar views on the level of liberalisation of the energy markets. Thus, at that time there was no gap between the ECT and the EU energy acquis. The gap appeared with the preparation of the second EU energy directive 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 the two legal systems (Figure 3). Since the ECT acts as a 'minimum standard' for its members, each ECT member state is free to upgrade the 'liberalisation level' of its domestic energy market at its own discretion but the ECT does not require it. Thus, the ECT 1994 can be seen as an instrument that protects non-EU and EU companies against 'excessive' liberalisation of internal EU energy space.

In the beginning, the European Union perhaps saw the ECT as a way of filtering the EU energy acquis into the legal systems of the non-EU states that were members of the ECT. As already mentioned, the ECT served as a preparatory class for Eastern European countries that wished to join the European Union. The multilateral instruments of the ECT (eg, 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 provided access to information on the countries of the East, which, in the 1990s, was hard to find.

From the time the European Union 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 European Union to find a new instrument to fulfil this role and, in the author's view, that instrument is currently the EU-SEE Energy Community Treaty. This may also explain why the ECT has been losing its value for the

European Union at the same time as the Energy Community Treaty grows in importance for the European Union.⁷⁵

ECT and intra-European disputes

The European Union 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.⁷⁶ 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 anonymous electronic voting on the potential conflict between dispute settlement procedures based on the ECT and on the European Union’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 per cent solicitors, 20 per cent barristers, three per cent in-house counsels, five per cent government representatives or embassy staff, 14 per cent students, 20 per cent other.

Source: Conference on ‘The Energy Charter Treaty: Energy security, investment protection and future developments’ organised 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>

⁷⁵ See, for example, the following note: ‘Well-placed sources of *Kommersant* report that references to the Energy Charter are likely to be deleted from the EU–Russia energy treaty as a concession to Moscow. As compensation, Brussels is going to integrate in its energy strategy Russia’s transit partners. The EU hopes to expand the Energy Community Treaty to include Russia’s neighbors Ukraine, Moldova and Turkey.’ (Europe Offers Russia a New Energy Deal, www.kommersant.com, 22 January 2007).

⁷⁶ There is jurisprudence and literature on the application of investment treaties within the European Union (see, for instance, Soderlund, ‘Intra-EU BIT Investment Protection and the EC Treaty’, *Journal of International Arbitration*, 24, issue 5, 2007 (www.kluwerlawonline.com/document.php?id=JOIA2007034)). A legal analysis and reference to the appropriate sources are 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 in relevant publications.

Of the audience (two-thirds of whom were professional lawyers), 86 per cent considered that it was possible the ECT could serve as the basis for an ECT Article 26 arbitration claim by an EU investor against an EU Member State. Fully two-thirds of the audience considered that it was likely that we would see disputes in which the European Community (as opposed to an EU Member State) would be a respondent. In light of this it is hardly surprising that the audience gave its strongest ranking to the proposition that European institutions will take steps to prevent intra-European disputes from being dealt with under the ECT. Less than ten per cent did not expect this outcome (see Table 1).

A good practical example of this occurred during the European Gas Conference in Vienna in January 2008.⁷⁷ One high-ranking representative of a key European gas company (commenting in front of high-ranking representatives of DG COMP and DG TREN) took the view that ‘ownership unbundling’ as proposed by the Commission in the draft third liberalisation package would be clear and direct ‘expropriation’. Further discussion failed to clarify the extent to which the Commission perceived the risk of an ECT Article 13 ‘expropriation’ claim by the individual EU company against the European Union in one of the international arbitration forums indicated in ECT Article 26 (ICSID, UNCITRAL or the Arbitration Institute of the Stockholm Chamber of Commerce) and not in the European Court of Justice.⁷⁸

This section of the article has raised the question of whether the European Union is really supportive of the ECT and would like to have the ECT as the legal background for the Russia–EU common energy space.⁷⁹

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 previously 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 close the door on using the ECT as a legal basis for the new Russia–EU PA? In responding to this it is important to consider both long-term and short-term aspects.

77 European Gas Conference 2008, organised by The Energy Exchange Ltd, 23–24 January 2008, Vienna, Austria.

78 On the competences of the European Union and Member States to conclude investment treaties, see, for instance, Soderlund, n 78 above.

79 Similar questions had also been raised by EU analysts some time ago. For instance, the former EU Ambassador to Russia, Michael Emerson, as long ago as 2004 noted that the ECT ‘means an economically sub-optimal regime for a most important sector’ (for the full interview with Michael Emerson of CEPS on Russia’s relations with the European Union see <http://www.euractiv.com/en>, 12 March 2004).

Regular adaptation (long-term aspects)

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)’.⁸⁰ These comments correspond to the adaptation of the Energy Charter process (including both its political and legal components)⁸¹ 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,⁸² where the contracting parties and other signatories to the ECT ‘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...’⁸³

The Energy Charter framework contains a number of different facilities:

- (1) the Charter as a policy forum: transparency, reporting, discussions, etc;
- (2) non-binding instruments: guidelines, benchmarking, recommendations, policy coordination, model agreements, declarations;
- (3) 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. Thus Treaty amendments are not the only instruments to adapt the current Treaty to the realities of the changing world. Furthermore, the stated 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.⁸⁴

80 See www.kremlin.ru/text/appears/2009/01/211884.shtml.

81 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 and www.konoplyanik.ru.

82 See www.encharter.org/index.php?id=22.

83 See www.encharter.org/fileadmin/user_upload/document/Final_Review_Conclusions.pdf.

84 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’ (2007) 6 *International Energy Law & Taxation Review* 85–93; A Konoplyanik and T Wälde, ‘Energy Charter Treaty and its Role in International Energy’ (2006) 24 *JERL* 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* (B Barton, C Redgwell, A Ronne, D N Zillman, eds, International Bar Association/Oxford University Press, 2004, 490 pp).

Crisis management (short-term aspects)

In the short term, 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 a 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 the 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 conflict situations (such as 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.⁸⁵ And it is here that the political leadership of the Secretariat needs to be able to understand not only the consequences of its actions, but also of its inaction. By inaction the author means 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 organisation takes adequate action in non-routine situations. This is why the member states accord the Secretary General

85 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 (www.encharter.org/index.php?id=21&id_article=171&L=0), the Secretary General denied the very possibility of advanced action on his part saying: 'Only the Member States have the right to initiate a procedure under the dispute resolution mechanism of the Treaty. The Secretariat does not have this mandate.' This is correct, with the letter of the Treaty, if the crisis was not prevented and is already in place. But the political leadership of the Secretariat in line with both the spirit and letter of the Energy Charter also needs to take advanced proactive actions to do its best to prevent the crisis. This type of 'passive' readiness is clearly demonstrated in the first, rather watered down and late, statement of the Secretary General on the Russia–Ukraine gas dispute, added to the Energy Charter website 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).

absolute operational power so that he can effectively respond to non-routine situations, preferably, prior to their transformation into fully-fledged crises.

During the first Russia–Ukraine gas dispute (December 2005), the Secretariat prepared a conciliatory procedure in advance in case the parties would not be able to reach agreement. Both parties gave preliminary agreement to its acceptability and to the proposed conciliator, though this procedure was not used in the end because the parties in dispute managed to reach a bilateral solution.⁸⁶ 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 9 January,⁸⁷ eg, only after transit to the European Union was fully broken on 7 January. This is only one example of delayed and inadequate reaction of the political leadership of the Secretariat which provided an opportunity for Russia to criticise the ‘Energy Charter’ organisation as a whole.

It is important that the Member States reflect constructively on this negative experience. One possible forum is the next regular Energy Charter Policy Review, 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 organisational 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.⁸⁸

86 See Андрей Конопляник, ‘Единственным вариантом обеспечения предсказуемости и прозрачности ценообразования между “Газпромом” и “Нефтегазом” может быть только формульный подход’, *Экономические Известия* (Украина), 24 ноября 2008 г, No 212 (975), с 1, 3; Андрей Конопляник, ‘Газотранспортная система Украины и России всегда была единой’, *Экономические Известия* (Украина), 24 декабря 2008 г, No 234 (997), с 1, 3, to be republished in English in OGEL.

87 See www.encharter.org/index.php?id=21&id_article=167&L=0.

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

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 organisation will act at best as merely a monitoring/registering vehicle, which reacts late to the post-effects of the dispute. And by doing so, the organisation 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 organisation did not pass with flying colours. But this does not mean that the organisation as a whole has failed. The inaction (or inadequate action) of individuals authorised to act on behalf of the organisation need not reflect on the organisation 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 fulfil 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 recognising 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.

Practical actions for moving forward

This article has argued that a common legal background for the Russia–EU common energy space should be based on the Energy Charter Treaty. In conclusion, it suggests the following practical actions to put this option into operation:

- (1) Finalise and sign the TP giving full consideration to Russia’s substantiated concerns on transit both in the draft TP and in the ECT.⁸⁹
- (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 Energy Charter Ad Hoc Strategy Group.⁹⁰ The conclusions of any discussions might be adopted within the 2009 Energy Charter Policy Review. Items (1) and (2) can be developed in parallel.

89 A key component of fulfilling this task is for both Russia and the European Union to send fully-fledged competent delegations to all the formal and informal corresponding meetings, so the process of TP finalisation will not slip owing to the physical absence of the persons involved.

90 Russia has presented a preliminary list of its ECT-related concerns but it is not a closed one.

- (3) After the aims of items (1) and (2) are achieved, Russia should simultaneously ratify the ECT and the TP, thus achieving in full a level playing field with the European Union. After this, the 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 the 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 TP.
- (5) Further practical improvement and adaptation of the ECT could follow once all ECT members have ratified the Treaty (currently 46 of the 51 ECT Member States have already done so).⁹¹ 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 cross-border energy value chains. This development would draw on 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 Article 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 multifaceted dimensions of the Energy Charter organisation (including the role of the Secretariat) and the lessons learned from the most recent Russia–Ukraine gas crisis.

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