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Oil, Gas & Energy Law Intelligence

Energy Charter Plus - Russia to Take the Lead Role in Modernizing ECT? by A. Konoplyanik

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Energy Charter Plus - Russia to Take the Lead Role in Modernizing ECT?¹

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in 2002-2008 - Deputy Secretary General of the Energy Charter Secretariat*

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

Criticism of the Energy Charter and intention to revoke the signature of the Russian Federation have been increasingly voiced during the recent months. Dmitry Medvedev said, first in Moscow on January 20 2009² and after that in Helsinki on April 20 2009³, that the document is not working and Moscow proposes to discuss creation of a new legal framework of international energy security. On April 29 2009, Vladimir Putin came to the fore, declaring in Sofia that "the Energy Charter has not worked" and this may be the reason why "Russia finds no sense in preserving its signature under the Energy Charter"⁴. Roughly at the same time, to our knowledge, the Ministry of Foreign Affairs and the Energy Ministry were instructed to consider the issue of revoking the signature. On June 5 2009 in St. Petersburg, Russian President reinforced Russia's position that the Energy Charter is not able to cope with all problems in international gas sphere. "Did this Energy Charter help in the course of the recent gas conflict? Procedures which are provided for by this charter did not work, incentives did not work either, the Energy Charter Treaty was not used. This means that we need another basis for downplaying such conflicts", he said⁵. The truth is that initiatives on creating a new system in place of ECT proposed by Russia did not enthuse potential partners. To the contrary, Brussels and some individual EU members declared that abolishment of the Energy Charter is out of question.

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

Disadvantages Resulting from Withdrawal

We have already pointed to negative consequences of potential withdrawal of Russia from provisional application of the Energy Charter Treaty (*See Vremya Novostey dated April 28⁶*). At the same time, no reasonable benefits for Russia are evident from its potential withdrawal from provisional application of ECT. In particular, withdrawal from the Charter will not help Russia

¹ English and slightly modified version of the paper, originally published in Russian in «Vremya Novostei» newspaper (Russia) on July 16, 2009.

² Президент России: Начало рабочей встречи с председателем правления компании Газпром А.Миллером. - <http://www.kreml.ru/text/appears/2009/01/211884.shtml>

³ «Президент РФ в Хельсинки сделал серию важных заявлений о европейской безопасности». – «Первый канал», 20.04.2009, <http://www.ltv.ru/news/polit/142214> ; «Медведев: Россия подготовила базовый документ, определяющий вопросы энергетического сотрудничества». – «Право ТЭК», 21.04.2009, www.lawtek.ru

⁴ «Путин: Россия не видит смысла в сохранении подписи под Энергетической Хартией». – «Право ТЭК», 29.04.2009, www.lawtek.ru

⁵ «Медведев призывает создать институт для разрешения газовых споров». – «РИА Новости», 05.06.2009, <http://www.rian.ru/economy/20090605/173397916.html>

⁶ English version published in English under the title "Energy Charter and the Russian initiative - Future prospects of the legal base of international cooperation" in "Oil, Gas and Energy Law" (OGEL), Special Issue on EU-Russia-EU relations, vol.7, issue 2, May 2009 at <http://www.ogel.org/article.asp?key=2872>

in UNCITRAL (United Nations Commission on International Trade Law) arbitration proceedings against it on UKOS case, while it looks like that it was this illusion that became one of the key motives for taking this decision. Revocation of the signature would have no retroactive effect, and Russia, in accordance with Article 45 (3-b) ECT, will be bound with an obligation to comply with the investment provisions of the Treaty during next 20 years.

At the same time, a notification on Russia's withdrawal from provisional application of the ECT filed to the depository can prevent Russia from implementing initiatives aimed at establishment of a new global order in the energy field which were announced by Russian President on April 21 2009 ("Concept of a New Legal Framework for International Cooperation in the Energy Field. Goals and Principles").⁷ Our country will be regarded as a lightweight negotiations partner, which unilaterally rejects the existing international legal instruments and rule of the game and, instead of following the evolutionary (gradual) adaptation thereof, calls for revolutionary reforms at a global scale without laying down a clear and coherent action plan.

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

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

A requirement to reject ECT and develop a new document to replace it is the least efficient way (if at all realizable) to satisfy grounded concerns of the Russian Federation in regard to the Energy Charter. If Russia's leaders give a negative assessment of the process of the Energy Charter due to some drawbacks which have become conspicuous today, one should not torpedo the process (such attempt will fail in any case – ECT has been part of international legal framework for 11 years now, 46 states have ratified it and will stick to their ratifications), but lead initiatives aimed at adaptation thereof, including account take of Russian presidential initiatives announced on April 21. The more so, because the key Russia's opponent in the Energy Charter Process – European Union – represented by its Chairman Jose Manuel Barroso, announced during the latest EU-Russia summit in Khabarovsk EU's consent to "actualize" the Energy Charter, i.e. intention of the EU to further improve the Charter process and its instruments.

Energy Charter Process "plus"

It would be advisable for Russia to propose a scenario to the Charter community (which includes 51 countries-signatories to ECT, 23 countries and ten international organizations being observers) which might allow for implementing initiatives announced on April 21 within the framework of the Energy Charter process. Let me emphasize it once again: it is only within the

⁷ Available in the OGEL Legal & Regulatory database at <http://www.ogel.org/legal-and-regulatory-detail.asp?key=3212>

framework and on the basis of this Charter process that Russia will be able not only to implement the initiatives proposed by the Russian President, but also to take the lead in implementing them, i.e. the process of building new global order in the global energy sector. And in this case Russia will be supported by major part of global community.

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

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

Road Map

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

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

However, the issues on which other ECT member states are to assume obligations for our country to agree to start ratification of the Treaty are to be resolved before December 2009 and legally formalized by the Conference decision.

Thus, Russia will establish itself as a leader in updating the Energy Charter based on existing institutions and tools, while sparing time and political resources which will be spent if Russian initiatives implemented outside the Charter.

In a Package

During the same session of the Energy Charter Conference at the end of the year, a decision to finalize preparation of two Protocols is to be taken. First of all, on the Energy Charter Protocol on Transit (Transit Protocol / TP) – taking full account of Russia’s grounded concerns with respect to the transit provisions of ECT and the TP itself. Secondly, on a new Protocol to the

Energy Charter on prevention of emergencies in transit (working title) on the basis of the draft of a relevant Russian document (see Figure 1). These Protocols are to be introduced for provisional application immediately after they are approved by the Conference. Together with the “road map” described above and counter obligation of Russia to start ECT ratification procedure, the parties to such agreement will get a balanced package solution.

Energy Charter & related instruments: evolving structure

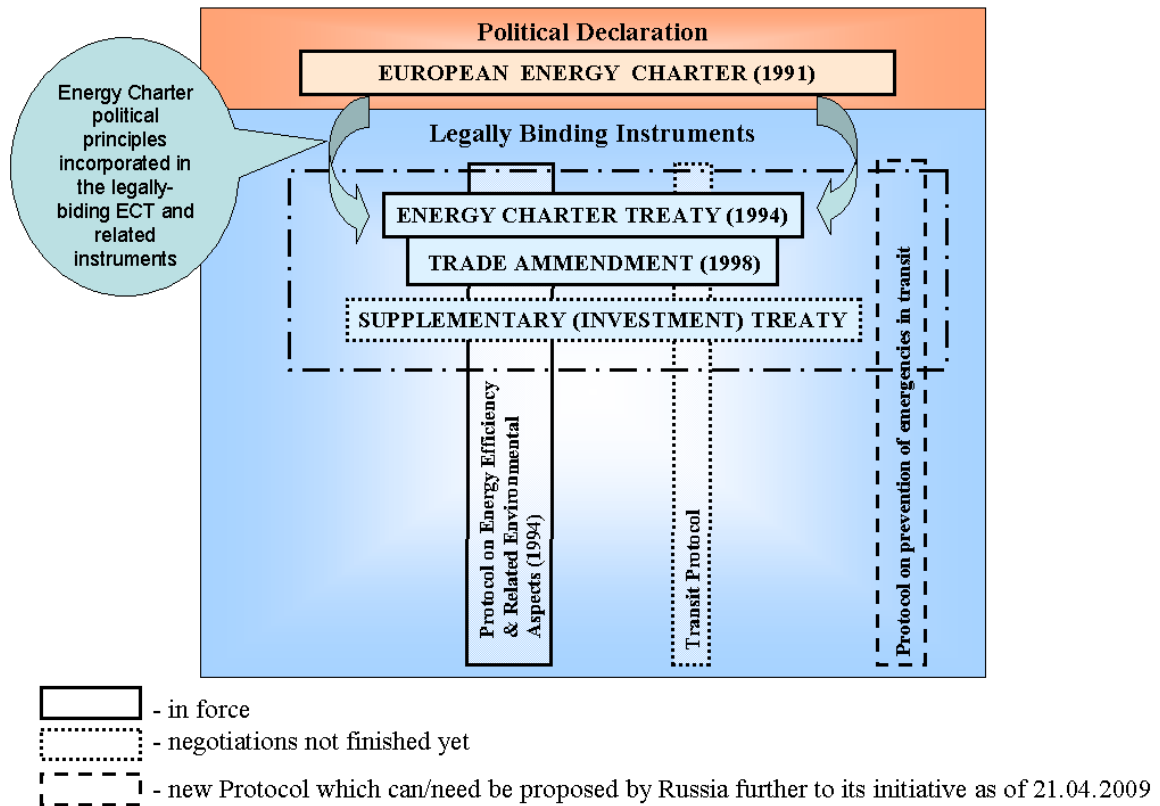


Figure 1.

By now, all open issues of the Transit Protocol, except one, have been resolved – provided the wording of relevant articles is edited. A still open question is disagreement between Russia and EU on the draft Article 20 of this Protocol. The nature of this disagreement is as follows: EU’s proposal to consider the territory of Regional Economic Integration Organization (REIO), which is the territory of the European Union, as a territory for transit purpose that is to ensure that the movement of energy resources within the European Union should not be classified as transit. And this can create additional transit risks for supplies of Russian gas to Europe, because after expansion of the EU in 2004-2007 a considerable number of these supplies – up to their contractual delivery points – are delivered via the EU territory. However, there is an important new aspect in the Energy Charter Plus scenario, which opens way for a radical solution of the “REIO issue”. This is the possibility of including a provision into the Transit Protocol that Article 20 shall automatically be deleted from it in case the Protocol is ratified by Russia. That means that this also happens in case Russia ratifies ECT, because our country can only ratify ECT and the Protocol simultaneously.

Practical discussion of such package solution should be held now, at the time of summer holidays. The key issue for the entire Charter community will be agreement in principle on this package between Russia and the European Union.

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

I believe that such approach of Russia to the reinforcement of international energy security will be supported by most of our partners.