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briefing papers

“The time for market innocence is over....

As we move out of recession, the global grab for energy will resume in earnest...”ⁱ

Tabula Russia

Escape from the Energy Charter Treaty

Christof van Agt, September 2009

Summary

The current governance system to mobilize investment and facilitate secure energy trade is reviewed not only by Russia but by other stakeholders too. Geopolitical challenges, evolving market demands and creative solutions expose the governance constraints that keep stakeholders from moving forward. The Eurasian energy market is in dire need of a clarifying update to restore confidence in energy investment and trade with Russia.

ⁱ The special representative for international energy issues Rt. Hon. Malcolm Wicks, MP, former UK energy minister “Energy security paper backs dash for home grown energy” *HM Government Press Notice* Ref. 2009/089 (London, 5 August 2009) 4th paragraph.

On the 20th of April 2009 Russia launched a new conceptual approach to the legal framework for energy cooperation and subsequently decided to withdraw from the 1994 Energy Charter Treaty (ECT) on the 30th of July this year. A 'stick and carrot' approach to international energy market governance. ECT rules will lose appeal elsewhere too now Russia has removed all ambiguity and formally dismissed their application. In the absence of an effective understanding with international stakeholders, Russia will treat foreign energy investment and trade flows at its own sovereign discretion. A rather desperate attempt to get Russia's interests acknowledged since the foreign investments that its energy sector urgently needs are slow tracked yet again. What are the next steps that the signatories of the 1991 The Hague European Energy Charter (1991 Energy Charter) that formally still include Russia, should contemplate in response? What do the ECT disciplines they negotiated stand for without Russia firmly on board?

The existing legal governance structure for energy, uniquely provided by the ECT, is enforced by 46 states in addition to the European Communities and Belarus that does still apply the treaty provisionally. In total 74 States participate in the Charter process next to key international organizations. Together they set an important standard in international law.¹ Replacing this with a new legal framework to accommodate Russia appears frivolous and difficult in substance. Even if circumstances have irreversibly changed, energy markets still require Russia's integration into a consensual multilateral governance system. Russia's proposals on international energy cooperation and subsequent rejection of the ECT should therefore be considered seriously. The decision to withdraw from the ECT hurts international confidence in Russia's observance of negotiated agreements, but sharpens the focus on President Medvedev's new approach.

This briefing paper looks at the Eurasian energy security architecture in light of evolving energy policy, industry practice and the competition for economic rents between governments to fulfill socio-economic goals. A fundamental change in circumstances, unforeseeable at the time of the Charter's conception in the early nineties, arguably underlies both initiatives (sanctity of contract vs. change of circumstance).² This may go some way to relieve the Russian government from the duty to provisionally apply the ECT. The government decision of Prime Minister Vladimir Putin now rules out ratification by the Russian parliament that was pending for 15 years since Russia signed the ECT at the Lisbon signing ceremony in 1994. Though provisional application survives for another 20 years

for investments made while the ECT was in force,³ withdrawal from the ECT altogether, questions if this government duty can still be enforced in Russia.⁴

Despite this high-level double volley, the ball remains in the Kremlin's court to persuade others that first negotiation of a new legal architecture improves the governance framework already in place and second energy investment and trade with Russia remain adequately protected. Russia's ability to rely on legacy production and transport infrastructure will come under renewed pressure once demand picks up.⁵ The massive investments to develop remote new oil and gas provinces and export pipelines were slow tracked in the economic crisis and affect the entire value chain.⁶ Energy sector investment in Russia will suffer a further backlash due to the shortcomings of the existing system and the confusion outstanding initiatives create. Russia itself will benefit most from an adequate multilateral investment and transit regime for energy. Lack of an adequate response to this governance failure undermines Russia's ability to attract investment and technology and negatively impacts on the energy security of all stakeholders.⁷

Today energy policy and market practice in wider Europe evolves asymmetrically in the interest of 'sovereign state monopolies' on the one hand and regulated open market entities on the other. This is a departure from the GATT/WTO inspired ECT. This treaty envisioned energy sector cooperation and economic integration through investment promotion and protection, market opening and non-discriminatory treatment of energy trade and capital flows. The 1991 Energy Charter signatories, however, cannot achieve the open and competitive energy market governance when producers, consumers and transit hubs, focused on maximizing rents, apply asymmetric measures in the same interconnected value chain.⁸ Energy trade and investment relations between Russia and other key stakeholders in Eurasia shifted from the euphoric positive- to a hardnosed zero sum game. The current system is therefore ineffective in Russia and elsewhere too.

Accommodating the new challenges that change has brought about within the existing governance system, adds inconsistencies that make its overall architecture less resilient. This contributes to rather than diminishes risks. A step back to the drawing board does not equal a retreat from existing disciplines. Instead it could help to enhance their effect in a manner that shows more sensitivity to the evolving interests of Russia and other key Charter stakeholders. Testing industry and government

opinions on Russia's recent initiative will show to what extent policy and corporate circles are concerned.

A new market order at the start of the pipeline?

Russia now considers itself entitled to defeat the object and purpose of the ECT even when it remains a signatory to the 1991 Energy Charter.ⁱⁱ Though the ball remains in the Kremlin's court to further clarify the position it has taken, consultations remain necessary in order to accommodate changed realities and address the investment challenges that lie ahead in a consensual governance system and commercially viable business model. Depending on the outcome of such further assessments among industry and government circles one ultimate option further down the road is to reconvene the 1991 Energy Charter signatories. This seems logical since both its objectives and instruments are put at stake by a major constituent. Even when an alternative market operating system may be hard to come by, a reset will enable an update of the energy policy framework with Russia so that stakeholders can move forward and invest in a stable and predictable environment. President Medvedev's proposal at least provides a basis for further discussion on how to turn this Titanic and keep investors on board. Before considering any such conference, however participants should make haste slowly and need to conduct a steely-eyed assessment of whether Russia is ready to engage in a meaningful discussion or needs more time to climb down from its confrontational stance. Depending on the findings of ongoing industry and government consultations, The Hague may take a role considering its public private energy markets experience, affinity with the 1991 Energy Charter, and the 'good offices' the Netherlands has provided before in the interest of energy security.

The bilateral dialogues through which both the EU and the US will continue to engage Russia require some multilateral framework or consensus to avoid undue trade and investment barriers and suboptimal investment flows. The enhanced geographic scope of the 1991 Energy Charter creates a sufficiently broad context in which Euro-Atlantic and Asian Pacific stakeholders can focus on the vital investment, market access, trade and transit interest they share with Russia. Vladimir Putin, at that time President of Russia, reaffirmed its declared object and purpose as recent as at the 2006 G8

ⁱⁱ See Annex 1 Notification to the Order of the Government of the Russian Federation of 30 July 2009 #1055-r Moscow 4th paragraph in italics

meeting in St Petersburg. Taking account of all key policy proposals and industry developments could distinguish fashion statements from fundamental change. Ideally, such an assessment of the new status quo could help to realign existing rules and practices under the enduring policy vision of the 1991 Energy Charter or, if market challenges so require, that of another brave international forum.

Separate assessments by key industry and government groups will benefit from a more integrated approach. A dedicated conference would be well timed in the wake of the global economic crisis. An improved governance framework with Russia could help to further stimulate and rationalize investment flows. Markets should return on trend in a better policy posture than the above referred 'zeitgeist' projects. This in contrast to other authoritative opinions⁹ and the Chair's summary of the 2006 G8 St Petersburg meeting:

*"We stressed that open, transparent, efficient and competitive energy markets are the cornerstone for our common energy security strategy. We also recognized that governments and relevant international organizations play an important role in this area".*¹⁰

Consultations with industry, the findings of upcoming high-level policy debates within the IEA, the UNFCCC, the ECT State party conference and bilateral energy dialogues with Russia by the US and EU should test the ground for such a conference. Enhanced solidarity among all the 'cornerstones', cited above, facilitates equitable rule based market integration with Russia and can strengthen the governance framework to stimulate counter cyclical investment in energy security more than regional initiatives ever can.

*“I loved you and might love you again still
Within my soul the flame has yet to fade in full
....”*

Aleksandr S. Pushkin (1799 — 1837)

Introduction

During his state visit on the 20th of April to Helsinki Finland, President Dmitry Medvedev launched his proposal on a “Conceptual approach to the new legal framework for energy cooperation” (the Concept).¹¹ According to a top economic aide to President Medvedev, the Concept was announced at various international gatherings notably the July 2008 G8 Hokkaido Toyako Summit.¹² The results of the self-compliance review with the G8 St Petersburg Global Energy Security Principles of July 2006 (2006 G8 St Petersburg Principles)¹³ may have failed to encourage G8 members gathered at Hokkaido. These principles were derived from the 1991 Energy Charter and long since deferred negotiations on a multilateral agreement on investment (MAI) conducted separately under the aegis of the Organization for Economic Cooperation and Development (OECD).¹⁴ The decision of the government of Russia to unilaterally revoke signature from the ECT¹⁵ in July 2009, does not strengthen confidence in Russia’s adherence to the rule of law. Nor does it inspire others to enter into an open ended negotiation with unclear results. The limits of the existing energy governance system, now more apparent than ever, sharpen policy focus on Medvedev’s Concept and stimulate other efforts to redress the governance gap if a real opportunity exists.

The key question is if a more satisfactory arrangement can be found in changing the legal basis of the existing practice to accord with evolving markets, as President Medvedev seems to propose, or by better accommodating new demands within the existing governance system. Aside of the Concept’s merits it’s launch exposes the failure of the existing system to deepen energy market policy coherence with Russia.¹⁶ Change is also apparent in the policy initiatives of the European Union¹⁷ and the United States that, in the same spirit of the Concept, test the principles of existing frameworks. Are these fashion statements or fundamental policy shifts brought about by market evolution and change (See box 1 *Change is in the air*)?

Swiftly launched government initiatives rival each other and create divisions and diversions in the overarching governance structure. Gas of course provides the clearest example. Open gas markets policies favor new entrants and competition in the European Union, while monopolist behavior to maintain market share and capture rents dominates in Russia and oligopolistic industry interests continue to have their impact on Europe. Most initiatives increase state involvement, since in tightly supplied markets energy security is increasingly governed by national security agenda's rather than by commercial and open market disciplines alone. On a rising tide of resource nationalism on all sides, government initiatives trump the open market disciplines upheld multilaterally by the World Trade Organization (WTO) and bilaterally through trade and investment treaties. The ECT specifically applies these rules to the Eurasian energy sector in the consensual multilateral framework of the 1991 Energy Charter (see also Box 2 *Ukraine's messy middle ground*).

Now "*The time for market innocence is over*" according to Malcolm Wicks, a former UK energy minister and currently the special representative for international energy issues to Prime Minister Gordon Brown.¹⁸ His statement captures the 'zeitgeist' as foreign energy import dependencies grow. "*As we move out of recession, the global grab for energy will resume in earnest, consumption is predicted to rise and with it prices*".¹⁹ The alarmist press notice sets the scene for an "*interventionist*" scramble by government to secure gas and electricity supplies in response to a new "*dash for gas*",²⁰ as the special representative reports.²¹ This is in stark contrast to the established energy market rules of the UK; the bedrock of the open energy market model that many EU member states still struggle to embrace. It is unclear if consumption will return on trend in both oil and gas markets, making predictions on when and how prices will rise premature.²²

If there are substantive assumptions behind these government statements and initiatives they must be a response to changes in circumstances on the ground. This adds credence to Russia's new conceptual approach beyond the specific Russian interests it no doubt serves. Energy policy frameworks, and their legal architecture, have to evolve beyond their current limits to successfully tackle an imposing range of energy security, climate and social economic challenges. The proposals of President Medvedev are in this sense part of the same consensus we have been seeking, unsuccessfully in existing arrangements to deal with new market demands. The WTO inspired multilateral energy governance system, in which the Energy Charter serves as a figure head for the energy sector, is re-evaluated actively already today and certainly not by Russia alone. The not so encouraging results of the self-

assessment at the 2008 G8 Hokkaido Summit in respect of the 2006 G8 St Petersburg Principles further testify to this trend.

To avoid that global economic recovery suffers from yet another commodity price spike, assuming that the United Kingdom's special representative for international energy issues is right, investors require transparency and predictability. Governments must sustain fiscal and legal stability for industry to follow through on counter cyclical investment decisions in which Russia's energy sector plays a key role.

It is useful to review these initiatives, including the Russian concept, more structurally and transparently against existing rules and market requirements in an open dialogue with relevant stakeholders (not necessarily limited to Charter signatories and the industry interest they incorporate though these appear most concerned). The debate could focus on the meaning and operational conclusions that can be drawn from these developments with a view to reinforce the consensual multilateral governance system for energy sector investment and trade. Failure to accommodate changing realities creates diverse systems that increase market fragility through the trade and investment barriers they inevitably need to sustain themselves (eg. The below referred to proposal of Ukraine to establish a 'transit space' or accommodation of Medvedev's proposal in the context of the state driven economies of the Shanghai Cooperation Organization (SCO)²³ outside the 'big-tent' that the 1991 Energy Charter still provides).

Box 1 Change is in the air

European Union

In its resolution adopting the Second Strategic Energy Review, the European Parliament calls on the Commission to contribute to a 'single voice' towards 'third country producers' inviting a new generation of mutually beneficial interdependency provisions to support the strengthening of trading power of EU undertakings "against" that of the state owned undertakings of third countries.²⁴

On the 13th of July 2009 the European Parliament and Council adopted the so called 'Gazprom clause' in a watered down version. The clause allows for discriminatory treatment of investments to be made by third country parties when these parties fail to adhere to EU energy market rules and don't offer similar access terms (reciprocity) in respect of gas transmission systems and operations.²⁵

The recent initiative of the European Commission on a Caspian Development Corporation (CDC) proposes a gas purchasing aggregator to facilitate investment in Caspian gas field and infrastructure development on terms comparable to those offered by Gazprom and other state monopolies.

Aside of their rationale, the optics and language of these new EU measures depart from the established open energy market policies applied in existing international arrangements such as the ECT, the European Energy Community Treaty²⁶ and EU's internal energy market law.²⁷ The recently proposed Eastern partnership, on the other hand is coherent with this practice as it seeks to align energy markets in Eastern Europe and the Caucasus to the EU's open energy market rules through deep and comprehensive free trade agreements. The EU effort to make a distinction between internal and external market rules works against WTO/ECT objectives.²⁸

United States

During the 2008 Presidential election campaign in which “change” was the main theme Senator Barack Obama proposed to “unilaterally renegotiate the North American Free Trade Agreement (NAFTA)”. This alarmed trade partners of the US and cast doubt on the stability of their existing trade agreements once Senator Obama would be elected President. Later the campaign explained this as political maneuvering with a view to obtain concessions rather than a reflection of actual policy.²⁹

On the 7th of July 2009 during the first state visit of President Obama to Moscow to “reset” the relationship with Russia he welcomed President Medvedev’s proposal to promote the rule of law. According to Russia’s Minister of Foreign Affairs Sergei Lavrov,³⁰ he also gave assurances to repeal the 1975 Jackson-Vanik Act, not so much a barrier but a residual irritant to energy sector cooperation with non-market economies.³¹

President Medvedev’s proposal may be driven by the same logic. The Jackson-Vanik act is one of the reasons, among many, that the United States cited for not signing up to the ECT. The US energy governance system, like that of the EU, sets more rigorous open market standards than the ECT does. That the US, still a signatory to the 1991 Energy Charter, did not sign-up to the ECT limited the appeal of the Charter process and formally weakened US investor protection. Repeal of the Jackson-Vanik act might however strengthen US involvement in the Charter or another multilateral energy trade and investment forum that includes Russia.

President Medvedev’s Proposal: The Concept

The Energy Charter Treaty does not satisfy Russia in its ‘*current form*’ therefore a new international legal basis is necessary.³² Still a signatory to the non-legally binding 1991 Energy Charter, Russia has

consistently challenged the ECT after its negotiation and signing ceremony in Lisbon in 1994. Russia ceased to consider itself bound already well before it decided to withdraw from the ECT on the 30st of July 2009 and notified the treaty depositary in Lisbon thereof on the 20th of August this year.³³ Hereby, Russia gave up on amending the ECT.³⁴ The Concept should therefore be treated as a self-standing Russian initiative that is necessary to “*efficiently improve the legal framework of the world trade in energy resources.*”³⁵ The Russian Ministry of Foreign Affairs acknowledges “*the many positive contributions made in the Energy Charter context which has gone a long way in contributing to international energy cooperation*”.³⁶ Though the Concept could at least include the non controversial elements of the ECT, it is much more likely that the Ministry of Foreign Affairs that advised against withdrawal from the ECT seeks to apply some damage control. Clearly the energy market codependency between Russia and other Charter signatories endures. This begs the question on who withdrew: The Russian Federation as a state party to the 1991 Energy Charter represented by President Dmitry Medvedev, or the Russian government of Prime Minister Vladimir Putin, obliged to apply the ECT provisionally, alone?

The Concept forms no exception to Russia’s other challenges of the existing governance system that focus on security and finance. It is not noteworthy so much for its content as it is for its launch by the Russian President Dmitry Medvedev himself. Since the Concept does not originate from dialogue within existing international governance structures this helps Russia to convey the diplomatic message that the Charter has yet to fully account for Moscow’s perspectives on energy market security. On the other hand President Medvedev’s bid is at arm’s length distance from many of Russia’s own government and ministerial view points.

The global scope of the Concept reflects Russia’s sense that the existing energy sector governance system is tilted towards one group of energy import dependent consumer interests. It may believe that all the while not aware of the effects of its own comportment in foreign eyes. The Charter supposedly fails to provide an equitable balance with energy exporting producer interests. In this group, Russia is clearly the single largest stakeholder within Eurasia’s ECT membership. The balance of benefits arguably also favors open market regulation over socio-economic development goals. According to Russia’s current policies, as distinct from those of the early nineties when the ECT was negotiated and Russia was a weak negotiating party, these are best served by state control and strong ‘national champions’ to compete with international oil and gas companies.³⁷ Russia has withdrawn from the market governance upheld by the Organization for Economic Cooperation and Development (OECD)

and International Oil and Gas Corporations (IOC) business models, in favor of an energy sector governance that is increasingly driven by state control and closed National Oil and Gas Company (NOC) structures. Russia's vital economic interest now appears to accord more with those of the growth economies in Asia, such as China with which it has gathered in the Shanghai Cooperation Organization (SCO), than with those of the OECD. This is odd since Russia shares its integrated oil and gas value chains with the mature market economies in the west. Russia has a vested interest in diversification of export markets and investment protection also for its own energy sector investment's abroad. Asia, with whom Russia has little kinship, is a convenient counterweight to Europe. Yet historic trade and investment mean that Russia will remain a European economy and that it will take some time before Russia will have new systems in place to serve subsidized growth markets to the east or gain access to mature markets further overseas.

The Concept is made up of general policy findings and main principles. These propose to comprehensively cover energy sector cooperation based on non-discriminatory treatment of parties and their entities guaranteed by an effective implementation mechanism. Two annexes itemize elements of a transit agreement and a list of energy materials and products that include nuclear energy, fossil fuels and electricity. Renewable energy sources and bio-fuels are not included. The Concept only refers to cooperative efforts towards environmental protection and prevention of climate change in the penultimate principle before acknowledging uniformity in terms and concepts at the end. Under the title "Goals and Principles", the first item is an acknowledgement that the existing system is out of touch and augments rather than diminishes risk with the catch all phrase "*a more sustainable long-term development model for the future requires a modern global energy system which would be adequate to the current conditions.*"³⁸ 'More sustainable' and 'current' are the critical notions that imply the non-sustainable risks and changed conditions that Russia believes haunt the existing system and ECT.

The comprehensive nature of the Concept revisits the early on abandoned ambition of the Charter to provide sector specific regimes for all aspects of global energy cooperation to complement the overarching ECT rules and principles. Already at the 10th anniversary session of the Energy Charter Conference in December 2001, V.A. Yazev, member of the Russian Duma, expressed Russia's disillusionment in the ECT for its failure to live up to these expectations:

*“Regrettably, the dynamic of the “post-treaty” period is not bright. The Protocol on Hydrocarbons was not developed. The Protocol on Emergency-Situations was not developed. The Supplementary Treaty was not concluded. Negotiations on the development of a Protocol on Electricity always postponed. Negotiations on the Protocol on Transit that are most important for Russia appear close to a dead end.”*³⁹

Secondly the Concept states that *“existing bilateral arrangements and multilateral legally binding norms....have failed to prevent and resolve conflict situations.”*⁴⁰ This refers not only to the alleged inadequacy of the multilateral ECT, and by implication the WTO, to solve conflicts with Ukraine but also to Bilateral Investment and Trade agreements (BITs). Russia’s ‘*tabula rasa*’ reservation of its full sovereign discretion over energy sector affairs is more absolute than its issues with the ECT at the tip of the iceberg ahead.

The third and fourth items of the “Goals and Principles” of the Concept highlight the all encompassing nature of the new legal framework. This should be *“Equal and non-discriminating (without imbalances favoring certain categories of actors)”*⁴¹ in reference to the above allegation that the ECT favors the interest of energy import dependent consumers. The Concept questions the ability of existing bilateral and multilateral agreements to prevent and resolve conflict situations. Yet it also requires that the new legal framework should be consistent with relevant obligations under other international instruments. The relevant obligations of a new legal framework then logically exclude those provisions that aim to prevent and resolve conflict situations in the ECT and BITs. These are the investor-state and intergovernmental dispute settlement mechanisms as well as the investment, trade and transit provisions, where Russia’s defensive interests are most exposed:

Firstly, Yukos majority shareholders seek \$50 billion in compensation for the expropriation of their investments. Secondly, the monopoly position with which Gazprom and Transneft keep Central Asian producers beholden to a *de facto* export cartel. This is worth billions of dollars in economic rents to Russia and serves both the geopolitical agenda of the Kremlin and the monopoly positions of Gazprom and Transneft in Russia and abroad. The existing transit and trade provisions seek to share these rents more equitably and protect investments against sovereign and regulatory risk. Russia however remains most concerned with securing access and protecting market share in downstream markets and the inviolability of transit flows downstream from Russia.

The second title of the Concept highlights ‘*Main Principles of the new legal Framework for Global Energy Cooperation*’. These propose to take guidance from the experience in implementation of the Charter documents. This would not necessarily mean that the ECT is the point of departure, but rather refers to those documents that Yazev had pointed out, as never making it to negotiation or implementation. The 2006 G8 St Petersburg Principles are based on the 1991 Energy Charter and the Multilateral Agreement on Investments (MAI) but side step the ECT. Some observers note that the Concept does not share the importance that the 2006 G8 St Petersburg Principles attach to open and competitive energy markets. This reflects the trend towards public private partnerships and a reassertion of government control over open and competitive energy markets that disenables the free energy trade and investor state arbitration mechanisms of the ECT. The outcomes of the subsequent self assessment at the 2008 G8 Hokkaido Summit and the various policy statements and initiatives this article refers to clearly point in that direction. It remains to be seen however, if these changes are temporary mood swings, or strategic responses to fundamental and irreversible developments in energy markets that call for a reassessment of the existing governance system.

A restricted draft document entitled “Treaty on the Management of Emergency Situations in Transit of Energy Materials and Products” circulates separately and further fleshes out annex 1 of the Concept on transit. For reasons further outlined below President Medvedev now follows a more institutional approach by proposing the establishment of an international commission for the management of emergency situations in transit and less so a legal regime. This reflects Russia’s difficulty in combining within a single nondiscriminatory legal regime its offensive transit interest towards Ukraine, Belarus and beyond, with its defensive transit interest towards Central Asian and Caspian oil and gas exporters who depend on transit through Russia itself.

Lisbon, we have a problem

In line with President Medvedev’s initiative and statements by his economic adviser Arkady Dvorkovich on the Energy Charter in its current form, Prime Minister Putin hinted separately that Russia may withdraw its signature from the ECT during a meeting in Sofia on the 29th of April 2009.⁴² The EU’s Commissioner for Energy and Transport Andris Piebalgs had little choice but to turn down the proposal to replace the Energy Charter Treaty at the Permanent Partnership Council (PPC) meeting in Moscow on the 30th of April this year.⁴³ At the EU-Russia summit meeting on 21-22 May in

Khabarovsk the President of the European Commission José Manuel Barroso, however promised to take Russia's proposals into consideration in the context of the ongoing review of the Energy Charter process.⁴⁴ The Commission also proposed a "Working Arrangement for the implementation of the Early Warning Mechanism (EWM) on the supply of oil, natural gas and electricity from the Russian Federation to the European Union". This was welcomed by President Medvedev who reaffirmed Russia's wish for a new agreement on energy security and not to take part in the current Energy Charter.⁴⁵ Shortly thereafter at the G8 energy ministers meeting that took place on the 24th and 25th of May in Rome gave the Concept of President Medvedev polite hearings in bilateral meetings with promises to continue debate. This prompted the Russian energy minister Sergei Shmatko to indicate that Russia could "*come out with a proposal to hold a broad international forum on the issue.*"⁴⁶ One month later on the 29th of June vice Prime Minister Igor Sechin chaired an interdepartmental meeting informing participants that despite objections from key ministries, the political decision was taken that Russia would cease the provisional application that its signature of the ECT in 1994 provides for.⁴⁷ Subject to the further confirmation of this decision in a next government meeting, Russia could formalize this decision by informing the depository in Lisbon.⁴⁸ On the 30th of July 2009, Prime Minister Putin signed the governmental order to adopt the proposal of the Ministry of Energy of Russia, coordinated among government bodies, to notify the government of Portugal, the ECT depository, of the Russian Federation's intent not to become party to the ECT.⁴⁹ Aside of Russia's well recorded critique and sense of exposure under the ECT, it's quite probable that developments highlighted in box 1 *Change is in the air*, contributed to the decision to withdraw signature in addition to 'ECT fatigue' and the wariness with which the new Concept was received.

The notification refers to ECT Article 45 (3(a)) and specifies that in accordance with ECT Article 45 (1) the ECT was not applied provisionally where inconsistent with the national laws of Russia.⁵⁰ The notification appears to add injury to insult in the statement that the Russian Federation henceforth does "*not consider itself bound by the obligation to refrain from acts which would defeat the object and purpose of the ECT*".⁵¹ This does more than formalize a *de facto* situation in respect of provisional application of the ECT's provisions even if this is yet to be tested in Russia.⁵² The notification not only announces the defeat of the ECT's provisional application and/or full enforcement in Russia⁵³ but allows for a proactive dismissal of the ECT's overarching policy objectives laid down in the non-binding 1991 Energy Charter. For the past one and a half decade "constructive ambiguity" characterized energy sector trade and investment relations with Russia by virtue of its ECT signature

and consent to provisional application. The ‘blank check made out to self’ read out of this decision enables a more confrontational policy posture and distances Russia from the 1991 Energy Charter and 2006 G8 St Petersburg Principles.

In response to a question from the mass media on Russia’s decision not to become a participant to the ECT Mr. Nesterenko of the Russian Ministry of Foreign Affairs refers to the fundamental changes in the global energy arena that the current legal architecture no longer responds to. He explains that this is also what motivates President Medvedev’s concept for a new global system for energy governance. Russia remains dedicated to global energy security that embraces the interests of all stakeholders as the 2006 St Petersburg Principles reaffirm. The press statement glosses over the significance of Russia’s withdrawal when Nesterenko highlights that this does not negate “*the many positive contributions made in the Energy Charter context which has gone a long way in contributing to international energy cooperation.*”⁵⁴

*“No I shall not lower myself before you
Neither your salute nor your reproach concern me
Know that we are strangers from now on
...”*

Michail J. Lermontov (1814-1841)

Tough love from Russia or a parting of ways...

Opinions on tactics

Some well informed observers believe that Russia’s withdrawal from the ECT is simply a show of ‘tough love’ in the hope of obtaining concessions in the Charter context. Amendments to revise the ECT’s application in Russia seem illusory for substantial, procedural and political reasons. Reaffirmation of Russian sovereign control over its domestic and foreign energy sector affairs through ECT withdrawal and launch of the Concept respectively is therefore all the more likely. With the brinkmanship that reveals Prime Minister Vladimir Putin’s hand, a negotiating position is set up in order to make a trade-off sometime after the 2009 summer recess to deal with the Concept of the nascent Presidency of Medvedev. Dialogue in the Energy Charter context is logical but may set limits that Russia seeks to escape from. Failure to have a relatively open dispassionate debate risks that noses will be cut off in order to not lose face and Russia withdraws from the Charter process altogether and departs on an entirely different course.

Both initiatives enable Russian energy policy makers to occupy the diplomatic playing field offensively and prepare an ‘a la carte’ opt-out from existing ECT arrangements in favor of a new and more ‘Moscovian’ approach. The Concept also gives Russia the opportunity to deflect criticism on its withdrawal from the ECT and on its conduct as the major European energy trade and investment partner for Euro-Atlantic and Asian Pacific import dependent counterparts. Should such an ‘opt out’ occur *de jure*, as it now has, Russia can refer defensively to the international energy communities failure to acknowledge its longstanding criticisms of the ECT and not dignifying the Concept with an appropriate response. The shifting posture of the European Union during negotiations on an Energy Charter Protocol on Transit creates another precedent that Russian can refer to (See *The energy policy exchange at low tide, Transit*). The sketchy outlines and vagaries of the Concept combined with

Russia's defiance of international principles and practices in other international arenas provide a basis for such a cynical view. Russia aims to maximize its room of maneuver setting aside the state practice that the 74 signatories to the 1991 Energy Charter set.⁵⁵

On the other hand there is a growing body of evidence in the undercurrents that changing circumstances elsewhere also surpass the ECT. Seizing the occasion that the Concept offers to address shortcomings of the existing arrangements with Russia that is now manifest in the ECT, therefore argue, even when counter intuitive to some, in favor of a straightforward and constructive response.

Without a consensual multilateral framework for energy cooperation with Russia, government and industry circles will have to accept that Russia will treat energy investments and trade relations at its own sovereign discretion. This logically implies a much more confrontational policy posture that deters investment instead of promoting it. The international oil and gas community is invited to do another profile check. Oil and gas industries already suffer from limited access to resources and will need to secure investments in Russia with ever more creative and less transparent solutions. In the absence of a broadly carried legally binding understanding with Russia on the terms of energy sector cooperation, treatment will depend of Russia's largess rather than a transparent and predictable adherence to the rule of law. This conclusion is also drawn in respect of the physical security of Caspian oil and gas pipeline infrastructure.⁵⁶ The Concept explicitly recognizes the physical security of essential energy infrastructure; an enticement to support the Concept in the wake of the Georgia crisis or the recent pipeline rupture that closed down gas exports from Turkmenistan? Hardly a reassuring premise for formulating policy: it is foremost in Russia's interest to remain a predictable stakeholder in international relations and accountable for its conduct under international law. Moscow must recognize this certainly under the Presidency of Medvedev that seeks to redress the 'legal nihilism' of earlier years. Some assert⁵⁷ Russia's sole purpose is to end provisional application but still remain a party to the ECT in a similar standing as Norway⁵⁸ that signed, did not consent to provisional application and before long appears not to ratify the ECT.⁵⁹ This might enable Russia to continue to participate in the State Party Conference of the ECT and remain represented within its secretariat. The notification itself, however precludes the option of keeping diplomatic channels open under the State Party Conference in favor of closing down on legal scrutiny under the provisions of the ECT. This of course concerns the \$50 billion Yukos majority shareholder claim. Unlike Norway, Russia agreed to provisionally apply the investor state arbitration provisions of the ECT. The Yukos affair may not have ended investment flows but its legal aftermath now sets the scene for an investor-state arbitration

that ends all investor-state arbitrations in Russia (See Annex 1 *Order of the Government of the Russian Federation of 30 July 2009 #1055-r Moscow*). Inside the Russian government there are many who think the break with the Charter was wrong. There are good reasons to want to attract foreign direct investment into Russia but the current confrontational position taken by Prime Minister Putin's government frustrates that. The most important change in energy markets today are ironically provided by the new economic crisis driven stresses in the Russian oil and gas sector that erode its ability to mobilize the finance and technology it needs.

Once upon a time in Eurasia

Market & Foreign Policy Dynamics

Russia's economic transition in the early nineties meant it could not offer the fiscal and legal stability that investors generally require. Russia's economic restructuring managed to attract major investments in upstream oil and gas projects through several production sharing contracts nonetheless. Recourse to these PSA's appears now to be rejected by the Concept as well. The ECT further complemented evolving Russian energy policies and frameworks with a stable international regime to promote and protect investment and regulate trade and transit across a multitude of borders and emerging jurisdictions. The transfer of state owned assets to the then still embryonic market economic system of Russia meant to forge societal change. It would create a strong Russian middle class to stabilize and carry forward the momentum for Russia's broad rule based economic integration within the world economy. This did not envision Russia emerging as a petro-state or languishing in its role as a resource and commodity provider to the rest of the world, but meant to ensure its successful transition to a mature market economic system alongside that of other OECD members. Poorly implemented reforms however transferred huge swaths of state assets in to the hands of a select number of powerful few. This discounted and derailed much of the market economic reform effort, raising further suspicions on cooperation with the West.

By the time of Vladimir Putin's second term as Russian President the world had also changed. Geopolitical dynamics since 9/11 2001, in which the invasion of Iraq, Kosovo's independence and NATO's expansion stand out much sharper than market reform, strengthened Russia's sense of being an encircled player on the world stage. The Kremlin's retake and centralization of management control

enhanced the role of Rosneft and Gazprom as national champions. The Russian Duma voted Gazprom's monopoly position into law in 2006 contrary to hopes of broadening energy sector reforms already ongoing in Russia's electricity sector. When Russia assumed the chairmanship of the G8 and dedicated this to energy security in January 2006, it promptly cut gas supplies to Ukraine in defiance of 'club rules'; a further chill to the frosty welcome in the house of the West.

In less than a decade Russia's oil and gas sector governance swung from loosening the reigns of market forces, towards a reassertion of state control and geopolitical assertiveness. If Gazprom's rising market dominance was driven by its classic monopolist behavior it has more recently resorted to abuse of market power when this dominance is used as the foreign policy tool closest to the Kremlin's hands.

To some the Kremlin sacrificed Gazprom's reputation as a reliable supplier to project 'gas power' in a display of heavy-handed market interventions wherever its sovereign interests might be at stake. To others the two recent interruptions in gas transit to Europe, whether they occurred for commercial intentions or not, have damaged both Russia's and Ukraine's reputation as reliable gas supply and transit countries. To confront these risks and perceptions the European Union stepped up efforts to complement the bilateral relations its Member States forge with Russia and launched initiatives that together should evolve into a common foreign energy security policy. This entrenchment of positions on both sides of the energy policy fence adds a new risk dimension over and above the traditional risk that characterize energy markets.

The Georgia crisis of August 2008 and the ongoing gas market controversies between Russia and Ukraine reinforced the energy market policy response. The EU in particular sharpened policy focus on gas import diversification including from the South Caucasus and Central Asia which culminated in the successful conclusion of the below mentioned agreement on the Nabucco project. Box 1 *Change is in the air* illustrates how these initiatives depart from the 'soft power' the European Union normally projects through its market reform and enlargement agendas. On the one hand there is a call for scrutiny on foreign investments by 'third parties' that seek access to market economies of the Euro-Atlantic. An OECD trend that does not only address Russia's foreign economic interests, but also those of other key players such as China.⁶⁰ On the other hand the European Union seeks to mobilize investment through innovative mechanisms that challenge these market rules themselves.

It is not surprising that the EU and Russia have become more outspoken and discriminating in their foreign policy stance towards each other. The United States on the other hand revisits a wider vision on energy market integration in Eurasia as it seeks to reset relations with Russia and work more with China in energy sector affairs too. The first foreign visit by the new Secretary of State to China and the appointment of a Special Envoy for Eurasian Energy Affairs to replace the Special Advisor for Caspian Basin Diplomacy reflect a more inclusive Eurasian stance on the part of the United States. The US will be working with Russia through a newly created Binational Commission. The EU seeks to balance government and business interest of individual member states with an emerging common foreign energy security policy that aims to speak in ‘one voice’ but with or ‘against’ who really? With which internationally acknowledged disciplines and principles can the EU engage most constructively on the international scene?

While solidarity among EU member states is certainly a good thing, solidarity among Eurasian stakeholders is even better. Producer, consumer and trade interests should be wary of an energy security policy race and other efforts to outsmart each other. ‘Counter solidarity’ to confront other interest groups is not policy at its best.⁶¹ Reestablishing a clear and convincing vision on Eurasia’s overall energy market performance with Russia is needed.

The proposals of President Medvedev could serve as a vehicle to reset and fine tune energy relations with Russia. Now that we may have to accept that open market rules are less broadly shared and even less so implemented, ensuring reliable investment and trade terms seems to be a more realistic policy focus than the pursuit of energy market liberalization in Russia⁶² (See also Box 2 *Ukraine’s messy middle ground*). An arrangement on investment might have been useful to avoid redundancies such as the ‘Gazprom clause’ referred to in Box 1 *Change is in the air*. The EU’s market rules and institutions at member state and community level should provide sufficient disciplines already. This could have stimulated upstream investment in Russia in return.

Box 2 Ukraine's messy middle ground

Ukraine, the balancing point between the asymmetric energy policies of Russia and the Euro Atlantic in Eurasia, provides a good example of what happens if multilateral frameworks fail to instill discipline on economic performance and bilateral disputes.⁶³

Eighty percent of European gas imports transits through an integrated system that cannot distinguish between supply and transit flows from indigenous Ukrainian, Russian and Central Asian supply sources. Ukraine's poor gas market performance stages wider Eurasian gas market security.

Political rivalry over foreign economic policy and economic reform agendas for the effectively insolvent gas sector, brought the Ukrainian economy to its knees. 'Coup de grace' was served by the global economic crisis. Threats by Russia to cut off supplies over the summer period should Ukraine not fulfill its payment obligations for gas supplies and storage requirements for winter, prompted the European Union to step out on a slippery slope with public institutional financing.

To enable Ukraine to make payments to Gazprom and to ensure flows are not interrupted Ukraine agreed to stringent gas sector reform requirements identified by the European Union and international financial institutions (IFIs). This development implies a relinquishment of Ukraine's sovereign control over its ailing gas sector. At the same time, the European Commission together with the IFIs involved edge closer to becoming a party to the volatile gas supply and transit agreements structures between Ukraine and Russia.

This show of solidarity sets an important precedent. Russian demands result in an encroachment of Ukraine's sovereign control over its gas sector by drawing in European stakeholders who seek to maintain transit flows. Their involvement exposes them further to risk that characterizes the endless continuum of agreements governing Ukrainian-Russian gas sector trade. Russia and its state actors on the other hand pursue their interest unchallenged when the Concept is not considered and the Charter label and substance are abandoned in full.

In parallel to these developments Ukraine notified the Lisbon depositary on the 6th of July the 'Verkhovna Rada' ratified the Trade Amendment to the ECT.⁶⁴ This made Ukraine the 34th state to ratify the amendment that enters into force upon receipt of the 35th instrument. Russia's ECT withdrawal however might trigger its entry into force without additional ratifications required.⁶⁵ Dmitry Medvedev's open letter to President Yushchenko of Ukraine highlights that Russia is of the "impression that Kiev constantly seeks to break traditional economic ties with Russia first and foremost in the energy sector."⁶⁶

The energy policy exchange at low tide

Energy security, transition and climate change

Investment

There are many other initiatives that aim to improve energy market security, in particular gas market security where risks are most acute. These mostly focus on transit and less so on investment where the bigger long-term risks reside. Once economic recovery sets in and demand picks up, upstream investments risks will resurface more sharply than the current preoccupation with midstream infrastructure trajectories. The moderate price environment will spark commercial incentives to cut capital expenditure on the part of IOCs, while monopolist tendencies of exposed resource holders and NOCs do their bit to sharpen decline rates and push new capacity over the horizon. Counter cyclical investment is unlikely in the current economic and geopolitical environment, not so in depth debate on investment terms. This is certainly the case for the upstream gas sector investment in Russia. Delays in developing the Bovanenkovskoye and other major Russian fields make Gazprom all the more reliant on Central Asian supplies when European and domestic demand picks up. NOCs, on the other hand, clearly have the upper hand in making counter cyclical investments as Chinese acquisitions overseas and Saudi investment decisions demonstrate in a saturated oil market.⁶⁷ Public private partnerships are certainly needed to mobilize and stabilize investment flows in Russia and Central Asia to secure sustainable gas sector performance in Eurasia for the longer term. But governments should also establish more clarity on the principles that govern the so called pre-investment phase that the ECT and MAI failed to cover and ensure that project specific partnerships strengthen and do not undermine the overall governance system.

Transit

The need to create an effective transit regime for hydrocarbons in Eurasia has long since been acknowledged in the Energy Charter process. This led to the negotiation of a detailed article on transit in the ECT.⁶⁸ To accommodate transit of hydrocarbons more comprehensively, negotiations on a legally binding Energy Charter Protocol on Transit (ECPT) commenced in 1998. Thus far this multilateral approach on transit, now ongoing for more than a decade, has failed to deliver a final agreement due to outstanding issues between Russia and the European Union.⁶⁹ The key opposition between the European Union and Russia was sparked by the introduction of the so called Regional Economic Integration Organization. This enables the European Union to ring-fence the ECTP's proposed governance of 'transit' within its member states. The European Union claims that by virtue of its liberal internal energy market laws, the area within its jurisdiction has moved beyond the necessity of a transit regime. According to Russia this changed the negotiation mandate fundamentally. The European Union simply no longer wished an agreement on transit it, formally still, negotiates under international law to be applicable within its own jurisdiction. Did this not mark the escape from the Energy Charter by the European Union through a more discreet window than Russia has now opted for?

There are four other public policy initiatives on transit that should also be taken into account when considering the Concept:

- The UN resolution on “Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation” adopted by the UN General Assembly on the 19th of December 2008.⁷⁰
- The European Commission's proposal on a “Working Arrangement for the implementation of the Early Warning Mechanism (EWM) on the supply of oil, natural gas and electricity from the Russian Federation to the European Union”.
- The concept of a Caspian-Black Sea-Baltic energy transit space within the framework of the Energy Charter. Ukraine appears to propose that countries with key transit routes and high import dependencies such as Belarus and Georgia pool their interests in negotiations with producers and other consumers. The initiative of Ukraine was discussed at the same Energy Charter Strategy Group meeting on the 16th of June 2009 in Brussels where Russia's Concept was discussed.⁷¹

- A Trans-Atlantic Energy Security Strategy proposed by US Senate Foreign Relations Committee Ranking Member Dick Lugar to establish a credible energy security strategy that diversifies energy sources for all Europe, establishes a collective framework to work with Russia, and refuses to tolerate the use of energy as an instrument of coercion.⁷²

The UN resolution was initiated by the new President of Turkmenistan Gurbanguly Berdymukhamedov in 2007 to help achieve the UN millennium goals and discussed at a well-attended UN conference held in Ashgabat on the 23rd of April 2009.⁷³ This led to the establishment of an expert group to further work out a UN convention based on this resolution that among others was supported by the Netherlands.

Russia welcomed the European Commission's initiative at the EU-Russia Summit Khabarovsk meeting in May 2009 where both sides agreed to continue technical negotiations in order to finalize the draft proposal. The "working arrangement" implies a temporary set up, pending the establishment of more permanent arrangements. This may be provided by any of the above mentioned initiatives. The draft document proposes a non-legally binding procedure between the European Commission's Directorate General for Transport and Energy and the Russian Ministry of Energy to implement an Early Warning Mechanism. This initiative resembles the institutional set up of President Medvedev's proposal for a "Treaty on the Management of Emergency Situations in Transit of Energy Materials and Products". A combination of both initiatives that would draw on the agreed elements of the putative Energy Charter Protocol on Transit might strengthen its effect in particular for countries such as Ukraine, Belarus and Georgia.

The Eastern Partnership (EaP) that the European Council adopted under the Czech EU Presidency on the 7th of May 2009 in Prague provides another recent dynamic to the Russian proposals. This policy framework initiated by Sweden and Poland in response to the conclusions of the European Council in 2007 proposes to deepen the EU's relations with EaP member states Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.⁷⁴ It introduces the concept of "Deep and Comprehensive Free Trade Agreements" (DCFTA) that would also cover energy to further align energy market governance in these states with the open market disciplines of the EU's internal energy market.⁷⁵ The EaP clearly distinguishes from notions such as 'third country producers' or reciprocity clauses and does not flirt with state aid to European undertakings against state owned undertakings of third countries as the Second Strategic Energy Review does.⁷⁶ What is clear amidst the legal confusion is that Russia's state

driven energy sector governance that is projected abroad through its 'sovereign monopolies', creates opposing foreign economic policy perspectives that clash in both principle and practice with the coherent application of open market rules along energy systems across wider Eurasia. Russian Prime Minister Vladimir Putin announced on the 9th of June 2009 that Russia, Kazakhstan and Belarus will conduct WTO accession negotiations as a single customs union could be seen in this context as a 'tit for tat' reaction to the (EaP). President Medvedev later called the idea too "problematic" and said Moscow would likely continue its WTO accession talks independently.⁷⁷ The controversy continues to obfuscate WTO accession.

Relations between the United States, European Union and Russia increasingly dominate multilateral energy sector and trade relations in Eurasia. This is at the expense of the interests and empowerment of other sovereigns. The proposal of Ukraine to form a "Caspian-Black Sea-Baltic energy transit space" should be seen in this light. The prospect of a transit cartel presents itself as a useful posturing exercise for intermediary states when the policy debate between dominant consumer and producers sharpens and their ambition to work within multilateral frameworks weakens.

The ambition to maintain a collective (multilateral) governance system of international energy markets motivates US Senator Lugar's initiative for a Trans-Atlantic Energy Security Strategy: "*The absence of a collective energy security strategy will lead to greater fragmentation among European nations and across the Atlantic. This fragmentation will not be exclusive to energy policy; it may also detrimentally impact on our ability to act upon shared security and economic issues.*"⁷⁸ This sets the stage for stronger engagement by the United States in multilateral energy market governance.

Finally, the United Nations Framework Convention on Climate Change (UNFCCC) effort to negotiate a post Kyoto agreement on climate change in Copenhagen by the end of 2009 further provides opportunities to strengthen multilateral frameworks and engage Russia. President Medvedev's conceptual approach does not address energy transition or climate change as a global energy security theme.⁷⁹ Transition to a low carbon economy and to energy security are intimately linked in substance and pose cross-border challenges that broad policy frameworks can best accommodate. Russia has just recently published its own doctrine on climate change that acknowledges the impact of climate change and the benefits of taking early action weighed against the long-term cost.⁸⁰ This means that in principle the political opportunity and momentum to align interests is also available here. This may add momentum to negotiations in the lead up to Copenhagen and strengthen any post Kyoto

agreement with a complementary update of existing agreements in the context of energy market security.⁸¹

Project specific initiatives

New market entrants

Where general frameworks do not provide sufficient investment incentives and stability, project specific arrangements enhance oil and gas market security. They facilitate market access for new entrants in favor of supply diversity and competition. This requires project specific coordination by governments and companies to mobilize cross border investment and secure transit flows in a coherent legal and regulatory system:

- The Intergovernmental agreements between Azerbaijan, Georgia and Turkey – the key states involved with the Baku-Tbilisi-Ceyhan oil pipeline (BTC)⁸² and the South Caucasus Pipeline (SCP) in the same ‘right of way’ up to Erzerum in Eastern Turkey. As well as the subsequent Host-government agreements concluded between each of these states and the pipeline investor groups individually.
- The Energy Charter ‘Model Agreements for Cross-Border Pipelines’ prepared by the legal advisory group to the Energy Charter in a first and second edition that the Energy Charter Conference welcomed in December 2003 and 2007 respectively. The Energy Charter Model Agreements set a standard for negotiations that state and private parties may draw from, strengthening contract stability and improve market transparency.⁸³
- The Agreement among Austria, Bulgaria, Hungary, Romania and Turkey regarding the Nabucco Project that was signed on the 13th of July 2009 in Ankara Turkey follows the same structure as the BTC and SCP agreements between governments. The Nabucco agreement does, however, not include separate Host-government agreements but provides for Project Support Agreements in recognition of the fiscal and legal stability within the EU.
- Finally, the Concept of a Caspian Development Corporation, referred to already above is a public-private partnership that proposes to catalyze gas production and infrastructure development along non-traditional routes in the Southern Corridor, by constructing a mechanism for coordinated gas purchasing.

Incumbents and dominant players

The Nord Stream and South Stream gas pipelines are the most visible industry consortium initiatives to invest in transportation routes that avoid exposure to transit and regulatory risk, maintain market share, and avoid gas to gas competition. There is natural market opposition between the interest of new market entrants and incumbents. Incumbents do the heavy lifting in ensuring volumes and dominant flows through main supply and distribution networks while new entrants add to overall performance by augmenting market discipline and security through the competition and diversity they bring. The current geopolitical climate in Eurasia however has pushed this natural opposition towards an impractical stand-off that is harmful to the vital interests of all stakeholders. Despite the vagaries of the Concept, President Medvedev appears to reopen a window if Russia is willing to be bound by what it negotiates.

The Big Rethink

Beyond Labels; Process & Procedure

The sobering effect of the economic crisis, the ensuing drop in oil and gas prices and gradual administration changes in Russia, the United States and European Union enable a timely rethink of energy governance systems. The initiative however remains with Russia to constructively contribute to and demonstrate ‘good faith’ in energy investment, trade and cooperation with its international partners. Addressing Russia on the substance of the Concept, the 1991 Energy Charter and 2006 G8 St Petersburg Principles, may well be more virtuous than denying the dynamics from which Russia’s rejection of the ECT stems for formalistic reasons alone. The global geographic scope and the relation of any ‘new legal framework’ to existing international arrangements such as the ECT, WTO and other well established international and bilateral agreements in particular between Russia and the EU must be better understood.⁸⁴ Existing arrangements cover energy markets already quite comprehensively and their founding principles remain non-negotiable. There is an emerging consensus however that the current system is not adequate to deal with new challenges. The apparent lacunae that remain: equitable terms for investment, land bound transit and market access cannot be overcome without reaffirming these fundamental principles and extending their reach. Initiatives that question the validity and status of existing legal frameworks erode industry and investor confidence. A reassessment of international policy frameworks and institutions that is currently provided for in the Charter context or EU Russia dialogue is needed. Russia has established a new ‘status quo’ that aside from the Charter, warrants discussion in the IEA and OECD context, industry advisory boards and oil and gas industry associations.

Before any party will commit to such a reassessment that may lead to further negotiations, the political conditions as well as a clear agreement on the setting, objectives, outcomes and duration must be in place. This could help achieve a more predictable and effective understanding with Russia on how to

address the wide ranging energy security challenges. For Russia these primarily hinge on investment and market access. This should be high on the agenda of Euro Atlantic stakeholders too in particular once demand picks up.

Opportunities to meet and move forward

The Russian initiatives coincide with the ongoing review of the Energy Charter process that the Energy Charter Conference will take into consideration at its next session in December 2009.⁸⁵ The Netherlands will chair the IEA governing board meeting at ministerial level on 14-15 October. The meeting creates an opportunity to further discuss the new 'status quo' with Russia and other invited energy ministers before the Energy Charter Conference of 2009.

Without prejudice to the fact that the ball remains in the Kremlin's court and to other ongoing dialogues, the Netherlands may consider a proactive role. Dutch experience in public private partnerships in oil and gas production, transit, trade and investment make it sensitive to most concerns along energy value chains. The hard fought national policy debate on EU energy market liberalization in the Netherlands and its well established role in support of the rule of law enable a well informed vision on investment requirements and the open, competitive and non-discriminatory functioning of energy markets in Europe and beyond.⁸⁶ The blend of public policy and corporate perspectives, position the Netherlands well as a responsible interlocutor between producer and consumer interests.⁸⁷ As before The Hague can offer its 'good offices' and assist in taking new and existing initiatives forward to keep Russia onboard.⁸⁸

Bilateral negotiations between the European Union and Russia are the obvious setting for further dialogue and engagement. Atmospheric and results thus far, however, have not been very encouraging. Important countries in the 'common abroad' that Russia shares with the EU all have vital interests here that need to be heard: Ukraine, Moldova and Belarus, Central Asia and the South Caucasus, Transatlantic and Asian-Pacific stakeholders would all by definition be excluded from a bilateral EU-Russia dialogue. Clearly a consensual multilateral approach is also still needed and not fully out of reach.

The Hague may not own up to its reputation as a centre for rule of law and the capital of the historic 1991 Energy Charter if Russia's recent steps are taken for granted and the problems of the existing

governance system are not further assessed. This is called for since Energy Charter objectives and instruments are put at stake by a major constituent of the process. Gathering industry and government stakeholders in a small ad hoc setting is useful to establish where they really stand, test what options are available, and explore grounds to take next steps. Consumers may make haste slowly now that depressed markets have bought time ample supplies are momentarily on their side, producers might be more pressed if demand does not return on trend and declining fields are not timely replaced with new production to meet even depressed demand. Overall it seems unwise to try and turn this very large ship of state by the time the Energy Charter Conference meets in December 2009 as some suggest.⁸⁹ Not merely because this would reward Russia's brinkmanship but, worse still, will rush and so preempt the profound reassessment that changed circumstances call for. An option, further down the road is to reconvene the signatories of the 1991 The Hague Energy Charter Declaration.

The current signatories to the Energy Charter include Russia still and bring in other key Asian Pacific and Euro-Atlantic players. They are best and uniquely positioned to conduct the 'rethink' that the above described change and trends point at. Firstly to escape the entrenched positions that the 'mini-lateralism' between the EU and Russia has arrived at and, secondly to avoid diluting focus between too varied interest in a 'maxi-lateral' UN context and, finally third, side step the overcharged agendas of other forums such as the G8. This could provide significant profile and opportunity to focus senior policy and industry minds on the new 'status quo' in international energy market governance without creating new institutions. An opportunity to rebalance and align initiatives in order to recast but not lose out on existing agreements with Russia. When the politics and the process are in place, outstanding issues on energy investment, transit and trade can be settled with Russia, without prejudice to the existing ECT and the practice its participants have set.

Annex I

Order of the Government of the Russian Federation of 30 July 2009 #1055-r Moscow

1. Adopt the proposal by the Ministry of Energy of Russia, coordinated with the MFA of Russia and other interested federal bodies of the executive, to send a notification of the Russian Federation's intention not to become a participant of the Energy Charter Treaty, as well as the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, signed on behalf of the Russian Federation in Lisbon on 17 December 1994.

Approve the draft of the respective notification of the Russian Party (attached).

2. The MFA of Russia is to send the notification mentioned in part 1 of this order to the Government of the Republic of Portugal.

Signed: Head of Government of the Russian Federation Vladimir Putin

(True to the notification delivered on the 20th of August 2009)

Notification

The Embassy of the Russian Federation to the Republic of Portugal presents its compliments to the Ministry of Foreign Affairs of the Republic of Portugal and has the honour to inform of the following.

In accordance with Article 45(3(a)) of the Energy Charter Treaty, signed in Lisbon on 17 December 1994, with the present the Russian Federation declares that it does not intend to become a participant of the said Treaty. The Russian Federation also confirms that in accordance with Article 45(1) of the Treaty it did not apply provisionally any Treaty provision to the extent that such provisional application was inconsistent with the Constitution, laws or regulations of the Russian Federation.

The Russian Federation also does not intend to become a participant of the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects signed in Lisbon on 17 December 1994.

Consequently, in accordance with Article 18(a) of the 1969 Vienna Convention on the Law of Treaties, the Russian Federation does not consider itself bound by the obligation to refrain from acts which would defeat the object and purpose of the said Treaty and Protocol.

The Embassy avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Republic of Portugal the assurances of its highest consideration.

Notes and References

¹ The Energy Charter's membership comprises as ECT signatories: the European Union, The Newly Independent States of the former Soviet Union, Australia, Japan, Norway, and Turkey. Countries participating in the Energy Charter as observers are signatories of the 1991 The Hague Energy Charter: Afghanistan, Algeria, Bahrain, Canada, China, Egypt, Indonesia, Iran, Jordan, Korea, Kuwait, Morocco, Nigeria, Oman, Pakistan, the Palestinian National Authority, Qatar, Saudi Arabia, Serbia, Tunisia, United Arab Emirates, United States of America and Venezuela. Key international organizations also participate. See also: "Indonesia Becomes the 74th Participant in the Energy Charter Process" on the 26th of May 2009 Energy Charter Secretariat (ECS) Brussels retrieved at <http://www.encharter.org/index.php?id=471&L=0>

² '*pacta sunt servanda*' and '*rebus sic stantibus*' doctrines laid down the 1969 United Nations Vienna Convention on the Law of Treaties (1969 UN Vienna Convention) Part III under article 26-27 "*Pacta sunt servanda*" and on *Internal law and observance of treaties*, and Part V section 3 Article 62 *Fundamental change of circumstance*. The change of circumstance doctrine is applied very restrictively to avoid that states use it to escape international obligations or undermine the stability of existing agreements.

³ The ECT entered into force on the 16th of April 1998.

⁴ Gaillard, Emmanuel "Russia cannot walk away from its legal obligations" *Letters, Financial Times* (August 18 2009) According to Professor Gaillard, Professor at Law and legal counsel for majority shareholders of the Yukos oil company, Russia's withdrawal aims to sow confusion and discord to preempt a successful award amounting up to \$ 50,- billion to claimants while a tribunal decision on jurisdiction and the ECT's application in Russia is pending.

⁵ "Soviet-era power infrastructure creaks", *Financial Times* (18 August 2009) p.4.

⁶ Natural Gas Market Review 2009, International Energy Agency (OECD/IEA Paris 2009) p. 45.

⁷ Izundu, Uchenna "Gazprom grapples with dents to revenues, investments" *Oil&Gas Journal* Volume 107.29 (3 August 2009) p. 25-26.

⁸ Coby van der Linde, Aad Correljé, Jacques de Jong en Christoph Tönjes , "The paradigm change in international natural gas markets and the impact on regulation", (EN) CIEP, The Hague, International Gas Union (IGU)/Clingendael Institute (April 2006).

⁹ Gingrich, Newt "Our Tanks Are on Full, The energy crisis is an artificial one, created by bad policies" *Newsweek* (April 13 2009) retrieved at <http://www.newsweek.com/id/192480/>

¹⁰ "Chairs Summary, Global Energy Security" *Official Website of the G8 Presidency of the Russian Federation in 2006* (St Petersburg, July 17, 2006). Paragraph 3. retrieved at <http://en.g8russia.ru/docs/25.html>

¹¹ "*Konceptual'nyj podchod k novoj pravovoj baze mezhdunarodnovo sotrudnichestva v sfere energetiki (celi i principy)*" President of Russia, Official Web Portal, 21 April 2009, retrieved at <http://www.kremlin.ru/text/docs/2009/04/215303.shtml>

¹² "*Otveti pomoshchnika presidenta Arkady Dvorkovicha na voprosy zhurnalistov*" President of Russia, Official Web Portal, Helsinki, 21 April 2009, retrieved at <http://www.kremlin.ru/text/docs/2009/04/215305.shtml>

¹³ "Global Energy Security" *Official Website of the G8 Presidency of the Russian Federation in 2006* (St Petersburg, July 16, 2006) retrieved at <http://en.g8russia.ru/docs>

¹⁴ The Multilateral Agreement on Investments (MAI) was negotiated between 1995 and 1998 under the aegis of the OECD. Negotiations were complex from the outset due to optics that the limited geographical scope of the OECD negotiating parties provided to the rest of the world (no Newly Independent States(NIS) were involved) In substance controversies on environmental and labor standards meant that negotiations on the MAI ceased in December 1998. retrieved at <http://www1.oecd.org/daf/mai/intro.htm>

¹⁵ Russia's unilateral withdrawal from the Energy Charter will be subject to further debates. Though the ECT itself provides for it under 45 (3(a)) as is duly cited in the Russian Government order of 30 July N° 1055. This is consistent with what the 1996 Vienna Convention on the Law of Treaties provides under Part V section 1 in Article 41 though Article 43 provides that this does not affect the duty of any state (in this case Russia) to fulfill any obligation in the treaty to which it would be subject under international law independently of the treaty (in this case the ECT).

¹⁶ Though this might have been to Russia's favor argues also Kirsten Westphal in "Medwedjew beim Wort nehmen" *SWP-Aktuell* N° 42 Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit (Berlin July, 2009) p. 3.

¹⁷ "EU needs new energy treaty: EC boss" *European Gas Daily, Platts*, Volume 14 Issue 170 (3 September 2009) p.1-2.

¹⁸ Crooks, Ed. "Call for more intervention on energy" *Financial Times Limited* (August 4, 2009)

¹⁹ "Energy security paper backs dash for home grown energy" *HM Government Press Notice* Ref. 2009/089 (London 5 August 2009) 4th paragraph.

²⁰ This 'new dash for gas' driven by national security interests and perceptions of scarcity, contrast with the dash for gas launched in the nineties. This was motivated by economic and environmental considerations in the presence of abundant, if not stranded, gas reserves coming available globally.

²¹ Wicks, Malcolm, Rt. Hon. MP, "*Energy Security: a national challenge in a changing world*" Department of Energy and Climate Change (London, 5 August 2009) retrieved at http://www.decc.gov.uk/en/content/cms/what_we_do/change_energy/int_energy/security/security.aspx

²² "*The Demand Conundrum: From Suppression to Destruction*" IEA medium Term Oil Market Report 2009 Edition (OECD/IEA Paris June 2009) p.24-30

²³ The Shanghai Cooperation Organization (SCO) an intergovernmental organization established on the 15th of June 2001 by China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Uzbekistan. Though its initial rationale centered on security concerns in respect of separatism, terrorism and fundamentalism its current goals and objectives are voiced positively to advance mutual confidence and good-neighborly relations among the member countries. India, Iran, Pakistan and Mongolia are observer states. SCO has a permanent secretariat in Beijing and a regional counter terrorist structure in Tashkent. retrieved at <http://www.sectsco.org/EN/brief.asp>

²⁴ European Parliament (EP) resolution of 3 February 2009 on the Second Strategic Energy Review (2008/2239INI) p.4, paragraph 8, and p. 8, paragraph 58 retrieved at <http://www.europarl.europa.eu>

²⁵ Article 11 on *Certification in relation to third countries* Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (Text with EEA relevance) Official Journal (14 August 2009) retrieved at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:211:0094:0136:EN:PDF>

²⁶ The Energy Community Treaty signed in Athens on the 25th of October 2005 by countries of South Eastern Europe applies the EU's internal energy market legislation; the 'acquis communautaire' on energy to network energy among adhering parties in accordance with a specific timetable. "The Energy Community Treaty", *Official Journal of the European Union* L 198 (Brussels 20 July 2006) p. 18-36 retrieved at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:198:0018:0018:EN:PDF>

- ²⁷ “EU’s third energy unbundling package gets final, formal sign-off” *Platts EU Energy* Issue 211 (July (3, 2009)
- ²⁸ The multilateral agreement on investment (MAI) might have provided a useful framework to settle these inconsistencies but the OECD deferred negotiations indefinitely in 1998. The ‘Gazprom clause’ against the spirit of the 1991 Energy Charter and ECT is not captured by the latter’s non-discriminatory energy market rules. These cover only the post investment phase. Negotiations on a supplementary treaty to extend the ECT’s scope to the pre-investment phase were deferred in 1998.
- ²⁹ Easton, Nina “Obama: NAFTA not so bad after all, The Democratic nominee, in an interview with Fortune, says he wants free trade to “work for all people”” *Fortune Magazine* (last updated June 18, 2008). retrieved at http://money.cnn.com/2008/06/18/magazines/fortune/easton_obama.fortune
- ³⁰ Popova, Nadia, “Obama Charts Path to Bolster Trade”, *The Moscow Times* Issue 4183 (Moscow 8 July, 2009) retrieved at <http://www.themoscowtimes.com/articles//detail.php?ID=379385&print=Y>
- ³¹ Repeal of the Jackson-Vanik Act is not decided by the US President but requires US Congress legislation a prerequisite to extending normal trade relations to Russia. Since 1994 Russia has been found in compliance with the Act’s freedom of emigration requirements but continues to be subject to semi-annual compliance reviews that take into account wider governance issues such as on democracy and human rights. See also “Jackson-Vanik and Russia Fact Sheet” The White House (Washington 13 November 2001) retrieved at <http://georgebush-whitehouse.archives.gov/news/releases/2001/11/20011113-16.html>
- ³² “*Otvety pomoshchnika Presidenta Arkady Dvorkovicha na voprosy zhurnalistov*” President of Russia, Official Web Portal, 21 April 2009, Helsinki retrieved at <http://www.kremlin.ru/text/docs/2009/04/215309.shtml>
- ³³ “*Otvety pomoshchnika Presidenta Arkady Dvorkovicha na voprosy zhurnalistov*” President of Russia, Official Web Portal, (Helsinki, 21 April 2009) retrieved at <http://www.kremlin.ru/text/docs/2009/04/215309.shtml>
- ³⁴ Vienna Convention Article 40 on Amendment of multilateral treaties and Article 41 on Agreements to modify multilateral treaties between certain of the parties only.
- ³⁵ “*Konceptual’nyj podchod k novej pravovoj baze mezhdunarodnovo sotrudnichestva v sfere energetiki (celi I principy)*” President of Russia, Official Web Portal, 21 April 2009, paragraph 2 retrieved at <http://www.kremlin.ru/text/docs/2009/04/215303.shtml>
- ³⁶ “Otvot oficial’nogo predstavatelya MID Rossii A.A. Nesterenko na vopros SMI otnositel’no resheniya Rossii ne stanovit’sya uchastnikom Dogovora k Energeticheskoy Chartii” *Ministry of Foreign Affairs of the Russian Federation Department of Information and Press* 1237 Moscow 7 August 2009.
- ³⁷ Putin, Vladimir, “*Mineral’no-syr’evye resursy v strategii razvitiia Rossiskoi ekonomiki*” (*Mineral Natural Resources in the Strategy for the Development of the Russian Economy*) Zapiski Gornogo Instituta Vl.144, (St Petersburg 1999), p. 3-9. In: Balzer, Harley “Vladimir Putin on Russian Energy Policy” Georgetown University (Washington 16 November 2005) retrieved at <http://www.cdi.org/russia/johnson/9297-23.cfm>
- ³⁸ “*Konceptual’nyj podchod k novej pravovoj baze mezhdunarodnovo sotrudnichestva v sfere energetiki (celi I principy)*” President of Russia, Official Web Portal, 21 April 2009, paragraph 1 retrieved at <http://www.kremlin.ru/text/docs/2009/04/215303.shtml>
- ³⁹ Speech of the Russian State Duma Delegate Mr. V.A. Yazev at the occasion of the 10 year anniversary session of the Energy Charter Conference on the 17 December 2001, paragraph 5, unpublished, retrievable with the author.
- ⁴⁰ “*Konceptual’nyj podchod k novej pravovoj baze mezhdunarodnovo sotrudnichestva v sfere energetiki (celi I principy)*” President of Russia, Official Web Portal, 21 April 2009, paragraph 2 retrieved at <http://www.kremlin.ru/text/docs/2009/04/215303.shtml>

⁴¹ *Ibidem*. paragraph 3 & 4

⁴² Konoplyanik, Andrei A., “Russia:”don’t oppose the Energy Charter, help to adapt it” *Petroleum Economist* (July 2009) p. 2-3.

⁴³ The Permanent Partnership Council is the highest coordinating body of the EU-Russia Energy Dialogue in which the Russian Minister for Energy, The EU’s Commissioner responsible for Energy and the Ministers responsible for Energy of the current and upcoming EU presidency meet.

⁴⁴ The ECT Article 34(7) requires a detailed Energy Charter review carried out at intervals of no more than five years. The Charter Conference should review functions in light of *implementation* of the provisions of the Treaty and its subsequent Protocols. This may lead to amendment or abolishment of Charter Conference and Secretariat functions. The November 2008 Charter Conference nominated Professor Sergio Garribba to conduct the current review that will be presented at the next Conference meeting of 2009. “2009 – Year of the Regular Energy Charter Review” ECS retrieved at <http://www.encharter.org>

⁴⁵ Mityayev, Oleg “Khabarovsk: Russia-EU gas dialogue still in the deadlock” *RIA Novosti* (2008)

⁴⁶ “G8 ministers interested in Russian energy proposal – Shmatko” *RIA Novosti* (25 May Rome 2009) retrieved at <http://en.rian.ru/business/20090525?155087711>

⁴⁷ See Article 45(1) of the Energy Charter Treaty and Article 25(1) of the 1969 Vienna Convention on the Law of Treaties.

⁴⁸ Konoplyanik, Andrei A., “Energochartiya-plyus, Rossiya dolzhna vozglavit’ process modernizacii DECH” *Online Vremya Novostej*, N^o 125, (16 July 2009). retrieved at <http://www.vremya.ru/2009/125/8/233299.html>

⁴⁹ `Pravitel’stvo Rossijskoj Federacii Rasporyazheniye ot 30 iyulya` 2009 N^o 1055/p Moskva

⁵⁰ 1969 UN Vienna Convention on the Law of Treaties Article 27 on International law and observance of treaties that stipulates a party may not invoke a violation of internal law to justify its failure to perform a treaty as well as Vienna Convention Article 46 stipulating a similar standard regarding the competence to conclude and consent to be bound by treaties.

⁵¹ See Annex 1

⁵² Hutcheon, Andrew and Spencer, James “Provisional Application of the Energy Charter Treaty” *The European & Middle Eastern Arbitration Review* 2008 retrieved at <http://www.globalarbitrationreview.com/handbooks/3/sections/5/chapters/65/provisional>

⁵³ Though not retrospectively: the ECT’s provisional application survives for investments made after its entry into effect on the 16th of April 1998 for a period of 20 years after 60 working days upon receipt of the notification at the depositary. This occurred on the 20th of August 2009 when the Russian Ambassador to Portugal delivered the notification to the ECT’s depositary at the Ministry of Foreign Affairs in Lisbon. This means that that the ECT ceases to be provisionally applicable in Russia mid October 2009.

⁵⁴ “Otvét oficial’nogo predstavatelya MID Rossii A.A. Nesterenko na vopros SMI otnositel’no resheniya Rossii ne stanovit’sya uchastnikom Dogovora k Energeticheskoy Chartii” *Ministry of Foreign Affairs of the Russian Federation Department of Information and Press* 1237 Moscow 7 August 2009.

⁵⁵ The 1996 Vienna Convention on the Law of Treaties provides under Part V section 1 in Article 43 that withdrawal does not affect the duty of any state (in this case Russia) to fulfill any obligation in the treaty to which it would be subject under international law independently of the treaty (in this case the ECT).

⁵⁶ Jaffe, Amy Myers “Russia and the Caspian States in the Global Energy Balance” Executive Summary Energy Forum James A. Baker III Institute for Public Policy Rice University (May 6, 2009) p. 31.

⁵⁷ Konoplyanik, Andrei “Russia remains a signatory of the Energy Charter Treaty” *Financial Times Letters* (26th of August) 2009. p. 6.

⁵⁸ Norway, however is a member to the European Association and Free Trade Agreement together with Iceland, Switzerland and Lichtenstein and has aligned its governance system with the 27 European Union Member States in the European Economic Area Agreement (Save for Switzerland that retains a bilateral link with the EU). retrieved at <http://www.efta.int/content/eea/eea-agreement>

⁵⁹ Norway normally cites the investor-state arbitration clauses of the ECT, that Russia may now be exposed to, as an unsurmountable obstacle to ratification since this is excluded by its constitution.

⁶⁰ Okano-Heijmans, Maaïke and Van der Putten, Frans Paul, "Europe needs to screen Chinese investment" *Financial Times* (12 August 2009) p.7.

⁶¹ "EU needs new energy treaty: EC boss" *European Gas Daily, Platts*, Volume 14 Issue 170 (3 September 2009) p.1-2.

⁶² Note however that demonopolisation and liberalization of the *internal* gas market are one of the priorities of the Russian energy policy as formulated in the energy strategy 2030 (august 2009). Recent comments by Prime Minister Putin made on the 20th of September 2009 in Salekhard at a gathering he hosted for international oil and gas companies to attract investment in the development of Yamal reserves struck a more accommodating note.

⁶³ Chow, Edward, Elkind Jonathan, "Where East Meets West European Gas and Ukrainian Reality" *The Washington Quarterly* (Center for Strategic and International Studies) 32-1 p. 77/92.

⁶⁴ The Amendment to the Trade-related Provisions of the ECT updates GATT based treaty provisions with those of the WTO. See also the "Status of Ratifications of the Trade Amendment to the Energy Charter Treaty as of July 2009" ECS (July 2009) retrieved at <http://www.encharter.org/>

⁶⁵ "Ukraine Ratifies the Trade Amendment to the Energy Charter Treaty" *ECS News* (Brussels 24 July 2009) retrieved at http://www.encharter.org/index.php?id=21&id_article=189&l=0

⁶⁶ "Medvedev ultimatum to Ukraine leadership" *Financial Times* (12th of August 2009) p.1

⁶⁷ "Saudi's invest \$100 in oil and political influence" *Financial Times* (7 September 2009) p.2

⁶⁸ See the 10 paragraph long Article 7 on Transit of the ECT. (ECS),"*The Energy Charter Treaty and Related Documents, A Legal Framework for International Energy Cooperation*", (Brussels September 2004) p. 48-51. retrieved at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf

⁶⁹ Kirsten Westphal in "Medwedjew beim Wort nehmen" *SWP-Aktuell* N° 42 (Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit Berlin July, 2009)

⁷⁰ United Nations (UN) "*Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation*" agenda item 49 of the second committee in the 63rd session of the UN General Assembly A/C.2/63/L.3/Rev.1/Add.1, (New York, 19 December 2008)

⁷¹ "Ukraine proposed EU to form Caspian-Black Sea-Baltic energy transit space" UNIAN online news agency 18 June 2009 retrieved at <http://www.unian.net/news>.

⁷² "Lugar Calls for Trans-Atlantic Energy Security Strategy" *The Lugar Energy Initiative Driving the Future of Energy Security* (April 15, 2008) retrieved at <http://www.lugar.senate.gov/energy/press/speech/ukraine.cfm>

⁷³ The resolution is in fact a re-launch of a similar initiative made at the UN by Turkmenistan in 1998.

⁷⁴ Sikorski, Rodowslaw, "The EU's "Eastern Partnership" with former Soviet states holds the key to relations with Russia" *Europe's world journal*, No. 12 (Brussels, Summer 2009) retrieved at <http://www.europeworld.org/NewEnglish/Home/Article/tabid/191/ArticleType/ArticleView/ArticleID/21413/Default.aspx>

⁷⁵ Peters, Ketië et alia, “*The Eastern Partnership; Towards a New Era of Cooperation between the EU and its Eastern Neighbours*” Clingendael European Studies Programme (CESP) EU Policy Seminar Series Overview paper Clingendael, (The Hague, 20 April 2009)

⁷⁶ European Parliament (EP) resolution of 3 February 2009 on the Second Strategic Energy Review (2008/2239INI) p.4, paragraph 8, and p. 8, paragraph 58 retrieved at <http://www.europarl.europa.eu>

⁷⁷ “Shuvalov: High Oil Prices Harm Russia’s WTO bid”, *Oil & Gas Eurasia The Wall Street Journal* (17 July 2009) retrieved at <http://www.oilandgaseurasia.com/news/p/0/news/5290>

⁷⁸ “Lugar Calls for Trans-Atlantic Energy Security Strategy” *The Lugar Energy Initiative Driving the Future of Energy Security* (April 15, 2008) retrieved at <http://www.lugar.senate.gov/energy/press/speech/ukraine.cfm>

⁷⁹ Nor does it list renewable or non-fossil fuels, apart from Nuclear energy, among the energy materials and products concerned.

⁸⁰ “Klimaticheskaya doktrina rossiskoj federacii” Ministry of Natural Resources (Moscow 28 May) retrieved at <http://www.mnr.gov.ru/part/?act=more&id=3569&pid=1059>

⁸¹ “From Moscow to Copenhagen: Russian Perspectives on Climate Change & Energy Governance; Roundtable Report and Key Findings” Clingendael International Energy Programme (The Hague, 29 May 2009) retrieved at http://www.clingendael.nl/ciep/events/20090529/20090529_final_report.pdf

⁸² BTC, since its inauguration in 2006 – the Heydar Aliyev BTC pipeline

⁸³ Energy Charter Model Agreements, ECS, retrieved at <http://www.encharter.org/index.php?id=282&L=1>

⁸⁴ These are the: Recently launched Eastern Partnership (EaP) that proposes Deep and Comprehensive Free Trade Agreements that also cover energy are to be concluded between the European Union and EaP members (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine); The energy chapter in the Partnership and Cooperation Agreement with Russia that is currently suspended in the wake of the Georgia crisis; WTO accession negotiations of Russia that has now formed a regional cooperation with Kazakhstan and Belarus, and the near decade long negotiations on the Energy Charter Protocol on Transit.

⁸⁵ The ECT Article 34(7) requires a detailed Energy Charter review carried out at intervals of no more than five years. The Charter Conference should review functions in light of *implementation* of the provisions of the Treaty and its subsequent Protocol. This may lead to amendment or, unlikely, abolishment of Charter Conference and Secretariat functions. The November 2008 Charter Conference nominated Professor Sergio Garribba to conduct the current review that will be presented at the next Conference meeting of 2009. “2009 – Year of the Regular Energy Charter Review” Energy Charter Secretariat internet site [retrieved at http://www.encharter.org](http://www.encharter.org) as posted on 7 January 2009

⁸⁶ The Netherlands launched and hosted the 1991 The Hague Energy Charter Conference to promote open and non discriminatory, trade, transit and investment in energy in Eurasia and was instrumental in the launch of the global producer consumer dialogue in the context of the International Energy Forum.

⁸⁷ Handke, Susan and De Jong, Jacques *Energy as a Bond: Relations with Russia in the European and Dutch Context*, Clingendael International Energy Programme, Clingendael Institute for International Relations (The Hague September 2007) retrieved at <http://www.clingendael.nl/ciep/publications/energy-papers/?id=6767&&type=summary>

⁸⁸ The Dutch Minister of Economic Affairs Minister Maria van der Hoeven recently obtained observer status for senior ministry officials at the Gas Exporting Countries Forum GECF; a supposed gas cartel led by Russia. She would withdraw from the forum if and when debate moves beyond the exchange of information and experience towards actual cartel behavior of its members.

⁸⁹ Konoplyanik, Andrei A., “Russia: don’t oppose the Energy Charter, help to adapt it” *Petroleum Economist* (July 2009).