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**EUROPEAN ENERGY SECURITY GOVERNANCE: KEY-
CHALLENGES AND OPPORTUNITIES IN EU-RUSSIA ENERGY
RELATIONS**

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Sijbren de Jong and Prof. Dr. Jan Wouters

ABSTRACT

Energy relations between the European Union (EU) and Russia have come under increasing strain in recent years, not least due to a series of interruptions in the supply of natural gas to the EU. Tensions are further compounded by Russia's recent withdrawal from the Energy Charter Treaty and the fact that agreement on a successor to the over ten year old Partnership and Cooperation Agreement remains outstanding. Through an extensive consultation among key-stakeholders involved, the paper provides a thorough analysis of the current status of EU-Russia energy relations and their major challenges. Departing from a brief chronological analysis that dates from the early 1990s until today, the paper identifies four key outstanding issues which are subsequently analysed in greater detail: (i) reciprocity in market access; (ii) the bilateral and international framework that forms the basis of legal ties between the two powers; (iii) coherence in external energy relations; and (iv) what role the Lisbon Treaty plays in this regard and whether there is a need for a new specific external energy treaty to guide the Union's external efforts vis-à-vis Russia. The paper concludes with a number of recommendations on each set of challenges.

KEY WORDS

Energy, Energy Security, EU-Russia Relations, Energy Charter, Coherence in External Energy Relations, Lisbon Treaty.

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INTRODUCTION*

The security dimension underpinning energy supply was laid bare in the early 1970s by a series of oil disruptions instigated by non-Western supplier countries.¹ In spite of the West's concerted response through the creation of the International Energy Agency in 1974, Europe itself did not react in a unified manner. In fact the oil crises effectively prompted the fragmentation of the European energy market.

Whereas some countries, such as France diversified their energy mix through an increased focus on nuclear energy, others such as the UK and the Netherlands embarked on a rapid exploration of their own deposits. Germany for its part built up strategic gas reserves and invested heavily in additional infrastructure.² It is this fragmentation of the market that would play a major role in the European Union's ('EU' or 'Union') energy policy for decades thereafter.

Twenty years later, after the entry into force of the Treaty of Maastricht in 1993, the European Commission intensified its efforts for the reintegration and reorientation of Europe's energy policy. One of the first times that this was openly and comprehensively addressed was through the launch of the European Commission's Green and White Papers on a European Energy Policy of 1995.³ The documents introduced a tripartite structure which consisted of ensuring (i) the competitiveness of the European economy; (ii) the security of its energy supplies; and (iii) the protection of the environment. These became the three mutually reinforcing angles from which European energy policy were to be approached at both European and international level.⁴

Over time, the depletion of Europe's domestic resources has caused the EU to become increasingly dependent on external sources, Russia in particular.⁵ At EU level the supply of energy is reasonably well diversified, whereas – mainly for historical reasons – at Member State level the dependence on a single gas supplier (in this case, Russia) is sometimes as high as 100%.⁶ It is unlikely that this picture will fundamentally change in the near term, as the EU

* The research leading to these results has received funding from the European Community's Seventh Framework Programme (FP7/2007-2013) under grant agreement n° 225722.

¹ In 1973 the Arab members of the Organization of Petroleum Exporting Countries (OPEC) instigated an oil embargo and curbed their exports to the US and Western Europe as a response to support for Israel during the Yom Kippur War. The 1979 Iranian revolution caused a major disruption in Iranian oil production and exportation. After resumption of exports, production was irregular and at a lower volume, causing prices to rise. During the Iran-Iraq war that followed in 1980, Iranian production virtually grinded to a halt.

² O. H. Maican, (2009), 'Some Legal Aspects of Energy Security in the Relations Between EU and Russia', *Romanian Journal of European Affairs* 9(4), p. 39.

³ COM(94) 659 final of 11 January 1995, p. 4; COM(1995) 682 final of 13 December 1995, p. 2

⁴ Early examples of their reflection at international level include COM(95) 223 final of 31 May 1995 final on the future relationship with Russia, p. 12; the SYNERGY Programme on international cooperation in the energy sector, see COM(95) 197 final of 6 September 1995, p. 2; COM(95) 206 final of 10 October 1995 on the need to formulate a strategy for relations with the independent States of Central Asia, pp. 2 and 8-9; and COM(1998) 181 final of 25 March 1998 on Building a Comprehensive Partnership with China. Note that with China the EU frames energy relations more in terms of environmental concern and trade relations, rather than security, see inter alia, COM(1998) 181 final, p. 21; and COM(2001) 265 final of 15 May 2001 on the implementation of the 1998 Communication, pp. 12-13.

⁵ In 2008, the EU27 were in total for 54,8% dependent on external sources of energy supply. With respect to natural gas the 27 Member States collectively had to import 62.3% of their needs and for oil this share amounted to 84,3%. See Eurostat Energy Statistics. Available at http://epp.eurostat.ec.europa.eu/portal/page/portal/energy/data/main_tables. Russian oil (33%) and gas (40%) take up a particularly high share in these imports. See <http://www.energy.eu/#dependency>. Accessed on 26 October 2010.

⁶ COM(2008) 781 final of 13 November 2008, p. 8.

economy is expected to remain highly dependent on imports of conventional fuels and Russia will remain the Union's main energy partner far into the future.⁷

Recent events have put the relationship between the EU and Russia under strain, causing the Union's energy dependence to be increasingly viewed in security terms. In January 2006, a dispute between Russia and Ukraine over terms and conditions of gas transit to Europe led to an interruption in supply and non-delivery of gas reports by European companies. One year later, in January 2007, a disagreement between Russia and Belarus over terms and conditions of oil transit caused disruptions in oil supply to Poland and Germany, sparking angry reactions from the EU.⁸ In January 2009, the EU experienced the worst cut in its energy supplies when a similar dispute between Russia and Ukraine led to a two-week interruption in the supply of natural gas during what was one of the coldest winters in decades.⁹ The recurrence of these disputes has prompted concerns on whether existing energy security arrangements and instruments are adequate.¹⁰

Further complicating the relationship are the cumbersome negotiations over a successor to the 1997 Partnership and Cooperation Agreement¹¹ (see also *infra*, 1.1 and 2.2), as both the EU and Russia diverge quite strongly on what a new agreement should look like – energy being one of the key areas where agreement is as of yet forthcoming.¹² Partly as a consequence of the above events and the lack of progress on a new agreement, relations between the EU and Russia are currently described as tense, based on conflicts and mistrust; energy being an area where this is prominently felt.¹³ However, the recent coming into force of the Lisbon Treaty prompted renewed hopes that the Union would be able to form a coherent, effective external energy policy vis-à-vis third countries (see also *infra*, 2.3).¹⁴

⁷ European Commission. (2010). 'Stock taking document Towards a new Energy Strategy for Europe 2011-2010', p. 7. Available at: http://ec.europa.eu/energy/strategies/consultations/doc/2010_07_02/2010_07_02_energy_strategy.pdf. oth accessed on 27 October 2010.

⁸ See Euractiv, 'Europe Caught in Middle of Russian-Belarus Oil Dispute, 9 Jan. 2007'. Available at: <http://www.euractiv.com/en/energy/europe-caught-middle-russia-belarus-oil-dispute/article-160725>. A similar dispute occurred earlier in 2010. See Reuters, 'Update 1-Russian oil flows to Belarus despite talks failure', 10 January 2010. Available at: <http://www.reuters.com/article/idUSLDE60904O20100110>. Both accessed on 27 October 2010.

⁹ The severity of the January 2009 gas interruption was of unseen proportions. For a detailed overview of the way in which the EU handled the crisis and how the Lisbon Treaty affects future crisis management, see S. de Jong, J. Wouters, and S. Sterkx, (2010), 'The 2009 Russian-Ukrainian Gas Dispute: Lessons for European Energy Crisis Management after Lisbon', *European Foreign Affairs Review* 15(4), pp. 511-538.

¹⁰ See, inter alia, S. Haghighi, (2007), *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries*, (Oxford: Hart Publishing), p. 357; J. Perovic & R. Orttung, (2007), 'Russia's Energy Policy: Should Europe Worry?', *Russian Analytical Digest* 18, p. 2; J. Stern, (2006), *The Russian-Ukrainian Gas Crisis of January 2006*, (Oxford: Oxford Institute for Energy Studies), p. 14; J. Grätz, (2009), 'Energy Relations with Russia and Gas Market Liberalization', *Internationale Politik und Gesellschaft* 3, pp. 67–68; J. Perovic, (2008), 'Russian Energy Power Abroad', *Russian Analytical Digest* 33, p. 2.

¹¹ Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, OJ L 327/3 of 28 Nov. 1997.

¹² T. Romanova, (2008), 'The Russian Perspective on the Energy Dialogue', *Journal of Contemporary European Studies* 16(2), p. 223.

¹³ R. Leal-Arcas, (2009), 'The EU and Russia as Energy Trading Partners: Friends or Foes?', *European Foreign Affairs Review*, 14(3), p. 348; J. Sherr, (2010), 'The Russia-EU Energy Relationship: Getting It Right', *The International Spectator*, 45(2), pp. 57–59. Contrary to the EU's 'market' perspective, Russia takes a firm 'statist' view with respect to its gas market characterized by strong vertical integration and control over its pipeline system. See J. M. Godzimirski, (2009), 'The Northern Dimension of the Russian Gas Strategy', *Russian Analytical Digest* 58, p. 3; and K. Hóber, (2009), 'Law and Policy in the Russian Oil and Gas Sector', *Journal of Energy & Natural Resources Law* 27(3), p. 426.

¹⁴ Interviews with officials from Permanent Representations of Bulgaria and Belgium to the EU, 19 and 22 April 2010. See also S. Fischer, (2009), 'Energie- und Klimapolitik im Vertrag von Lissabon: Legitimationsverweiterung für wachsende Herausforderungen', *Integration* 1, p. 57; U. Ericke and D. Hackländer, (2008), 'Europäische

The present working paper provides a thorough analysis of (i) the origins and evolution of the EU-Russia energy partnership, and (ii) assesses to what extent the Union is able to shape mutual cooperation such that it corresponds to its energy security needs. The paper does not aim to be exhaustive, but instead focuses on the issues which were most commonly identified as inhibitive of mutual relations. It consists of three sections. The first section analyses the origins of the relationship, providing detailed information about how EU-Russia cooperation evolved over time, both discursively and institutionally. Section two focuses on some of the key outstanding issues which emerged from section one and analyses their implications for EU security governance – set against the backdrop of defining international events and important Russian undertakings on energy security. The third and final section draws conclusions from this analysis and provides recommendations on the future direction of EU-Russian energy cooperation.

1. ORIGINS AND EVOLUTION OF EU-RUSSIA ENERGY RELATIONS

1.1. 1992- 1999: THE REFORM YEARS

The years following the collapse of the Soviet Union were turbulent to say the least. Boris Yeltsin, who had just become Russia's first President, embarked on a program of 'shock' economic reforms which left an unprecedented impact on the Russian economy still felt today. Along with economic reforms came the abolition of most price controls, causing hyperinflation that wiped out the savings of most ordinary Russians.¹⁵ It was around this time also that global oil prices – and with it the price of natural gas – had hit a low, hovering around US \$16 a barrel, depriving the Russian state of badly needed foreign currency.¹⁶

By the mid 1990s, the EU had become Russia's largest trading partner. The bulk of this trade was energy related, prompting the Union to see close energy cooperation between the Union, the Commonwealth of Independent States (CIS) and Russia of utmost importance.¹⁷ However, the low price of oil and gas meant that Russia – and with it most of the former Soviet Union – was largely unable to put forward the necessary investments to ensure the adequate future exploration and efficiency of gas and oil resources located within its territory.¹⁸ This feat, coupled with the chronically unstable investment climate within Russia at the time, prompted the EU to encourage the Kremlin to push for an implementation of the Energy Charter Treaty (ECT)¹⁹ (see also *infra*, 2.2).²⁰

The emergence of Russia as the prime successor to the Soviet Union's meant that Brussels needed an agreement with Moscow that would create a stable legal basis for (future) cooperation between the two. A proposal on a Partnership and Cooperation Agreement (PCA)

Energiepolitik auf der Grundlage der neuen Bestimmungen des Vertrags von Lissabon', *Zeitschrift für Europarechtliche Studien* 11(4), p. 593

¹⁵ K. Van Den Heuvel, (2007), 'Yeltsin's (Real) Legacy', *the Nation* May 2007, p. 5; P. Desai, (2005), 'Russian Retrospectives on Reforms from Yeltsin to Putin', *Journal of Economic Perspectives* 19, p. 98.

¹⁶ US Energy Information Administration, 'World Crude Oil Prices', 3 January 1992. Available at: http://www.eia.doe.gov/dnav/pet/pet_pri_wco_k_w.htm. Accessed on 10 November 2010.

¹⁷ COM(95) 223 final of 31 May 1995, p. 12.

¹⁸ COM(95) 197 final of 6 September 1995, p. 8.

¹⁹ The ECT is a legally binding multilateral agreement that has as its aim to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments, and so mitigate risks associated with energy-related investment and trade.

²⁰ COM(95) 223 final, *supra* note 17, pp. 4, 12, 17, 22-23

was launched by the European Commission back in 1994, which framed energy cooperation within the principles of the market economy, the European Energy Charter (see also *infra*, 2.2), set against the backdrop of the progressive integration of the energy markets in Europe (see also *infra*, 2.1).²¹

Meanwhile, economic reforms within Russia were picking up pace. Until the mid 1990s, one of the crucial elements of the reforms was a plan in which every Russian citizen received vouchers for purchasing shares in newly privatised firms.²² What this wave of privatisation did – next to permitting shareholding by outsiders, managers and employees²³ – was give rise to the so-called ‘Oligarchs’ who managed to gain significant control over Russian industrial assets (often located in the extractive industries) through the buy-up of these vouchers and the subsequent ‘loans-for shares’ auctions.²⁴

These auctions typically meant for a government appointed commercial banker to hold a bidding that would allocate a controlling stake of a large natural resource enterprise in exchange for a loan to the federal government, which the latter had no intention of repaying. The auctioneer then would commonly award the stake for himself at a bid which represented a mere fraction of the object’s true value, by excluding all outside contenders.²⁵ The scheme had been designed in order to consolidate the bankers’ support for Yeltsin’s re-election campaign in 1996.²⁶

In 1997, the PCA came into force for a period of ten years.²⁷ Under Article 106, the agreement is automatically prolonged, unless either party to the agreement gives notice of termination. Both parties have agreed to leave it in place until a new agreement is signed, to avoid having no agreement at all (see also *infra*, 2.2).²⁸ Given energy’s vital importance, the PCA contains specific energy provisions, including the ‘improvement of the quality and security of energy supply’.²⁹ The agreement aims both at security of energy supply but also at assisting Russia in overcoming its shortages in the energy sector. This includes modernisation of the latter’s energy infrastructure, promotion of energy saving and energy efficiency, and improvements in the management and regulation of the energy sector in line with market economy principles.³⁰ The

²¹ COM(94) 257 final of 15 June 1994, Art. 65 Proposal for a Council and Commission Decision on the conclusion of the Agreement on Partnership and Cooperation between the European Communities and their Member States of the one part, and Russia, of the other part.

²² P. Desai, (2005), *supra* note 15, pp. 88 and 97.

²³ For a detailed overview of the voucher system, see M. Boycko, A. Shleifer and R. Vishny, (1995), *Privatizing Russia*, (Cambridge and London: MIT Press).

²⁴ Many people ended up receiving very little for their vouchers, as information about the real value of factories put up for sale was incomplete and foreign and domestic middlemen bought up vouchers from cash deprived citizens. Ultimately, many Russians judged the loans-for-shares scheme as a corrupt maneuver to enrich the few. See P. Desai, (2005), *supra* note 15, pp. 96-97.

²⁵ S. Guriev and A. Rachinsky, (2005), ‘The Role of Oligarchs in Russian Capitalism’, *Journal of Economic Perspectives* 19, p. 138.

²⁶ C. Freeland, (2000), *Sale of the Century: Russia’s Wild Ride from Communism to Capitalism*, (New York: Crown Business); K. Van Den Heuvel, (2007), *supra* note 15; P. Desai, (2005), *supra* note 15, p. 97.

²⁷ Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of the One Part, and the Russian Federation, of the Other Part, OJ L 327/3 of 28 Nov. 1997.

²⁸ See K. Barysch, (2006), ‘Report from the 4th Friedrich-Ebert Stiftung and Foundation for Unity for Russia Roundtable’, p. 2. Available at: http://www.cer.org.uk/pdf/partnership_with_russia_barysch_dec06.pdf. Accessed on 9 November 2010.

²⁹ Art. 65 EU-Russia PCA, *supra* note 27. It is expected that the energy chapter will be one of the most important ones in the new PCA, should an agreement be reached. Interviews with officials from Permanent Representation of Poland to the EU, 13 May 2010; and official from European Commission Directorate-General (DG) Energy, 8 October 2010; Brussels European Council, 8-9 March 2007, Presidency Conclusions, ANNEX I: European Council Action Plan (2007-2009) – Energy Policy for Europe (EPE), point 4, first indent, p. 19.

³⁰ *Ibid.* See also S. Haghighi, (2007), *supra* note 10, pp. 343–344; and R. Leal-Arcas, (2009), *supra* note 13, p. 352.

PCA does not make any reference to the diversification of energy supplies, which at the time seemed to implicitly confirm the role of Russia as the prime energy supplier for the EU.³¹ That same year, the Union concluded the ECT³² and it entered into force in April 1998.³³

Following Yeltsin's re-election, ongoing reforms by the International Monetary Fund (IMF) brought down inflation, yet caused the Russian Rouble to rise strongly and undermine the country's competitive position on international markets. The overvalued currency, coupled with the extreme interest rates at the time, inspired Russian governmental and commercial banks to embark on a speculative borrowing spree, which culminated in the collapse of the Rouble and the Yeltsin government's default over its debts in August of 1998.³⁴ By this time, the global oil price had plummeted to even below its 1992 level, to around US\$11 a barrel.³⁵

One year later, on 31 December 1999, Boris Yeltsin announced his resignation as President of Russia. In January 2000, then Prime Minister Vladimir Putin took over as acting President, with elections due in March of that year.³⁶ On 7 May 2000, Vladimir Putin was inaugurated as Russia's new President.³⁷

1.2. 2000-2003: THE ESTABLISHMENT OF AN ENERGY PARTNERSHIP

The European Council adopted its Common Strategy on Russia back in 1999, which centred on the consolidation of democracy and the rule of law, Russia's integration into the European economic and social area, increased cooperation on security and common challenges, including energy and the environment.³⁸ With respect to energy, the Strategy holds that the EU and Russia share an interest in developing their policies in such a way as to improve the exploitation and management of resources and security of supplies, both in Russia and in Europe.³⁹ Shortly after its adoption however, a second war broke out in Chechnya. Following bombardments of Chechen cities, the EU had to react in light of the Strategy's human rights objectives.⁴⁰ The January 2000 General Affairs Council discussed possible sanctions, however, EU Member States – whilst disapproving Russian action – were not too keen to adopt harsh measures. Instead, they rather carried on business in their bilateral ties, particularly in the domain of energy (see also *infra*, 2.3).⁴¹

Since 2000, after almost a decade of economic decline, Russia experienced a marked economic recovery. Alongside this growth came a strengthened role of the State – bolstered by

³¹ O.H. Maican, (2009), *supra* note 2, p.31.

³² Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69 of 9 March 1998.

³³ For The Energy Charter Treaty and Related Documents, see: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. Accessed on 29 June 2010.

³⁴ K. Van Den Heuvel, (2007), *supra* note 15; P. Desai, (2005), *supra* note 15, p. 100.

³⁵ US Energy Information Administration, *supra* note 16, 7 August 1998.

³⁶ BBC News on this day: 31 December 1999. 'Putin takes over as Yeltsin resigns'. Available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/december/31/newsid_4102000/4102107.stm. Accessed on 10 November 2010.

³⁷ BBC News World Monitoring Media Reports: Putin's inauguration speech, 7 May 2000. Available at: http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/739432.stm. Accessed on 11 November 2010.

³⁸ Cologne European Council, Presidency Conclusions, 3-4 June 1999, Annex II, Common Strategy of the European Union on Russia of 4 June 1999, points 1-4.

³⁹ *Ibid.*, point 1, second para.

⁴⁰ *Ibid.*, Common Strategy of the European Union on Russia of 4 June 1999, point 1.

⁴¹ S. Haghighi, (2007), *supra* note 10, pp. 353-354.

the high energy prices since 1999.⁴² The primary purpose for re-establishing the dominance of the State had been internal, to overcome the chaos of the 'shadow structures' perpetuated by the Oligarchs under Yeltsin. The need for modernisation might be universally acknowledged within Russia; the priority however remains control.⁴³

The EU viewed a long-term partnership with Russia as an important step to the benefit of supply security on the one hand, and a source of foreign exchange required for the modernisation of the Russian economy on the other (see *infra*, this section on the establishment of the EU-Russia Energy Dialogue).⁴⁴ However, the rise in oil and gas prices was in the eyes of the European Commission threatening to undermine the recovery of the European economy, which was consuming increasing amounts of energy.⁴⁵ Geopolitically, this translated into a 40% dependence on Russian natural gas, in spite of Europe having adopted a policy of geopolitical diversification.⁴⁶ This dependence also showed the need to restructure and improve the competitiveness of Russian industry, as well as for tackling access restrictions to Russia's market (see also *infra*, 2.1).⁴⁷ Although wary of such reliance on external suppliers, the Commission was keen to point out that the Soviet Union and subsequently Russia had up to then always fulfilled its supply obligations under the long-term contracts with the EU.⁴⁸

Indeed, the real risk factor for Europe in terms of gas trade seems more to do with the regional nature of gas markets and their need for fixed (pipeline) infrastructure. The transit of natural gas to the EU often crosses several country borders before reaching its final destination. This transit is subject to the rules and conditions as laid down in specific transit contracts negotiated between the supplier State and the transit country in question. The EU has no influence over the negotiations concerning these transit contracts (see *infra*, 1.3 and 1.4 on the recent supply interruptions).⁴⁹ By promoting Russian ratification of the ECT and continuing the negotiations on a Multilateral Transit Framework, the EU was hoping to enhance cooperation between Russia and its neighbours over access to the Russian pipeline system (see *infra*, 2.2).⁵⁰

Arguably, the most significant achievement in EU-Russia energy relations during the first half of the 2000s was the establishment of a regular dialogue on energy.⁵¹ The EU-Russia Energy Dialogue (EU-RU ED or 'Dialogue') comprises the EU-Russia Permanent Partnership Council

⁴² Country Strategy Paper 2002-2006 Russian Federation, p. 1. Available at: http://www.eeas.europa.eu/russia/docs/02-06_en.pdf. Accessed on 14 November 2010.

⁴³ J. Sherr, (2010), *supra* note 13, pp. 57 and 61; T. Romanova, (2008), *supra* note 12, p. 225.

⁴⁴ COM(2000) 769 final of 29 November 2000, pp. 40 and 41; Country Strategy Paper, *supra* note 42, pp. 4 and 15; and R. Leal-Arcas, (2009), *supra* note 13, p. 353.

⁴⁵ COM(2000) 769 final., *supra* note 44, p. 2. The European Commission speaks of a dramatic rise in oil prices. Late November 2000, oil prices were hovering around US \$30 a barrel. See US Energy Information Administration, *supra* note 16, 24 November 2000

⁴⁶ COM(2000) 769 final, *supra* note 44, pp. 2 and 23.

⁴⁷ Country Strategy Paper, *supra* note 42, pp. 4 and 12.

⁴⁸ EU-Russia Energy Dialogue, Synthesis Report, Brussels/Moscow, September 2001, p. 2; COM(2000) 769 final, *supra* note 44, pp. 23 and 40. Here the Commission also points out that vast amounts of natural gas have been discovered in regions where both production and transport costs are now at economically viable levels, in particular, Western Siberia and the Caspian region (see also *infra*, 2.1 and 2.3).

⁴⁹ *Ibid.*, p. 24. See also, A. Goldthau, (2010), 'Energy Diplomacy in Trade and Investment of Oil and Gas' in A. Goldthau and J. M. Witte (eds.), *Global Energy Governance: The New Rules of the Game*, (Washington D.C.: Brookings Institution Press), p. 40; S. Haghighi, (2007), *supra* note 10, p. 14; and COM(2004) 777 final of 13 November 2004, p.10.

⁵⁰ Common Strategy of the European Union on Russia, *supra* note 38, part II, point 4a, third para.

⁵¹ Joint Declaration, EU-Russia Summit, Paris, 30 October 2000. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/ACF262F.html. Accessed on 11 November 2010.

(PPC)⁵², regular contacts at Commission level⁵³, as well as frequent interaction between officials at working level. The Dialogue's daily workings are served by three main working groups dedicated to energy strategies, forecasts and scenarios; market developments; and energy efficiency.⁵⁴ Some of the initial topics in the dialogue focused on the improvement of the legal basis for energy production and transport in Russia, particularly production sharing agreements (PSAs); the physical security of transport networks; the legal security for long term supplies and the important role played by long-term contracts in this regard, and the recognition of certain transport infrastructures being of "common interest".⁵⁵

The May 2001 EU-Russia summit saw the decision to develop, within the framework of the PCA, the concept of a common European economic space between the two parties⁵⁶ - situated within the broader context of completing the EU internal market and the establishment of a real energy partnership (see also *infra*, this paragraph).⁵⁷ By this time, it became clear that the Union started to get worried over the continued delays in Russian ratification of the ECT. According to the Brussels, few problems remained in the way of Treaty ratification and completion of the Transit Protocol – a thought not underlined by Moscow (see also *infra*, 2.2).⁵⁸

Modest progress in the framework of the Dialogue was noted by 2002, including an agreement with Gazprom to construct an EU-Russia gas certification centre for testing and adopting modern, efficient, gas technologies and the inauguration of the EU-Russia Energy Technology Centre in Moscow.⁵⁹ Some issues were raised though by both parties. The Commission for its part sought to ban the use of so-called 'destination clauses'⁶⁰ used by Gazprom in its trade with its EU partners. This practice helps to maintain price differentials across different national markets and for this reason such clauses were criticised by the Commission as constituting market partitioning devices – running counter to the idea of an EU common market.⁶¹ After a

⁵² The PPC comprises the Energy Commissioner, the current and incoming EU Presidency and the Russian Minister for Energy.

⁵³ Regular contacts are maintained between the EU energy Commissioner and the Russian Minister for Energy.

⁵⁴ European Commission, Directorate-General Energy, EU-Russia Energy Dialogue. Available at: http://ec.europa.eu/energy/international/russia/dialogue/dialogue_en.htm. Accessed on 11 November 2010.

⁵⁵ *Ibid.*; EU-Russia Energy Dialogue, Synthesis Report, *supra* note 48, pp. 2-4.

⁵⁶ Joint Statement, Russia-European Union-Summit, Moscow, 17 May 2001. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/08853.en1-communiqu%C3%A9.doc.html. Accessed on 11 November 2010.

⁵⁷ Joint Statement, EU-Russia Summit, Brussels, 3 October 2001, Annex 3: Future direction of the energy dialogue between the European Union and the Russian Federation. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/12423.en1.doc.html. Accessed on 11 November 2010.

⁵⁸ EU-Russia Energy Dialogue, Synthesis Report, *supra* note 48, p. 4; Joint Statement, EU-Russia Summit, Brussels, 3 October 2001, Annex 3, *supra* note 57.

⁵⁹ EU-Russia Energy Dialogue, Second Progress Report, Brussels/Moscow, May 2002, pp. 2-3. The EU-Russia Energy Technology Centre is a joint project by the European Commission and Russia. It serves as a contact point for Russian and European companies active in the field of hydrocarbons, coal and electricity as well as renewable energy and energy efficiency and should facilitate co-operation and technology transfer between the European Union and the Russian Federation in the sphere of advanced energy technologies. Available at: <http://www.erec.org/index.php?id=40>. Accessed on 14 November 2010.

⁶⁰ Destination clauses are clauses in long-term commodity supply contracts which have the effect of forbidding wholesalers from re-selling the commodity outside the countries where they are established thereby guaranteeing the seller a form of protection.

⁶¹ EU-Russia Energy Dialogue, Second Progress Report, *supra* note 59, p. 2 ; EU-Russia Energy Dialogue, Fourth Progress Report, Moscow/Brussels, November 2003, p. 15. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/77845.pdf. Accessed on 14 November 2010. See also, R. Youngs, (2009), *Energy Security: Europe's New Foreign Policy Challenge*, (Abingdon: Routledge), p. 32.

protracted discussion, it was decided to preserve long-term contracts, but the destination clause was abolished and the average duration of contracts shortened (see also *infra*, 2.1).⁶²

Conversely, Russia raised the issue of the alleged existence of possible EU or Member State import limits of up to 30% of consumption on energy resources coming from Russia.⁶³ Following, these allegations, several meetings were organised by the Commission involving EU and Russian experts, leading to the conclusion that no such requirement on quantitative limits for importing different kinds of fossil fuels from Russia existed within the EU.⁶⁴ Russia did ask for an indication that the Union's policy of opening up its electricity and natural gas markets to competition is not being conceived in a way that would limit the presence of Russian supplies within the European market (see also *infra*, 2.1).⁶⁵

The 2002-2003 National Indicative Programme for Russia placed a priority on private sector development and the de-monopolisation of the so-called 'natural monopolies' (e.g. Gazprom), with the aim of allowing the entry of new market participants and to create opportunities for foreign investment.⁶⁶ A total of €42 million was allocated to achieve the above aim⁶⁷, which – given the windfall profits of Gazprom in the early 2000s – could not be considered a serious incentive for the Russian government to truly de-monopolise its energy giant. Interestingly, the Programme also admits that the results in the energy sector under the Technical Aid to the Commonwealth of Independent States (TACIS) Programme have been insufficient so far – in spite of €639million in assistance since 1991.⁶⁸

During the 2003 EU-Russia Summit held in conjunction with the 300th anniversary of St.-Petersburg, the EU and Russia signed agreements to create four 'common spaces': a common economic space; a common space of freedom, security and justice; a space of cooperation in the field of external security; as well as a space of research and education, including cultural aspects.⁶⁹

The Common Economic Space – deemed by far the most important one – was, *inter alia*, aimed at the elimination of obstacles in economic activity and the creation of opportunities with regard to the cross-border trade in goods, services and capital.⁷⁰ The removal of trade barriers fits into

⁶² T. Romanova, (2008), *supra* note 12, pp. 221 and 224; Joint Statement on EU Enlargement and EU-Russia Relations, Brussels, 27 November 2004, p. 3. Available at: http://eeas.europa.eu/russia/docs/js_eu-russia_2004_en.pdf; and EU-Russia Energy Dialogue, Fifth Progress Report, Moscow/Brussels, November 2004, p. 2. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress5_en.pdf. Both accessed on 15 November 2010.

⁶³ EU-Russia Energy Dialogue, Fourth Progress Report, *supra* note 61, p. 15; EU-Russia Energy Dialogue, Third Progress Report, Brussels/Moscow, November 2002, p. 3. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress3_en.pdf. Accessed on 14 November 2010.

⁶⁴ EU-Russia Energy Dialogue, Third Progress Report, *supra* note 63, p. 3.

⁶⁵ *Ibid.* Russia is set to promote a non-discriminatory regime for Russian companies to access foreign energy markets and advance their participation in large international oil and gas projects. See, A. Cohen, (2009), 'Russia: The Flawed Energy Superpower' in G. Luft and A. Korin (eds.), *Energy Security Challenges for the 21st Century*, (Santa Barbara CA: ABC-CLIO, LLC), pp. 92-93.

⁶⁶ National Indicative Programme 2002-2003 Russian Federation, pp. 23-24. Available at: http://www.eeas.europa.eu/russia/docs/02-06_en.pdf. Accessed on 14 November 2010.

⁶⁷ *Ibid.*, p. 25.

⁶⁸ *Ibid.*, ANNEX 3 and 4.

⁶⁹ Joint Statement, EU-Russia Summit, St.-Petersburg, 31 May 2003, p. 1. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/75969.pdf; Joint Statement, 12th EU-Russia Summit, Rome, 6 November 2003, pp. 2-4. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/77845.pdf. Both accessed on 14 November 2003.

⁷⁰ *Ibid.*, Joint Statement, 12th EU-Russia Summit, p. 8 and Annex II Final Report of the High Level Group on the Common European Economic Space to the EU-Russia Summit on 6 November 2003, p. 10. A roadmap for the

the EU's emphasis on secure and stable supplies. But, next to the trade in fossil fuel products, the Union – as a net energy importer – also focuses on renewable energy, energy efficiency and energy demand management. Russia – as a major exporter – has a different view, focused more substantially on enhancing energy supplies.⁷¹ Russia's view on energy security can be traced back to its Energy Strategy, which defines it as the 'state of protection of the country, its citizens, society, state, economy from the threats to the secure fuel and energy supply' [and the] 'full and secure provision of energy resources to the population and the economy on affordable prices that at the same time stimulate energy saving, the minimisation of risks and the elimination of threats to the energy supplies of the country'.⁷²

Externally, Russia applies a policy whereby it aims to 'lock in' demand with energy importers, and consolidates oil and gas supplies by signing long-term contracts with Russian and Central Asian State-owned or State-controlled energy producers and pipeline monopolists owned by Moscow. It strives to control supply by buying up major energy infrastructure companies, such as pipelines, refineries, electric grids and ports.⁷³ Furthermore, Russia prefers to deal with EU Member States separately, rather than as a group which allows for price-discrimination among its customers, and maximizes the revenue close to the country's paying potential (see also *infra*, 2.3).⁷⁴

This state-centric model was most dramatically illustrated by the 'Yukos' affair in 2003. At the time, Yukos represented the country's largest oil firm. In what many believe to be a politically motivated raid against its owner, Mikhail Khodorkovsky (an outspoken critic of the Kremlin), the firm was accused of alleged tax fraud and subsequently auctioned off, dismantled and largely bought by Rosneft in 2004 (see also *infra*, 2.1 and 2.2).⁷⁵

Taking the above into account, coupled with the high oil and gas prices at the time, there seemed few incentives for Russia to give in to European demands as the EU could offer little more than energy efficiency improvements and technical assistance as meaningful rewards in

Common Economic Space was eventually adopted at the May 2005 EU-Russia Summit. See Road Map for the Common Economic Space – Building Blocks for Sustained Economic Growth, 15th EU-Russia Summit, Moscow 10 May 2005. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/84815.pdf. Accessed on 19 November 2010. See also A. Konoplyanik, (2009a), 'A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement, Acquis Communautaire and the Energy Charter', *Oil Gas and Energy Law Journal* 27(2), pp. 258-291.

⁷¹ EU-Russia Energy Dialogue, Fourth Progress Report, *supra* note 61, p. 14.

⁷² Energy Strategy of Russia for the Period up to 2030, Approved by Decree No 1715-r of the Government of the Russian Federation, dated 13 November 2009, pp. 28-36. See also, O. H. Maican, (2009), *supra* note 2, p. 30.

⁷³ A. Cohen, (2009), *supra* note 65, p. 93; A. Goldthau, (2010), *supra* note 49, pp. 31-33.

⁷⁴ A. Cohen, (2009), *supra* note 65, p. 93. This is largely supported by the actions of certain EU Member States who do not wish to see an increase in the Commission's autonomy on external energy relations. See T. Romanova, (2008), *supra* note 12, p. 227; S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, pp. 518, 529-530 and 537-538; R. Youngs, (2009), *supra* note 61, p. 34; R. Leal-Arcas, (2009), *supra* note 13, p. 351; E. Kirchner and C. Berk, (2010), 'European Energy Security Co-operation: Between Amity and Enmity', *Journal of Common Market Studies* 48(4), pp. 859-880; R. Alcaro and E. Alessandri, (2010), 'Engaging Russia: Prospects for a Long-Term European Security Compact', *European Foreign Affairs Review* 15(1), pp. 196-197, and K. Rosner, (2009), 'The European Union: On Energy, Disunity' in G. Luft and A. Korin (eds.), *Energy Security Challenges for the 21st Century*, (Santa Barbara CA: ABC-CLIO, LLC), pp. 160-175.

⁷⁵ R. Youngs, (2009), *supra* note 61, pp. 91-92; A. Cohen, (2009), *supra* note 65, pp. 93, 98-99; and A. Goldthau, (2010), *supra* note 49, p. 32. Note that at the time of writing Khodorkovsky was sentenced to a 14 year sentence on account of embezzlement, in spite of advance warnings by the EU that the severity of punishment meted out to Mikhail Khodorkovsky could negatively affect bilateral relations. See EUobserver, 'Khodorkovsky sentence could impact EU-Russia relations', 27 December 2010. Available at: <http://euobserver.com/9/31578>; EUobserver, 'Russia defies EU diplomacy on Khodorkovsky sentence', 30 December 2010. Available at: <http://euobserver.com/9/31584>. Both accessed on 1 January 2011.

exchange for access to the Russian energy sector. Although, the impact of the financial crisis and the January 2009 gas interruption potentially changed this situation (see, *infra*, 1.4).⁷⁶

1.3. 2004-2008: A DETERIORATION OF ENERGY RELATIONS

Although the 2004 enlargement round had increased the economic interdependence of both Russia and the EU⁷⁷, divergent views on energy security caused relations to come under strain and prompted the Union to take up a hardened stance. The EU claimed it should be ready to discuss all matters and should not hesitate to defend its interests vigorously, which implied the discussing of Russian practices that were perceived to run counter to universal and European values, such as democracy, human rights in Chechnya, media freedom and environmental issues.⁷⁸

Institutionally, divergence on a new PCA had emerged as one of the most pronounced issues (see also *infra*, 2.2).⁷⁹ Also, the momentum for societal and market reforms witnessed towards the end of the 1990s had somewhat slowed down, as political energies were redirected towards elections. Implementation and enforcement of legislation remained an issue, and corruption was still a significant barrier. Consequently much remained to be done to reform the 'natural monopolies' as ongoing reforms were left unaccompanied by sufficient economic diversification away from traditional rents from energy and basic manufactures.⁸⁰

Moreover, the EU and Russia seemed to speak different languages when presenting their views about the concept of the Energy Dialogue. Whereas Moscow presented a political vision which did not translate into specific legal norms of action to follow, the EU did the exact opposite.⁸¹ In short, despite ambitious political declarations concerning the Common Spaces and the establishment of the EU-Russia Energy Dialogue (see *supra*, 1.2), there had been insufficient overall progress on substance.⁸²

When the Russian State Duma ratified the Kyoto Protocol in October 2004, it was thought the act would potentially provide a fresh impetus to EU-Russia energy relations.⁸³ However, soon thereafter political turmoil ensued in Ukraine; Europe's most critical transit State. Following the 2004 Presidential elections, allegations of massive fraud and corruption on part of winning

⁷⁶ R. Leal-Arcas, (2009), *supra* note 13, p. 353. For example, only €46 million was invested in the promotion of environmental protection and the management of resources under the TACIS Programme since 1991, indicative of the lack of interest in this area on part of Russia and the dominance of the hydrocarbon sector. See National Indicative Programme 2002-2003, *supra* note 66, ANNEX 3; interview with official from European Commission DG Energy, 15 October 2010.

⁷⁷ The Joint Statement issued after the 2004 round of enlargement confirmed that no longer any restrictions on imports of gas and oil into the EU existed. See Joint Statement on EU Enlargement and EU-Russia Relations, *supra* note 62, p. 3.

⁷⁸ COM(2004) 106 final of 10 February 2004, p. 7.

⁷⁹ *Ibid.*, p.3.

⁸⁰ COM(2004) 106 final, *supra* note 78, pp. 11 and 15.

⁸¹ T. Romanova, (2008), *supra* note 12, p. 226.

⁸² *Ibid.*, pp. 3-4. Part of the problem lay in the divergent interests from both sides concerning the EU-Russia Energy Dialogue. Whereas, the EU strove to improve current energy relations and fundamentally transform them by establishing a pan-European market, Moscow's initial attitude the Dialogue was relatively short term. It was targeted at preserving Russia's position in the European market and at supporting Russia's internal energy planning. See T. Romanova, (2008), *supra* note 12, p. 220. By this time, the Commission also recognised that finding a solution to outstanding issues through the ECT had failed, as Russia had stalled ratification of the Treaty since signing it in 1994. See COM(2004) 777 final, *supra* note 49, p. 2.

⁸³ BBC News, 'Russian MPs ratify Kyoto treaty', 22 October 2004. Available at: <http://news.bbc.co.uk/2/hi/europe/3943727.stm>; Joint Press Release 14th EU-Russia Summit, the Hague, 25 November 2004, p. 2. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/82799.pdf. Both accessed on 17 November 2010.

candidate Viktor Yanukovich resulted in a two month street protest against the election outcome. The protest – which later became known as the ‘Orange Revolution’– eventually caused the annulment of the election results in December 2004. The new elections brought victory to Viktor Yushenko, who’s Presidency would seek closer ties with the Union, rather than Russia.⁸⁴ The revolution unfortunately also meant that Ukraine found itself squarely in between Russia and the EU. This translated into a worsening of the negotiating environment between Moscow and Kiev on terms and conditions for gas transit.⁸⁵

In 2005, the new Ukrainian government embarked on a series of political and economic reforms, including in the country’s energy sector.⁸⁶ Moscow, seemingly unhappy with the closer ties between Kiev and the West, moved towards the charging of ‘European prices’ for gas delivered to Ukraine by January 2006.⁸⁷ Kiev was prepared to pay market prices for gas; however it insisted that these were phased over a period of time to allow for a gradual adjustment.⁸⁸ The two sides eventually did not manage to reach agreement on the terms and conditions of a new transit contract, causing Gazprom to cut gas supplies to Ukraine on 1 January 2006.⁸⁹

In spite of Russian claims that the gas cut would not impact the EU, the impact was immediate with falling pressures and non-delivery of gas reported by European companies on 1 January 2006.⁹⁰ The European Commission hastily called a meeting with Member States to discuss possible measures.⁹¹ Eventually, a solution to the dispute was found on 4 January 2006.⁹² The

⁸⁴ 2631st General Affairs and External Relations Council Meeting, Brussels, 13-14 December 2004, p. 8. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/83084.pdf. Accessed on 15 November 2010.

⁸⁵ A. Konoplyanik, (2009b), ‘Gas Transit in Eurasia: Transit Issues between Russia and the European Union and the Role of the Energy Charter’, *Journal of Energy and Natural Resources Law* 27(3), pp. 455-456.

⁸⁶ Conclusions of the General Affairs and External Relations Council, Brussels, 21 February 2005. Available at: <http://www.eu2005.lu/en/actualites/conseil/2005/02/21Conclagreg/Cagreukraine210205.pdf>; EU-Ukraine Cooperation Council, Luxembourg, 13 June 2005. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/85196.pdf. The change in politics in Ukraine led to closer cooperation between Kiev and Brussels on a range of issues, including energy. A Memorandum of Understanding (MOU) on energy cooperation was signed in December 2005. See MOU on co-operation in the field of energy between the EU and Ukraine, Kyiv, 1 December 2005. Available at: http://ec.europa.eu/energy/international/bilateral_cooperation/doc/ukraine/2005_12_01_ukraine_mou.pdf. All accessed on 17 November 2010.

⁸⁷ See BBC News, ‘Russia threatens Ukraine gas cut’, 13 December 2005. Available at: <http://news.bbc.co.uk/2/hi/business/4526138.stm>. Accessed on 17 November 2010; J. Stern, (2006), supra note 10, p. 5; A. Heinrich, (2006), ‘Gazprom – A Reliable Partner for Europe’s Energy Supply?’, *Russian Analytical Digest* 1/06, p. 2; S. de Jong, J. Wouters, and S. Sterkx, (2010), supra note 9, p. 516; and Council on Foreign Relations, ‘The Business and Politics Behind the Russia-Ukraine Gas Dispute’. Available at: http://www.cfr.org/publication/18178/business_and_politics_behind_the_russiaukraine_gas_dispute.html. Accessed on 17 November 2010.

⁸⁸ J. Stern, (2006), supra note 10, p. 6; BBC News, ‘Ukraine ups ante over Russian Gas’, 28 December 2005. Available at: <http://news.bbc.co.uk/2/hi/business/4564228.stm>. Accessed on 17 November 2010.

⁸⁹ See BBC News, ‘Putin admits Ukraine gas ‘crisis’, 29 December 2005. Available at: <http://news.bbc.co.uk/2/hi/business/4567270.stm>; and BBC News, ‘Russia cuts Ukraine gas supplies’, 1 January 2006. Available at: <http://news.bbc.co.uk/2/hi/4572712.stm>. Accessed on 17 November 2010. See also, J. Stern, (2006), supra note 10, p.7.

⁹⁰ See BBC News, ‘Russian gas cut ‘will not hit EU”, 30 December 2005. Available at: <http://news.bbc.co.uk/2/hi/business/4568288.stm>. Accessed on 17 November 2010; and J. Stern, (2006), supra note 10, p. 8.

⁹¹ Elsevier, ‘Gas Crisis treft Europa; spoedvergadering EU’, 2 January 2006. Available at: <http://www.elsevier.nl/web/1062062/Nieuws/Economie/Gascrisis-treft-Europa-spoedvergadering-EU.htm>. Accessed on 27 November 2010.

⁹² See BBC News, ‘Ukraine and Russia reach gas deal’, 4 January 2006. Available at: <http://news.bbc.co.uk/2/hi/europe/4579648.stm>. Accessed on 17 November 2010. Also see J. Stern, (2006), supra note 10, p.10.

damage to both countries' reputation however was significant, causing Europe to rethink its existing energy security arrangements.⁹³

The uncertainty concerning transit negotiations and a perceived incoherence on part of the Union in dealing with third States, led to a heightened focus on what Europe itself could do to secure its energy supplies through its internal market and the external projection thereof. The March 2006 European Commission Green Paper asserted that a 'pan-European energy community' would prove the best guarantor of energy security. This translated into installing reinforced market-based provisions on energy in the EU's existing and future agreements with third countries, which would enhance the conditions for European companies seeking access to global resources.⁹⁴ In this view, a well functioning market is the best guarantor of safe and affordable energy supplies. Hence, energy security is achieved through the extension of the Union's own energy market to its neighbours within a common regulatory area with shared trade, transit and environmental rules.⁹⁵ The market became the 'precursor', *i.e.* the EU's 'homework' required before an energy-guided foreign policy approach could be effective (see also, *infra* 2.1 and 2.3).⁹⁶

The March 2006 European Council acted on the above, calling for the definition of an 'energy policy for Europe', on account of security risks affecting producing and transit countries.⁹⁷ In light of security of supply, the Commission, Member States and the European Council all emphasised that in its external policy, Europe should speak with a single voice and it should intensify diversification efforts with respect to external and indigenous sources, suppliers and transport routes.⁹⁸ Poland even went as far as to propose a European Energy Security Treaty open to EU and NATO Member Countries, with the aim of establishing mutual energy security guarantees⁹⁹ (see also, *infra* 2.3 and 2.4).¹⁰⁰ The 2006 G8 Summit that followed shortly thereafter, joined the debate through its release of a comprehensive statement on energy

⁹³ Andris Piebalgs EU Energy Commissioner Speaking Notes welcoming the agreement between Gazprom and Naftogaz. Joint Press Conference with Mr. Bartenstein, Austrian Federal Minister for the Economy and Labour, Brussels, 4 January 2006, p. 2. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/1&format=HTML&aged=0&language=EN&guiLanguage=en>. Accessed on 17 November 2010. The 2006 gas crisis was labeled a wake-up call by various EU actors, including the then External Relations Commissioner Ferrero-Waldner and the European Parliament. See B. Ferrero-Waldner, (2006), 'Guest Editorial: The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument', *European Foreign Affairs Review* 11(2), p. 141. The Parliament also claimed energy is at times used as a political tool and called for the continued assessment of third countries' observance to EU market rules. See European Parliament, Report on towards a common European foreign policy on energy of 11 September 2007, pp. 14 and 16.

⁹⁴ See COM(2006) 105 final of 8 March 2006, pp. 15-20; and R. Youngs, (2009), *supra* note 61, p. 30.

⁹⁵ An External Policy to Serve Europe's Energy Interests. Paper from Commission/SG/HR for the European Council, p. 3. Available at: <http://www.consilium.europa.eu/uedocs/cmsUpload/st09971.en06.pdf>. Accessed on 18 November 2010.

⁹⁶ R. Youngs, (2009), *supra* note 61, p. 32. The perceived necessity to do so was also voiced in various interviews. Interviews with officials from Permanent Representations of Belgium, Germany, and UK to the EU, 22 April, 2 July and 10 June 2010.

⁹⁷ European Council, Presidency Conclusions, Brussels European Council, 23-24 March 2006, pp.4 and 13.

⁹⁸ *Ibid.*, p. 14. See also COM(2006) 590 final of 12 October 2006, p. 2; and 2717th Transport, Telecommunications and Energy Council Meeting, Brussels, 14 March 2006, pp. 6-7.

⁹⁹ *Ibid.*, 2717th Transport, Telecommunications and Energy Council, p. 9.

¹⁰⁰ The 2006 gas crisis acted as a catalyst. Before, the gas crisis a new Member State was given the post of Energy Commissioner. But, after climate change and energy security rose to the top of the EU's policy agenda, a shift has taken place, with energy popping up everywhere. Interview with official from Permanent Representation of Bulgaria to the EU, 19 April 2010.

security which made reference to the so-called 'Global Energy Security Principles'¹⁰¹ – securitisation of energy relations had reached its apparent climax.

By October 2006, it became clear to Russia that the Commission attempted to smuggle part of the ECT provisions into a new PCA mandate.¹⁰² Following this, relations deteriorated further in November of that year when Poland vetoed the opening of negotiations for a new EU-Russia agreement in response for a Russian ban on Polish meat imports.¹⁰³ The Polish stance caused divergence within the Union on how to face Russia (see *infra*, 2.3). Remarkably, the seventh progress report of the EU-Russia Energy Dialogue released around the same time said nothing about the increase in tensions.¹⁰⁴

2007 got off to a rough start when Russia interrupted oil supplies to Belarus due to a dispute over transit tariffs, affecting the supplies of several EU Member States.¹⁰⁵ Following the dispute, Putin claimed Russia would reduce dependency on unreliable transit States by forging direct pipeline deals with EU Member States (see also *infra*, 2.3).¹⁰⁶

Later that year, the Commission published its 2007 Strategic Energy Review. The Review continued to assert that EU-Russia energy relations should be seen through the prism of market principles, based on those of the ECT and its Draft Transit Protocol (DTP).¹⁰⁷ Relations between the two powers were still very much at unease however at this point. And, to make matters worse, Lithuania joined Poland with a second veto against talks for a new EU-Russia agreement after Russia instigated another interruption, this time of oil supplies through the Druzhba pipeline – ostensibly for technical reasons. However, prior to the incident the refinery had been sold to a Polish firm, rather than a Russian rival bid.¹⁰⁸ The May 2007 Summit in Samara which followed, took place after a series of high profile cases involving European energy companies and was largely marred by public disagreements on a whole range of issues, including energy, Kosovo, market access, and human rights. The Summit finally ended without a formal declaration (see also *infra*, 2.1 and 2.2).¹⁰⁹

¹⁰¹ The Principles mention, inter alia, the importance of transparent and competitive markets and the need for investment in all stages of the energy supply chain, safeguarded by an effective legal and regulatory framework. The document further calls for enhanced dialogue between stakeholders; diversification; the promotion of energy saving and efficiency measures both nationally and at international level; the environmentally sound development and use of energy; the deployment and transfer of clean energy technologies to tackle climate change; the safeguarding of critical infrastructure; and the addressing of the energy challenges of the poorest populations in developing countries. See G8, (2006), 'St. Petersburg Plan of Action on Global Energy Security', 16 July 2006, point 6. Available at: <http://en.g8russia.ru/docs/11.html>. Accessed on 19 November 2010.

¹⁰² COM(2006) 590 final, supra note 98, p. 3; R. Youngs, (2009), supra note 61, p. 84; and BBC News, 'Putin firm on EU energy charter', 21 October 2006. Available at: <http://news.bbc.co.uk/2/hi/europe/6068386.stm>. Accessed on 18 November 2010.

¹⁰³ Ibid., R. Youngs, (2009), supra note 61, p. 84.

¹⁰⁴ EU-Russia Energy Dialogue, Seventh Progress Report, Moscow/Brussels, November 2006. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress7_en.pdf. Accessed on 17 November 2010.

¹⁰⁵ BBC News, 'Russia oil row hits Europe Supply', 7 January 2007. Available at: <http://news.bbc.co.uk/2/hi/6240473.stm>. Accessed on 18 November 2010.

¹⁰⁶ R. Youngs, (2009), supra note 61, p. 86.

¹⁰⁷ COM(2007) 1 final of 10 January 2007, p. 24. See also, European Parliament, Report on towards a common European foreign policy on energy, supra note 93, p. 11.

¹⁰⁸ Ibid., p. 87.

¹⁰⁹ BBC News, 'EU-Russian talks end in acrimony', 18 May 2007. Available at: <http://news.bbc.co.uk/2/hi/europe/6668111.stm>. Accessed on 18 November 2010.

Dedicated to complete the internal market and speed up its liberalisation, the Commission put forward a package of proposals to reform the internal gas market in September 2007.¹¹⁰ Internally, the proposals met with serious resistance by several Member States.¹¹¹ By this time, access to the European market was firmly seen as a conditional, political tool. The principle of reciprocity was formally included in the package of proposals, including a clause that threatened restrictions on third-country access to the European market where EU investment was seen to be impeded elsewhere. The clause quickly became known as the ‘Gazprom clause’¹¹², something by which Russia was obviously not amused (see *infra*, 2.1).¹¹³ Despite ongoing difficulties, the October 2007 Summit did see continued commitment to address investment barriers and both Parties agreed on the creation of an Early Warning Mechanism in the case of energy interruptions (see *infra*, 1.4).¹¹⁴

1.4. 2008-2010: ENERGY FOREIGN POLICY

New Year’s energy interruptions seemed to become a tradition, as 2008 saw a replay of 2006. In February 2008, a new conflict between Russia and Ukraine broke out over outstanding debt causing gas flows to be reduced.¹¹⁵ After a brief three-day crisis, supplies were reinstated. Despite reassurances from Moscow that European supplies would not be affected, the crisis did little good to the reputation of neither Gazprom, nor Naftogaz.¹¹⁶ There were increasing signs that EU Member States were getting anxious about Russia’s reliability as an energy partner – sparking fears in Brussels that individual actions could undermine its external energy policy (see also *infra*, 2.3).¹¹⁷

By March 2008, the EU discussed the reopening of the PCA negotiations, in response to the change of Presidency within Russia¹¹⁸ Poland dropped its veto when Russia lifted the meat ban,

¹¹⁰ See COM(2007) 529 final of 19 September 2007; and Euractiv, ‘EU unveils plan to dismantle big energy firms’, 20 September 2007. Available at: <http://www.euractiv.com/en/energy/eu-unveils-plan-dismantle-big-energy-firms/article-166890>. Accessed on 18 November 2010. The third legislative market package was eventually adopted on 25 June 2009. See Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity, OJ L 211/55 of 14 August 2009; and Directive 2009/73/EC of 13 July 2009 concerning common rules for the market in natural gas, OJ L 211/94 of 14 August 2009.

¹¹¹ R. Youngs, (2009), *supra* note 61, pp. 37-38; Interview with official from Permanent Representation of Bulgaria to the EU, 19 April 2010.

¹¹² COM(2007) 529 final, *supra* note 110, p. 7. See also R. Youngs, (2009), *supra* note 61, p. 38.

¹¹³ RiaNovosti, ‘Putin to attend EU-Russia Summit in Portugal’, 19 October 2007. Available at: <http://en.rian.ru/russia/20071019/84574250.html>. Eventually, the clause was watered down somewhat. Member States now have to take into account the Union’s energy security when allowing third party access to the grid, and also inform the Commission. See EUobserver, ‘EU weakens ‘Gazprom clause’ on foreign energy investors’, 13 October 2008. Available at: <http://euobserver.com/9/26914>. See also European Parliament, ‘3rd Energy Package gets final approval from MEPs’, 29 April 2009. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20080616FCS31737&language=EN>. Both accessed on 18 November 2010.

¹¹⁴ EU-Russia Energy Dialogue, Eighth Progress Report, Brussels/Moscow, October 2007, pp. 3-4 and 6-7. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress8_en.pdf. Accessed on 19 November 2010.

¹¹⁵ BBC News, ‘Gazprom threatens Ukraine gas cut’, 7 February 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7233401.stm>; BBC News, ‘Gazprom to reduce Ukraine’s gas’, 29 February 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7271604.stm>. Both accessed on 19 November 2010.

¹¹⁶ BBC News, ‘Gazprom cuts Ukraine gas supply’, 3 March 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7274380.stm>; BBC News, ‘Gazprom restores Ukraine gas flow’, 5 March 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7276589.stm>. Both accessed on 19 November 2010. See also, R. Youngs, (2009), *supra* note 61, p. 90.

¹¹⁷ M. aan de Brugh, (2008), ‘Kabinet wil nauwere banden met oliestaten’, NRC Handelsblad, 25 April 2008. Available at: http://www.nrc.nl/economie/article1890801.ece/Kabinet_wil_nauwere_banden_met_oliestaten. Accessed on 2 December 2010.

¹¹⁸ R. Youngs, (2009), *supra* note 61, p. 89. The new President of Russia became Dimitry Medvedev, former CEO of Gazprom. Vladimir Putin became Prime Minister. The close links between the Kremlin and Gazprom are seen as a

yet Lithuania upheld its veto until stronger language would be adopted in the new mandate given what they saw as Russia's slide towards autocracy at home and aggression abroad.¹¹⁹ Eventually by May 2008, the Council agreed on a new negotiating mandate. Negotiations were subsequently launched at the EU-Russia Summit of late June 2008.¹²⁰ Furthermore, both parties agreed that an energy section would be part of the new agreement, based on the 2006 G8 Summit principles, as well as the issues of demand, supply, transportation and transit reliability, energy efficiency, the Early Warning Mechanism and nuclear power.¹²¹

Just as relations began to improve, a war broke out between Russia and Georgia over the breakaway region of South Ossetia, bringing post-Cold War EU-Russia relations to an all time low.¹²² Europe was left divided¹²³ on how strongly to react to the Russian military actions and ultimately only insisted on a withdrawal of Russian troops from South Ossetia (see also *infra*, 2.3).¹²⁴ The EU did launch a formal inquiry into the origins of the conflict¹²⁵ which concluded that although Georgia may have started the war, Russia's response went far beyond the reasonable limits of defence.¹²⁶ The hostilities were not without consequences in terms of energy supply, as by the end of the conflict, both the Baku-Tbilisi-Ceyhan and the Baku-Supsa pipelines running across Georgia's territory had been shut down.¹²⁷

The conflict in Georgia pushed the EU into pressing harder for additional infrastructure interconnections, oil and gas reserve stocks, adequate crisis response mechanisms, and diversification of both energy sources and routes in its Second Strategic Energy Review.¹²⁸ On

cause for concern. See BBC News, 'Russia's energy giant flexes its muscles', 24 February 2008. Available at: <http://news.bbc.co.uk/2/hi/business/7259407.stm>. Accessed on 19 November 2010.

¹¹⁹ R. Youngs (2009), *supra* note 61, p. 89; The Economist, 'The European Union and Russia: Divide, rule or waffle', 1 May 2008. Available at: <http://www.economist.com/node/11293629>. accessed on 8 December 2010; The Economist Intelligence Unit, (2008), 'Lithuania: Holding EU-Russia talks hostage'. *Economist Country Monitor*, 28 April 2008, p. 4.

¹²⁰ Slovenian Presidency of the EU 2008, 'EU Council of Ministers approves mandate for negotiating new framework agreement with Russian Federation', 26 May 2008. Available at: http://www.eu2008.si/en/News_and_Documents/Press_Releases/May/0526MZZ_GAERC_Rusija.html; Joint Statement of the EU-Russia Summit on the launch of negotiations for a new EU-Russia agreement, Khanty-Mansiysk, 27 June 2008. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/101524.pdf. Both accessed on 19 November 2010.

¹²¹ EU-Russia Energy Dialogue, Ninth Progress Report, Paris, October 2008, p. 8. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress9_en.pdf. Accessed on 19 November 2010.

¹²² R. Alcaro and E. Alessandri, (2010), *supra* note 74, p. 193.

¹²³ According to leaked US diplomatic documents, the EU was firmly divided in a 'Russia-friendly' and a 'Russia-hostile' camp. The former consisting of Bulgaria, the Czech Republic, Denmark, Estonia, Latvia, Lithuania, Poland and the UK, and the latter of France and Germany and including Greece, Italy, Luxembourg, the Netherlands, Slovakia and Spain. See EUobserver, 'US cables shed light on EU 'Friends of Russia' in Georgia war', 1 December 2010. Available at: <http://euobserver.com/9/31400>. Accessed on 3 December 2010.

¹²⁴ R. Youngs, (2009), *supra* note 61, p. 89; and A. Cooley, (2008), 'Principles in the pipeline: managing transatlantic values and interests in Central Asia', *International Affairs* 84(6), p. 1184.

¹²⁵ See Declaration by the Presidency on behalf of the European Union on the deterioration of the situation in South Ossetia (Georgia), Brussels, 11 August 2008. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/102219.pdf; European Voice, 'EU postpones partnership talks with Russia', 1 September 2008. Available at: <http://www.europeanvoice.com/article/imported/eu-postpones-partnership-talks-with-russia/62119.aspx>. Both accessed on 19 November 2010; and Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent fact-finding mission on the conflict in Georgia, OJ L 323/66 of 3 December 2008.

¹²⁶ Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I, pp. 19 and 24. Available at: http://www.ceiig.ch/pdf/IIFMCG_Volume_I.pdf. Accessed on 19 November 2010.

¹²⁷ R. Youngs, (2009), *supra* note 61, p. 89; A. Cooley, (2008), *supra* note 124, p. 1184; and interview with official from Embassy of Azerbaijan in Brussels, 13 September 2010.

¹²⁸ COM(2008) 781 final, *supra* note 6, p. 3.

external relations, the EU started negotiations on Ukraine's admission to the Energy Community Treaty (ENCOM), back in November 2008.¹²⁹ ENCOM, of which the EU is a member¹³⁰, is a regional Treaty building an integrated market in Southeast Europe adjacent to the Union. It represents a form of EU 'external governance', by extending the Union's *acquis* on the internal market, security of supply legislation for electricity and gas, environment and renewables.¹³¹

However, with the ink of the Review barely dry, there were increasing signs that Russia and Ukraine would face a new crisis.¹³² Russia finally cut off the gas on 1 January 2009.¹³³ What followed was a two week crisis, in what was one of the coldest winters in decades.¹³⁴ The crisis caused stark reactions from the EU, who claimed:

"Gas coming from Russia is not secure. Gas coming through Ukraine is not secure. This is an objective fact";¹³⁵ [...] "Given the importance attached to solidarity within the EU, this is a problem for the EU as such. It is unacceptable for the EU to see its citizens and enterprises suffering from gas shortages due to the non respect by both partner countries of their contractual obligations [and it] calls on both parties to accept independent monitoring of the actual flows of gas through the pipelines."¹³⁶

Following the resolution of the crisis, Commission President Barroso issued a Statement in which he called for the rapid development of infrastructure, diversification of energy sources and supply routes, and a revision of the 2004 Gas Directive.¹³⁷ A proposal to the latter's effect was put forward on 16 July 2009.¹³⁸

¹²⁹ Energy Community Ministerial Council – Meeting Conclusions, Tirana, 11 December 2008, point 13. Available at: <http://www.energy-community.org/pls/portal/docs/296197.PDF>. Accessed on 13 April 2010.

¹³⁰ The Treaty establishing Energy Community was signed in October 2005 in Athens, Greece. It entered into force on 1 July 2006. See: The Energy Community Treaty, OJ L 198/18 of 20 July 2006.

¹³¹ The Energy Community provides a stable investment environment based on the rule of law, and ties the Contracting Parties together with the European Union. Through its actions, the Energy Community aims to contribute to security of supply in wider Europe. See: http://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Facts_and_Figures. Accessed on 18 May 2010. Also see: A. Belyi, (2009), 'EU External Energy Policies: A Paradox of Integration', in: J. Orbie (ed.), *Europe's Global Role*, (Aldershot: Ashgate), pp. 210-211; R. Youngs, (2007), 'Europe's External Energy Policy: Between Geopolitics and the Market'. CEPS Working Document No. 278, November 2007. Brussels: CEPS, p. 3.

¹³² BBC News, 'Russia may cut off Ukraine's gas', 24 December 2008. Available at: <http://news.bbc.co.uk/2/hi/7799321.stm>; BBC News, 'Russia-Ukraine gas row heats up', 31 December 2008. Available at: <http://news.bbc.co.uk/2/hi/7805770.stm>. Accessed on 19 November 2010.

¹³³ BBC News, 'shuts off gas to Ukraine', 1 January 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/7806870.stm>. Accessed on 19 November 2010.

¹³⁴ For a comprehensive overview of the crisis and the EU's attempts to resolve it, see S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9.

¹³⁵ EUobserver, 'EU cannot trust Russia or Ukraine, Barroso says', 20 January 2009. Available at: <http://euobserver.com/?aid=27442>. Accessed on 9 December 2010.

¹³⁶ EU Declaration on the Russia/Ukraine problem and energy security, Brussels, 8 January 2009, points 1 and 3. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/04&type=HTML>. Accessed on 19 November 2010.

¹³⁷ José Manuel Barroso President of the European Commission. Statement of President Barroso on the resolution of the Ukraine-Russia Gas Dispute, Press Point, Doc. SPEECH/09/12, Brussels, 20 January 2009. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Extraordinary Council meeting Transport, Telecommunications and Energy, Council conclusions, Brussels, 12 January 2009, p.2. Available at: <http://register.consilium.europa.eu/pdf/en/09/st05/st05215.en09.pdf>. Both accessed on 19 November 2010.

¹³⁸ See COM(2009) 363 final of 16 July 2009.

The remainder of 2009 dealt largely with the crisis' aftermath and the EU pressed hard to make diversification a reality in the (near future).¹³⁹ In March 2009, the EU signed a deal with Ukraine paving the way for \$3.4 billion of investment in its gas infrastructure. As a follow-up, in August 2009 the EU and international lending institutions agreed with Ukraine a loan worth \$ 1.7 billion in return for reforms of its gas sector.¹⁴⁰ 2009 saw also many developments with regard to the Nabucco project – a planned gas pipeline connecting the Caspian region, the Middle East and Egypt via Turkey, Bulgaria, Romania, and Hungary with Austria and further on with the Central and Western European gas markets, bypassing both Russia and Ukraine. The project enjoys EU support, stemming from its desire to diversify both in terms of suppliers and transit routes. In July 2009, the Nabucco Intergovernmental Agreement was signed by the four EU transit countries and Turkey, paving the way for its further development and construction (see also *infra*, 2.1 and 2.3).¹⁴¹

To allow for better crisis management capabilities and a more rapid response, the EU and Russia reached agreement on strengthening the Early Warning Mechanism in November 2009.¹⁴² Towards the end of the year however, tensions between Ukraine and Russia rose once more, prompting fears of another crisis.¹⁴³ A new crisis was eventually averted by late November 2009, when Russian Prime Minister Putin and his Ukrainian counterpart agreed on a modification of the transit terms with Ukraine.¹⁴⁴ The agreements nevertheless did not prevent tensions from flaring up with Belarus. Luckily for Europe, this time damage was modest.¹⁴⁵

Elections held in Ukraine in February 2010 saw the era of the Orange Revolution come to an end and a return to the scene of former 'villain' – and pro Russian candidate – Viktor

¹³⁹ In March 2009 former External Relations Commissioner Benita Ferrero-Waldner said the EU was seeking bilateral agreements on gas shipments with former Soviet countries, including Armenia, Azerbaijan, Moldova, Ukraine and Belarus. See Bloomberg, 'EU Seeks Gas Accords With Ex-Soviet States, Commissioner Says', 9 March 2009. Available at: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aoON0rcc_3ZY. Accessed on 19 November 2010.

¹⁴⁰ BBC News, 'EU reaches deal with Ukraine', 1 August 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/8179461.stm>. Accessed on 13 April 2010.

¹⁴¹ BBC News, 'Europe gas pipeline deal agreed', 13 July 2009. Available at: <http://news.bbc.co.uk/2/hi/business/8147053.stm>; See also: 'José Manuel Barroso President of the European Commission Signature of the Nabucco Intergovernmental Agreement', Ankara, 13 July 2009. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/339>. Both accessed on 19 November 2010.

¹⁴² EU-Russia Energy Dialogue, The Tenth Progress Report, Moscow, November 2009, p. 10. Available at: http://ec.europa.eu/energy/international/russia/doc/reports/progress10_en.pdf. See also 'The EU and Russia reinforce the Early Warning Mechanism to improve prevention and management in case of an energy crisis', Brussels, 16 November 2009. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1718>; Euractiv, 'Russia and EU agree on supply alert mechanism', 16 November 2009. Available at: <http://www.euractiv.com/en/energy/russia-eu-agree-gas-supply-alert-mechanism/article-187360?Ref=RSS>. All three accessed on 19 November 2010.

¹⁴³ See BBC News, 'Putin in new Ukraine gas warning', 30 October 2009. Available at: <http://news.bbc.co.uk/2/hi/business/8335041.stm>; Euractiv, 'Bulgaria fears new winter gas crisis', 18 November 2009. Available at: <http://www.euractiv.com/en/energy/bulgaria-fears-new-winter-gas-crisis/article-187411?Ref=RSS>; and EUobserver, 'EU risks winter gas crunch despite Russia pact', 17 November 2009. Available at: <http://euobserver.com/9/28999>. All three accessed on 19 November 2010.

¹⁴⁴ See France 24, 'Putin says compromise gas deal reached with Ukraine', 20 November 2009. Available at: <http://www.france24.com/en/20091120-russia-ukraine-putin-compromise-gas-deal-reached-energy-oil>; Euractiv, 'Putin says Ukraine gas deals ensure supplies', 20 November 2009. Available at: <http://www.euractiv.com/en/energy/putin-ukraine-gas-deals-ensure-supplies/article-187532?Ref=RSS>; and BBC News, 'Russia agrees to ease Ukraine gas supply terms', 20 November 2009. Available at: <http://news.bbc.co.uk/2/hi/europe/8369705.stm>. All three accessed on 19 November 2010.

¹⁴⁵ Euractiv, 'Russian oil flowing to EU despite Belarus dispute', 5 January 2010. Available at: <http://www.euractiv.com/en/energy/russian-oil-flowing-eu-despite-belarus-dispute/article-188545>. Accessed on 19 November 2010.

Yanukovych. Energy had been a central theme throughout the election campaigns¹⁴⁶, and given Yanukovych's strong pro-Russian orientation, Ukraine again found itself at a crossroads – in between Brussels and Moscow.¹⁴⁷ It did not take Kiev long to reassert its ties with Moscow, reaching a long awaited agreement over the extension of the lease for Russia's Black Sea fleet in exchange for cheaper gas.¹⁴⁸

The following months witnessed a range of new initiatives. Former Commission President Jacques Delors – together with European Parliament (EP) President Jerzy Buzek – released a widely published call for a 'European Energy Community' in May 2010 (see *infra*, 2.4).¹⁴⁹ The EU-Russia Summit sought to bring new life to the reform of Russia's energy sector and market and launched the EU-Russia 'Partnership for Modernisation'.¹⁵⁰ The Partnership aims to bring about a reform of the Russian economy and society, whereby expanding investment opportunities and the promotion of a sustainable and energy efficient low-carbon economy are some of its key priorities.¹⁵¹

Unfortunately, almost immediately after this successful Summit another dispute with Belarus erupted.¹⁵² The dispute caused a cut in supplies to EU Member State Lithuania, prompting the Commission to voice its strong concerns over the events – who called it an affront to the whole Union.¹⁵³ Negotiations on the new Gas Regulation subsequently intensified and it was approved by Parliament by mid September (see also *infra*, 2.3).¹⁵⁴

¹⁴⁶ See Euractiv, 'Pro-Russia Yanukovych set to win Ukraine elections', 8 February 2010. Available at: <http://www.euractiv.com/en/foreign-affairs/tymoshenko-estranged-former-orange-revolution-partner-changed-election-rules-three->; and BBC News, 'Ukraine election focuses European minds on gas', 14 January 2010. Available at: <http://news.bbc.co.uk/2/hi/europe/8459877.stm>.

¹⁴⁷ See Euractiv, 'Ukraine under Yanukovych: Relations with the EU', 18 February 2010. Available at: <http://www.euractiv.com/en/east-mediterranean/ukraine-under-yanukovych-relations-eu-analysis-260459>; and Euractiv, 'EU ponders 'what to offer' Ukraine', 22 February 2010. Available at: <http://www.euractiv.com/en/east-mediterranean/eu-ponders-what-offer-ukraine-news-275127>. Both accessed on 19 November 2010.

¹⁴⁸ BBC News, 'Ukraine's Yanukovych signals shift over Russia fleet', 5 March 2010. Available at: <http://news.bbc.co.uk/2/hi/europe/8550969.stm>; and BBC News, 'Ukraine extends Russia's Black Sea Fleet lease', 21 April 2010. Available at: <http://news.bbc.co.uk/2/hi/8635345.stm>. Both accessed on 19 November 2010.

¹⁴⁹ See President of the European Parliament, 'The Buzek and Delors Declaration on the creation of a European Energy Community'. Available at: http://www.europarl.europa.eu/president/view/en/press/press_release/2010/2010-May/press_release-2010-May-4.html. Accessed on 19 November 2010; and S. Andoura, L. Hancher and M. van der Woude, (2010), 'Towards a European Energy Community: A Policy Proposal'. Paris: Notre Europe.

¹⁵⁰ Joint Statement on the Partnership for Modernisation, EU-Russia Summit 31 May-1 June 2010, Rostov-on-Don, 1 June 2010. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/114747.pdf. Accessed on 19 November 2010.

¹⁵¹ *Ibid.*, p. 2.

¹⁵² EUobserver, 'Russia to cut supplies to Belarus', 21 June 2010. Available at: <http://euobserver.com/9/30328>. Accessed on 19 November 2010.

¹⁵³ Russia-Belarus gas dispute: Commission strongly concerned about gas cuts in Lithuania, Brussels, 23 June 2010. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/797&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Euractiv, 'Russia-Belarus gas row leaves bitter aftertaste', 25 June 2010. Available at: <http://www.euractiv.com/en/russia-belarus-gas-row-leaves-bitter-aftertaste-news-495592>. Both accessed on 19 November 2010.

¹⁵⁴ Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, OJ L 295 of 12 November 2010. See also Euractiv, 'Parliament approves rules to secure gas supply', 22 September 2010. Available at: <http://www.euractiv.com/en/energy/parliament-approves-rules-secure-gas-supply-news-497983>. Accessed on 19 November 2010.

In late 2010, the Commission published its long awaited energy strategy towards 2020.¹⁵⁵ The €1 trillion Strategy proposes to pursue an external EU energy policy and was accompanied by a €200 billion plan laying out the EU's infrastructure priorities for the next decade.¹⁵⁶ The plan identified four priority corridors in the electricity sector and three in the gas sector – none of which involve Russia.¹⁵⁷

2011 seemed to start without any signs of disturbance. However, on 1 January Gazprom stopped deliveries of crude oil to Belarus following a pricing dispute.¹⁵⁸ The row caused Belarus to halt diesel supplies to Europe and forge a two-year deal with Ukraine on transit through the Odessa-Brody pipeline, allowing Minsk to import alternative supplies of crude.¹⁵⁹ European distillates diesel prices subsequently rose to a 28-month high.¹⁶⁰ Some say the dispute arose because Belarus declined to sell some of its assets to Russia in exchange for cheap energy supplies. This view is contended in Moscow, as it claims it does not use energy as a leverage tool, but rather simply phases out energy subsidies to its neighbours.¹⁶¹

1.5. THE CURRENT STATUS OF EU-RUSSIA RELATIONS

The above overview demonstrated an EU-Russia relationship which has considerably evolved since the end of the Cold War. Writing today, relations can be described as tense, distrustful and antagonistic, causing it to be difficult to move beyond a lowest-common-denominator solution for key issues. How different were relations some twenty years ago, when the end of the Cold War prompted almost a decade of incremental rapprochement between Brussels and Moscow.

However, this convergence came to a halt in the late 1990s and subsequently worsened throughout the first five years of this century. It was during these years that a resurgent Russia, bolstered by high international energy prices, became increasingly assertive in its bilateral relations and with respect to its position on the international political stage. This trend has caused EU-Russia relations to end up in a downward spiral, culminating in a series of high profile energy disputes over the last five years which continue all the way up to the present day.

The longitudinal analysis in section one identified several key outstanding issues, which we claim lay at the basis of current tensions in the EU-Russia energy relationship. The next section investigates these issues in greater detail with a focus on their implications for EU energy

¹⁵⁵ COM(2010) 639 final of 10 November 2010.

¹⁵⁶ Ibid., pp- 6-18; COM(2010) 677 final of 17 November 2010.

¹⁵⁷ Ibid., pp. 10-11.

¹⁵⁸ The dispute did leave exports to Germany and Poland via the Druzhba pipeline unaffected however. See Euractiv, 'Russia-Belarus dispute cuts EU diesel supplies', 18 January 2011. Available at: http://www.euractiv.com/en/energy/russia-belarus-dispute-cuts-eu-diesel-supplies-news-501371?utm_source=EurActiv+Newsletter&utm_campaign=6e86cec7d3-my_google_analytics_key&utm_medium=email. Accessed on 19 January 2011.

¹⁵⁹ Oil and Gas Insight, 'Diesel Exports Halted As Russian Crude Tax Dispute Drags On', January 2011. Available at: <http://www.oilandgasinsight.com/file/95531/diesel-exports-halted-as-russian-crude-tax-dispute-drags-on.html>. Accessed on 19 January 2011.

¹⁶⁰ Reuters, 'Europe Distillates-Diesel prices up on Belarus export problems', 17 January 2011. Available at: <http://af.reuters.com/article/energyOilNews/idAFLDE70G20U20110117>. Accessed on 19 January 2011.

¹⁶¹ Foreyard, 'Russia-Belarus dispute cuts diesel export to Europe-Update 1', 17 January 2011. Available at: <http://www.foreyard.com/en/news/Russia-Belarus-dispute-cuts-diesel-export-to-Europe-2011-01-17T190314Z-UPDATE-1>. Accessed on 19 January 2011.

security governance, against the backdrop of defining international events and relevant Russian and EU Member State undertakings on energy security.

2. KEY ISSUES IN EU-RUSSIA COOPERATION

EU-Russia energy relations can be said to constitute somewhat of a paradox. Although, strongly intertwined and geographically conveniently situated, the energy partnership has not always been predicated on the basis of mutual trust and constructive engagement.¹⁶² A number of issues remain which – for the moment – hamper either EU-Russia rapprochement, or undermine the EU's own ability to engage Russia as effective as possible.

The first of these issues concerns reciprocity in energy market access. This topic is continuously highlighted by both Russia and the EU, yet has come to mean different things on either side of the partnership. In general, a true partnership is predicated on mutual trust and equal rights and participation. With regard to energy, this should manifest itself in equal access to each other's energy market. The question remains why this is not the case today (*infra*, 2.1).

Second, relations between the EU and Russia are based on a – by now over thirteen years old – Partnership and Cooperation Agreement. This document is outdated and represents an incomplete reflection of the status quo between Brussels and Moscow. This lack of clarity is exacerbated at international level by Moscow's recent withdrawal from the Energy Charter Treaty. Given the importance attached to Russia's participation, the Charter's role in international energy security governance has been called into question and a proposal for an alternative Treaty has emerged (*infra*, 2.2).

Third, coherence in external relations is a topic which is frequently referred to throughout EU documents and statements, not limited to the topic of energy alone. However, more often than not, the EU and its Member States do not form a coherent whole with respect to their energy initiatives and actions vis-à-vis Russia. This lack of unity is seen as one of the prime reasons for the Union's inability to position itself strongly in its dialogues with major hydrocarbon producers, such as Russia (*infra*, 2.3).

Finally, precisely the issue of coherence has led some to believe that the EU is in need of a specific Energy Treaty to guide its external policy. Such a Treaty would provide the Union with a stronger basis and ability to 'close its ranks', thereby safeguarding coherence. In that respect, paragraph 2.4 discusses the role of the Treaty of Lisbon and another recent 'Energy Treaty' proposal.

2.1. RECIPROCITY

As stated in 1.5 *supra*, the principle of reciprocity is understood very differently in both Brussels and Moscow. For the EU, reciprocity means that if a country decides to open its market to outsiders, it should subsequently gain access to those States' markets in return. Similarly, the reciprocity principle allows for the protection of markets against others who have not liberalised their energy sectors in equal measure. The Union thus sees reciprocity as a qualitative exchange, as a sort of 'values-by-values' type of deal. From a Russian perspective however, reciprocity is related to the status of the long-term supply regime that exists in international gas trade. It deals more with quantitative exchanges, such as 'volumes-by-volumes', or asset

¹⁶² R. Leal-Arcas, (2009), *supra* note 13, p. 348; J. Sherr, (2010), *supra* note 13, pp. 57–59; T. Romanova, (2008), *supra* note 12, pp. 222-225; and R. Alcaro and E. Alessandri, (2010), *supra* note 74, pp. 193-196.

swaps. At the same time, investment reciprocity stems from any political accord between the actors involved.¹⁶³

The differences in understanding over reciprocity have resulted in a series of misunderstandings and difficulties, both between Russia and the EU, as well as *intra-EU*; between EU Member States and the European Commission themselves. This paragraph analyses the issue of reciprocity based on a number of key energy market reforms within the EU and Russia, illustrated by actual cases where appropriate.

The issue concerning reciprocity as it stands today finds its origins in early 2006. It was back then when rumours emerged that Gazprom was interested in taking over UK gas supplier Centrica. Allegedly, the move worried the British government to the extent that it contemplated a change in its merger rules in order to prevent the takeover from happening. Gazprom reacted by warning the EU that attempts at politicising gas supply could result in a redirection of gas supplies to other world markets.¹⁶⁴

The high profile row over Centrica incensed the Russians and seemed to have inspired then President Vladimir Putin when he delivered his speech at the 2007 Munich Security Conference, who claimed examples of Russian companies who participate extensively in key economic sectors in western countries simply did not exist.¹⁶⁵ Within the EU, what followed were a series of far-reaching reforms of the internal energy market, with the aim of creating a fully liberalised market.¹⁶⁶ At the time, the opinion within the EU was strongly that in order for the Union to be an effective external actor, it would first have to complete its internal market.¹⁶⁷ The proposals, which included strong rules on the separation of networks from activities of production and supply (unbundling) and a reciprocity clause – popularly dubbed the ‘Gazprom clause’ – raised eyebrows in Moscow¹⁶⁸, but also within the EU.¹⁶⁹

¹⁶³ See A. Belyi, (2009), ‘Reciprocity as a factor of the energy investment regimes in the EU-Russia energy relations’, *Journal of World Energy Law & Business* 2(2), p. 117; A. Konoplyanik, (2009a), *supra* note 70, p. 268.

¹⁶⁴ T. Romanova, (2008), *supra* note 12, p. 224; EUobserver, ‘Gazprom warns EU on Russian gas supplies’, 20 April 2006. Available at: <http://euobserver.com/?aid=21396>; EUobserver, ‘EU gives wary backing to G8’s ‘new global energy order’’, 16 July 2006. Available at: <http://euobserver.com/?aid=22101>. Similarly, it is alleged that European companies considered outbidding Gazprom. See The Guardian, ‘Centrica bidders aim to thwart Gazprom’, 17 June 2007. Available at: <http://www.guardian.co.uk/business/2007/jun/17/utilities.observerbusiness>. All accessed on 7 December 2010.

¹⁶⁵ President Vladimir Putin, Speech at the Munich Conference on Security Policy, 11 February 2007. Available at: <http://www.globalresearch.ca/index.php?context=va&aid=4741>. Accessed on 8 December 2010.

¹⁶⁶ Proposals to that effect were put forward by September 2007. See COM(2007) 529 final, *supra* note 110.

¹⁶⁷ Interviews with officials from Permanent Representations of Belgium and Germany to the EU, 22 April and 2 July 2010; interview with officials from European Commission DG Energy, 8 and 15 October 2010; interviews with several officials from European Parliament Directorate-General External Policies, 5 March 2010. See also R. Youngs, (2009), *supra* note 61, pp. 31-32.

¹⁶⁸ The original proposal reads that companies from third countries [who] wish to acquire a significant interest or even control over an EU network, will have to demonstrably and unequivocally comply with the same unbundling requirements as EU companies, allowing the Commission to intervene where a purchaser cannot demonstrate both its direct and indirect independence from supply and generation activities. See COM(2007) 529 final, *supra* note 110, p. 7 and p. 30; P.K. Baev and I. Øverland, (2010), ‘The South Stream versus Nabucco pipeline race: geopolitical and political stakes in mega-projects’, *International Affairs* 86(5), p. 1081. See also Euractiv, ‘EU may restrict foreign access to energy assets’, 30 August 2007. Available at: <http://www.euractiv.com/en/energy/eu-may-restrict-foreign-access-energy-assets/article-166303>; Euractiv, ‘Gazprom Clause’ issues Russia ultimatum for energy co-operation’, 20 September 2007. Available at: <http://www.euractiv.com/en/energy/gazprom-clause-issues-russia-ultimatum-energy-operation/article-166888>; EUobserver, ‘Germany highly critical of EU energy package’, 19 September 2007. Available at: <http://euobserver.com/?aid=24797>; EUobserver, ‘Energy and Kosovo tension sets tone for EU-Russia summit’, 25 October 2007. Available at: <http://euobserver.com/?aid=25040>; and EUobserver, ‘Experts to lock horns

After vehement opposition in several EU Member States to full ownership unbundling¹⁷⁰, an alternative proposal was put forward which would see the transmission system operator (TSO) be a separate firm, distinct from the parent company, but at the same time the TSO would be owned by the same set of shareholders as the parent firm.¹⁷¹ An agreement was eventually reached in April 2009, where companies will be required to choose one of three options of unbundling – full separation of transmission and production, handing over the management of the grid to an independent operator or keeping the transmission business but under strict supervision by a mixed body which includes third party shareholders.¹⁷²

The third option – or ‘third way’ as it became known – resembled closest the views of the group of eight Member States who opposed the Commission’s plans.¹⁷³ Similarly, the ‘Gazprom clause’ was weakened during negotiations, resulting in an agreement that, EU Member States remain free to decide whether to allow a foreign bidder to their market. However, should they decide to do so, they must take into account the impact of the move on the Union’s energy security, while also consulting the European Commission.¹⁷⁴ The ‘third market package’ was eventually adopted in June 2009.¹⁷⁵

This relaxation of terms however seemed to have done little to quell concerns in Moscow, which continues to assert that unbundling reduces the opportunity for investors to get a reasonable income and might possibly therefore look to more attractive markets, such as China.¹⁷⁶

over EU energy market reform’, 16 October 2007. Available at: <http://euobserver.com/877/24980>. All accessed on 7 December 2010.

¹⁶⁹ France, Germany, Austria, Bulgaria, Cyprus, Greece, Latvia, Luxembourg and Slovakia opposed full ownership unbundling, with France and Germany leading the charge. Interviews with officials from Permanent Representations of Bulgaria, Romania, Slovenia and Poland to the EU, 19 April, 12 May, 23 April and 13 May 2010; EUobserver, ‘Piebalgs brushes off criticism of energy package’, 24 September 2007. Available at: <http://euobserver.com/?aid=24818>; and EUobserver, ‘Germany highly critical of EU energy package’, supra note 168. All accessed on 7 December 2010. The proposal initially only won support from the UK, Spain, Sweden, the Netherlands. R. Youngs, (2009), supra note 61, p. 37; P.K. Baev and I. Øverland, (2010), supra note 168, p. 1081; Interviews with officials from Permanent Representations of the UK, and Bulgaria 10 June and 19 April 2010. Italy was said to be in favour of electricity unbundling, yet not in the oil and gas sector. Interview with official from Permanent Representation of Italy to the EU, 24 June 2010.

¹⁷⁰ EUobserver, ‘EU energy liberalisation plans run into opposition’, 3 December 2007. Available at: <http://euobserver.com/?aid=25260>; EUobserver, ‘Eight member states criticise EU energy liberalisation plans’, 31 January 2008. Available at: <http://euobserver.com/9/25570>; EUobserver, ‘Energy liberalisation critics suffer blow in EU parliament’, 7 May 2008. Available at: <http://euobserver.com/?aid=26090>. All accessed on 7 December 2010.

¹⁷¹ Interview with official from Permanent Representation of Bulgaria to the EU, 19 April 2010; EUobserver, ‘France and Germany push ahead with own energy liberalisation plans’, 17 January 2008. Available at: <http://euobserver.com/?aid=25480>; EUobserver, ‘[FOCUS] Energy liberalisation battle reaches critical stage’, 19 May 2008. Available at: <http://euobserver.com/9/26136/?rk=1>. Both accessed on 7 December 2010.

¹⁷² Art. 9 Directive 2009/73/EC, supra note 110. See also O. H. Maican, (2009), supra note 2, p. 37; R. Youngs, (2009), supra note 61, p. 38; EUobserver, ‘EU energy giants escape forced break up’, 9 June 2008. Available at: <http://euobserver.com/?aid=26287>; EUobserver, ‘MEPs approve softer version of energy law’, 22 April 2009. Available at: <http://euobserver.com/863/27981>. Both accessed on 7 December 2010.

¹⁷³ Interviews with officials from Permanent Representations of Bulgaria and Slovenia to the EU, 19 April and 23 April 2010; EUobserver, ‘Parliament rejects full gas company unbundling’, 10 July 2008. Available at: <http://euobserver.com/?aid=26472>.

¹⁷⁴ Art. 11 Directive 2009/73/EC, supra note 110. Again, Germany was said to be particularly influential. See EUobserver, ‘EU weakens ‘Gazprom clause’ on foreign energy investors’, supra note 113.

¹⁷⁵ See Directive 2009/72/EC, supra note; and Directive 2009/73/EC, supra note 110.

¹⁷⁶ Euractiv, ‘Gazprom warns EU it could turn to China’, 15 October 2010. Available at: <http://www.euractiv.com/en/energy/gazprom-warns-eu-it-could-turn-china-news-498822>. Accessed on 7 December 2010.

Moreover, the Kremlin claimed that limiting Russian investment in the Union could prevent asset swaps that could give European energy companies access to Russia's vast energy reserves.¹⁷⁷

Indeed, the third market package, and its 'Gazprom clause' in particular, stem *inter alia* from similar concerns in Brussels over restrictions faced by EU companies that try to invest in the Russian energy market.¹⁷⁸ The Yukos case of 2003 (see *supra*, 1.2) served to demonstrate the strengthening of the Russian State within the oil and gas sector. However, it were particularly the cases of Sakhalin II¹⁷⁹ and Shtokman¹⁸⁰ in 2006 that raised concerns in Brussels. Sakhalin II, which was governed by a PSA, was heavily criticised by the Russian National Accounting Chamber over high cost-overruns – the negative point for Russia being that PSA agreements allow foreign companies to recover all costs before the State starts to receive any profit. Moscow argued that the Russian State had lost several hundred million US dollars as a result. In addition, Shell was accused of having caused serious environmental damage to the region.¹⁸¹ Following the accusations, an agreement was reached where Gazprom was to buy 50 percent, plus one share, in the project operating company from the Sakhalin II shareholders. The environmental problems, as well as other related issues, were subsequently 'solved'.¹⁸²

Discussions on the Shtokman gas condensate field had been going on for nearly 10 years. However, Gazprom was in need of a partner as it lacked the necessary advanced technology itself to successfully extract the gas. In September 2005, a short list of candidates to develop the field was announced – including Norwegian Statoil, Norsk Hydro; American ChevronTexaco and ConocoPhillips; and French Total. Negotiations however dragged on until Gazprom announced it did not need a partner as none of the candidates offered a sufficient stake in exchange for a share in Shtokman.¹⁸³ The decision raised eyebrows in Brussels who pondered whether the decision was taken on political, rather than economic grounds.¹⁸⁴ An agreement was however finally reached in 2007, when French Total, Norwegian Statoil and Norsk Hydro became Gazprom's partners.¹⁸⁵

¹⁷⁷ Euractiv, 'Putin warns EU energy laws hurt business', 26 November 2010. Available at: <http://www.euractiv.com/en/energy/putin-warns-eu-energy-laws-hurt-business-news-500036>. Accessed on 7 December 2010.

¹⁷⁸ Euractiv, 'EU may restrict foreign access to energy assets', *supra* note 168; A. Belyi, (2009), *supra* note 163, p. 124.

¹⁷⁹ Sakhalin II is an oil and gas development project on Sakhalin Island in Russia. It includes development of the Piltun-Astokhskoye oil field and the Lunskoye natural gas field offshore Sakhalin Island in the Okhotsk Sea, and associated infrastructure onshore. Sakhalin-2 includes the first Liquefied Natural Gas (LNG) plant in Russia.

¹⁸⁰ The Shtokman gas condensate field is one of the world's largest natural gas fields in the central part of the Russian sector of the Barents Sea.

¹⁸¹ K. Hóber, (2009), *supra* note 13, p. 440; and The Guardian, 'Kremlin attack dog vows to take on Shell in the battle of Sakhalin', 4 October 2006. Available at: <http://www.guardian.co.uk/business/2006/oct/04/russia.oilandpetrol>. Accessed on 7 December 2010.

¹⁸² K. Hóber, (2009), *supra* note 13, p. 441; and International Herald Tribune, 'Shell cedes control of Sakhalin-2 to Gazprom', 21 December 2006. Available at: <http://www.nytimes.com/2006/12/21/business/worldbusiness/21iht-shell.3981718.html>. Accessed on 7 December 2010.

¹⁸³ T. Romanova, (2008), *supra* note 12, p. 224; and EUobserver, 'Russia snubs European firms in Arctic gas project', 9 October 2006. Available at: <http://euobserver.com/?aid=22597>. Accessed on 7 December 2010.

¹⁸⁴ EUobserver, 'EU must save energy to offset import risks, Barroso says', 10 October 2006. Available at: <http://euobserver.com/?aid=22609>. Accessed on 8 December 2010.

¹⁸⁵ T. Romanova, (2008), *supra* note 12, p. 224.

What served to create greater concern in the EU was Russia's adoption of the Law on Foreign Investments in Strategic Sectors¹⁸⁶ in April 2008. The law lays out 42 different sectors of the economy, including the oil and gas sector, for which investment now requires approval from a government committee.¹⁸⁷ Foreign investors must obtain preliminary consent to acquire more than 50 percent of the shares in strategic companies.¹⁸⁸ The law does not pose retroactive effect with regard to transactions which were finalised before it came into force, however foreign investors must notify the designated authority if they hold at least 5% of shares in strategic companies.¹⁸⁹ The designated authority is hence able to monitor the activities of foreign investors in the relevant sectors of the economy.¹⁹⁰

Subsequently, a number of existing laws were amended, the most important of which was the 2008 revision of the Russian Law on the Subsurface (hereinafter, both are referred to as the Law on Foreign Investment).¹⁹¹ The amendments introduced allow the Russian government to grant approval for 'mineral exploration and production' to a Russian or foreign entity who has discovered strategic resources during geological survey, or it may terminate the right to use these strategic resources even if a foreigner has a license for survey, exploration, and production.¹⁹² More importantly, the license to use subsoil parcels of federal significance¹⁹³ on the continental shelf may only be granted to Russian legal entities that have at least 5 years experience of the Russian continental shelf exploration/production and are at least 50% controlled by the Russian federation.¹⁹⁴ The Law on Foreign Investment drew in widespread criticism, claiming that it breeds unpredictability, does not accord with international business practice and contradicts the ECT's investment provisions (see *infra*, 2.2).¹⁹⁵ Moreover, the limitations set on continental shelf exploration means that *de facto* only Gazprom and Rosneft qualify as eligible.¹⁹⁶ This puts the exploration of Russia's huge Siberian gas fields in major doubt, as Russia lacks the technologies, equipment and funds needed to successfully explore these fields itself (see also *infra*, 2.2).¹⁹⁷ Moreover, a chronic lack of investment during the boom years and the impact of the financial crisis have seen Gazprom's share value reduced by about

¹⁸⁶ Law No. 57-FZ "On the Procedure for Contributing Foreign Investments in Legal Entities which are of Strategic Importance for the Defence of the Country and Security of the State" ('Law on Foreign Investments in Strategic Companies'). Available at: <http://www.rusland.no/filestore/57FZ.27.html>. Accessed on 8 December 2010.

¹⁸⁷ Ar. 7 Law No. 57-FZ, *supra* note 186. See also K. Hóber, (2009), *supra* note 13, p. 436; S. Seliverstov, (2009), 'Energy Security of Russia and the EU: Current Legal Problems'. Note de L'Institut Francais des Relations Internationales (IFRI). April 2009, p. 16; and Clifford Chance, (2009), 'Russian oil and gas'. Client Briefing April 2009, p. 1.

¹⁸⁸ *Ibid.*; A. Belyi, (2009), *supra* note 163, p. 126.

¹⁸⁹ S. Seliverstov, (2009), *supra* note 187, p. 17; A. Belyi, (2009), *supra* note 163, p. 126.

¹⁹⁰ *Ibid.*; Clifford Chance, (2009), *supra* note 187, p. 3.

¹⁹¹ Law No 58-FZ amending and repealing certain legislative provisions. The Law on the Subsurface is the fundamental legislative act for natural resources in Russia. It was adopted on 21 February 1992 and provides for a general framework for licensing exploration and development activities relating to minerals and other subsurface resources, including hydrocarbons. See K. Hóber, (2009), *supra* note 13, p. 432.

¹⁹² Art. 1 Law No 58-FZ, *supra* note 191. See also K. Hóber, (2009), *supra* note 13, p. 438.

¹⁹³ Subsoil parcels of federal significance include all subsoil parcels in the internal waters, territorial sea and continental shelf and other parcels that contain extractable reserves over a certain threshold. Any field with – or with more than – 50 bcm of gas or 70 million tons of oil.

¹⁹⁴ S. Seliverstov, (2009), *supra* note 187, p. 17; K. Hóber, (2009), *supra* note 13, pp. 438-439.

¹⁹⁵ S. Nappert, (2010), 'EU-Russia Relations in the Energy Field: The Continuing Role of International Law'. *International Association for Energy Economics, Third Quarter 2010*, p. 12; S. Seliverstov, (2009), *supra* note 187, p. 17; Clifford Chance, (2009), *supra* note 187, p. 4; Interview with official from European Commission DG Energy, 15 October 2010.

¹⁹⁶ S. Seliverstov, (2009), *supra* note 187, p. 17; K. Hóber, (2009), *supra* note 13, p. 439.

¹⁹⁷ K. Hóber, (2009), *supra* note. 13, p. 439.

¾ in 2008, making the prospects for the successful exploration of these fields look even more doubtful in the short to medium term.¹⁹⁸

The problems surrounding the EU's third legislative market package and Russia's lack of openness to foreign investors recently again came to the fore in two cases involving Poland and Bulgaria. In late October, Polish company PGNiG and Gazprom reached a deal to prolong the contract on the Yamal pipeline¹⁹⁹ to 2037, increasing supplies by 2,5bcm annually to 10bcm.²⁰⁰ The EU however put the deal on hold, claiming a 'territorial clause' within the contract violated internal market rules by banning Poland to sell surplus gas to its neighbours when it receives more than it needs.²⁰¹ The Commission claimed Poland should grant third-party access to the Yamal pipeline and allow gas to flow in both directions by allowing the transport of gas from Germany to Poland, as required by EU law.²⁰² To meet that requirement, Polish state-owned pipelines operator Gaz-System has been charged with managing the Yamal-Europe gas pipeline, owned by a joint venture between Gazprom and PGNiG. However, the state-owned operator will only manage any excess pipeline capacity that may appear, while it will effectively be EuRoPol Gaz and its owners deciding when (and if) that happens. This translates into Gazprom and PGNiG to decide among themselves if there's any capacity to sell to a third party.²⁰³ So, third party access exists – yes – though, mostly on paper. The deal was eventually finalised in late October 2010, after the territorial clause was lifted, thus allowing PGNiG to re-export natural gas surpluses to other countries without Gazprom's consent.²⁰⁴

Around the same time, an agreement between Russia and Bulgaria to set up a joint venture, which will build and operate the Bulgarian section of the South Stream gas pipeline²⁰⁵, sparked questions of compatibility with EU law. The initial draft contract provided South Stream shareholders with exclusive gas transportation, thus violating EU law on ownership unbundling. A sentence has since been added that renders such possibility conditional upon the Commission's approval.²⁰⁶ The main problem however, is a 2008 intergovernmental agreement between Bulgaria and Russia which ensures full and unrestricted transit of Russian gas across

¹⁹⁸ K. Rosner, (2009), supra note 74, p. 166; J. Sherr, (2010), supra note 13, p.60; A. Goldthau, (2010), supra note 49, pp. 32 and 38-39; R. Kefferpütz, (2009), 'Gazprom's Changing Fortunes'. CEPS Commentary. Brussels: Centre for European Policy Studies; and K. Rosner, (2008), 'Russia's Financial Market Meltdown: Energy Security Implications', *Journal of Energy Security*. Available at: http://www.ensec.org/index.php?option=com_content&view=article&id=168:russias-financial-market-meltdown-energy-security-implications&catid=90:energysecuritydecember08&Itemid=334. Accessed on 9 December 2010.

¹⁹⁹ The Yamal pipeline brings Russian gas to Germany from Poland's border with Belarus.

²⁰⁰ Euractiv, 'Gazprom warns EU it could turn to China', supra note 176.

²⁰¹ Euractiv, 'Commission slams Poland over 'Gazprom clause'', 15 July 2010. Available at: <http://www.euractiv.com/en/energy/commission-slams-poland-over-gazprom-clause-news-496352>. Accessed on 8 December 2010. The Commission also pointed to the lack of access for foreign companies to the Yamal pipeline.

²⁰² Ibid.

²⁰³ M. Sobczyk and M. Kruk, (2010), 'Gazprom Keeps Grip on Polish Pipeline', October 27. The Wall Street Journal Blogs. Available at: <http://blogs.wsj.com/new-europe/2010/10/27/gazprom-keeps-grip-on-polish-pipeline/>. Accessed on 8 December 2010.

²⁰⁴ Euractiv, 'Polish-Russian gas treaty receives EU blessing', 4 November 2010. Available at: http://www.euractiv.com/en/energy/polish-russian-gas-treaty-receives-eu-blessing-news-499415?utm_source=EurActiv+Newsletter&utm_campaign=2ca220a26a-my_google_analytics_key&utm_medium=email; and EUobserver, 'Poland and Russia finalise major gas deal', 27 October 2010. Available at: <http://euobserver.com/9/31138>. Both accessed on 8 December 2010.

²⁰⁵ South Stream is a proposed gas pipeline to transport Russian natural gas to the Black Sea to Bulgaria and further to Italy and Austria.

²⁰⁶ Euractiv, 'Commission urges Bulgaria to change Gazprom clause', 15 November 2010. Available at: <http://www.euractiv.com/en/energy/commission-urges-bulgaria-change-gazprom-clause-news-499737>; WAZ.EUobserver, 'Putin leaves Bulgaria with a gas deal and a new puppy', 15 November 2010. Available at: <http://waz.euobserver.com/887/31264>. Both accessed on 8 December 2010.

Bulgarian territory. The agreement violates EU rules on third party access to planned pipeline projects such as Nabucco or South Stream.²⁰⁷ Bulgaria afterwards assured the Commission, it would revise the agreement. The difficulties prompted Russian Prime Minister Putin to criticise EU legislation, warning that rules on ownership unbundling would prevent big energy players from building new gas infrastructure projects, thus stalling infrastructure development – small and inexperienced companies being unable to carry the risk and putting an additional burden on current prices.²⁰⁸

In terms of positions, Russia views the Law on Foreign Investment as logical as to ensure the protection of a vital industry, yet sees the EU's third legislative market package as a source of 'imbalance' and concern of the investment climate between Russia and the EU. Possibly even in violation of WTO law, which could become a problem if Russia eventually joins the organisation.²⁰⁹ However, when compared, the EU's 'reciprocity clause' does not seem to be equally restrictive as the Law on Foreign Investment, rendering a change in Russian policy more justified – a view shared by many of the EU's New Member States.²¹⁰ Some of the Union's big Member States seem to have a different stance on reciprocity which ranges from questioning whether reciprocity is desirable at all²¹¹, to whether in fact it should mean that there should be the *exact same* rules, or that EU rules would also have to apply outside of the EU.²¹²

The EU seems to view reciprocity as a tool to export market liberalisation beyond its borders as well as a leverage on access to downstream markets, whereas Russia considers reciprocity as a bargaining tool for further investment projects in its domestic upstream.²¹³ Some comment that Brussels has little leverage in Moscow to move on this issue however. Moreover, the internal dividedness between 'old' and 'new' Europe makes it harder to reach a compromise on reciprocity, and easier for powerful third countries such as Russia to take advantage of the lack of a unified stance (see also *infra*, 2.3).²¹⁴ Instead, Brussels should seek to overcome French and German opposition and impose true reciprocity through the establishment of 'across-the-board' unbundling, rather than focus on the 'third way' and its reciprocity clause as a compromise measure (see also *infra*, 3 concluding remarks).²¹⁵

²⁰⁷ Euractiv, 'Commission urges Bulgaria to change Gazprom clause', *supra* note 206.

²⁰⁸ *Ibid.*; WAZ.EUobserver, 'Putin leaves Bulgaria with a gas deal and a new puppy', *supra* note 206.

²⁰⁹ Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010. The likelihood of Russia joining the WTO has become greater after the last EU-Russia Summit saw a partial relaxation of EU objections. See EUobserver, 'EU and Russia to sign trade memo amid US mockery', 7 December 2010. Available at: <http://euobserver.com/9/31442>; and Euractiv, 'EU backs Russia's WTO bid at 'best ever summit'', 8 December 2010. Available at: <http://www.euractiv.com/en/global-europe/eu-backs-russias-wto-bid-best-ever-summit-news-500397>. Both accessed on 8 December 2010.

²¹⁰ Interviews with officials from Permanent Representations of Romania, Estonia, Poland, Slovakia, Lithuania, Bulgaria and the Czech Republic to the EU, 12 May, 7 June, 13 May, 20 May, 5 May, and 19 April 2010, ; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010.

²¹¹ The reasoning here is that when a State is unwilling to open up its markets, there is no guarantee that closing 'your' market in return will facilitate the opening up of the former. Instead it prevents exports from running properly.

²¹² Interviews with officials from Permanent Representations of the UK and Germany to the EU, 10 June and 2 July 2010. See also, R. Youngs, (2009), *supra* note 61, p. 34.

²¹³ A. Belyi, (2009), *supra* note 163, p.128.

²¹⁴ R. Alcaro and E. Alessandri, (2010), *supra* note 74, p. 204; E. Kirchner and C. Berk, (2010), *supra* note 74, p. 868; S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 518; The Economist, (2008), *supra* note 119; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interview with official from Embassy of Azerbaijan in Brussels, 13 September 2010.

²¹⁵ O. H. Maican, (2009), *supra* note 2, p. 37; K. Barysch, (2007), 'Reciprocity will not secure Europe's energy'. CER Bulletin 55. Available at: http://www.cer.org.uk/articles/55_barysch.html. Accessed on 8 December 2010.

2.2. BILATERAL AND INTERNATIONAL LEGAL FRAMEWORK

The PCA between the EU and Russia has been automatically prolonged since November 2007, when its ten year span officially came to an end. Although, no bilateral legal vacuum was created as such, both parties are well aware of the need to introduce a new treaty sooner, rather than later.²¹⁶ In fact, negotiations on a new agreement were launched at the EU-Russia Summit of late June 2008.²¹⁷ After the Georgian conflict in August 2008, negotiations were temporarily put on a halt, but these were resumed in December of that year.²¹⁸

Internationally, the Energy Charter Treaty (ECT) and its Draft Transit Protocol (DTP) represent the only intergovernmental agreement in the energy field that has legally binding rules backed up by a dispute settlement mechanism; the first binding multilateral agreement for the promotion and protection of foreign energy investment; and the first multilateral instrument that explains detailed provisions on transit.²¹⁹ However, much to the consternation of the EU, Russia never ratified the Treaty. Instead, Moscow opted for provisional application²²⁰, until it finally announced it would terminate provisional application on 20 August 2009.²²¹

The issues concerning the PCA and the ECT are strongly interrelated since, in the eyes of the EU, a new bilateral agreement should be firmly based on the principles of the Energy Charter, as well as reciprocity, transparency and non-discrimination.²²² Russia on the other hand sees full implementation of the ECT, among other things, as providing free access to its oil and gas production and transport infrastructure and is not sure it is getting something of equal value in return, both in terms of assets and regulatory protection (see also *infra*, this paragraph).²²³ If a new PCA is to be based on Energy Charter principles, inability to reconcile on these matters is a fundamental problem. Given the strong interrelatedness of both agreements, this paragraph analyses their key-issues in a combined fashion.

Russia and the EU diverge strongly on what a new PCA should look like.²²⁴ Whereas, the EU seems to favour a new agreement containing precise wordings on energy and security in

²¹⁶ J. Kulhánek, (2010), 'EU and Russia in search of a new modus operandi: Time is running out'. Association for International Affairs, 12 April 2010. Available at: <http://www.amo.cz/publications/eu-and-russia-in-search-of-a-new-modus-operandi-time-is-running-out.html?lang=en>. Accessed on 8 December 2010.

²¹⁷ Slovenian Presidency of the EU 2008, supra note 120; Joint Statement of the EU-Russia Summit on the launch of negotiations for a new EU-Russia agreement, supra note 120.

²¹⁸ EUobserver, 'EU and Russia resume treaty talks', 2 December 2008. Available at: <http://euobserver.com/?aid=27215>. Accessed on 9 December 2010.

²¹⁹ Y. Selivanova, (2010), 'Managing the Patchwork of Agreements in Trade and Investment', in A. Goldthau and J. M. Witte (eds.), *Global Energy Governance: The New Rules of the Game*, (Washington D.C.: Brookings Institution Press), p. 61; S. Haghghi, (2007), supra note 10, p. 193; O.H. Maican, (2009), supra note 2, p. 32; R. Leal-Arcas, (2009), supra note 13, p. 359.

²²⁰ Provisional application is provided for by Art. 45 ECT. Russia linked ratification of the ECT to reaching an agreement on the Transit Protocol.

²²¹ See Energy Charter, 'About the Charter: Members & Observers'. Available at: <http://www.encharter.org/index.php?id=414#c1338>. Accessed on 9 December 2010.

²²² COM(2008) 740 final of 5 November 2008, p. 3; COM(2006) 590 final, supra note 98, p. 3. See also A. Hadfield, (2008), 'EU-Russia Energy Relations: Aggregation and Aggravation', *Journal of Contemporary European Studies* 16(2), p. 234.

²²³ Interview with official from Energy Charter Secretariat, 13 October 2010; Responses to questions from Russian journalists following the Russia-EU Summit and Press Conference, Sochi, 25 May 2006. Available at: http://archive.kremlin.ru/eng/speeches/2006/05/25/2359_type82915_106123.shtml. Accessed on 9 December 2010. See also F. Lukyanov, (2008), 'Russia-EU: The Partnership That Went Astray', *Europe-Asia Studies* 60(6), p. 1110.

²²⁴ Some scholars argue that the current PCA simply no longer corresponds to the existing character of EU-Russia relations. See, inter alia, Y. Borko, (2004), *Partnership and Cooperation Agreement between the EU and Russia: Do We Need a New Treaty?* (Moscow: Probel); N. Arbatova, T. Bordachev & A.S. Makarychev, (2006), in M. Emerson

particular based on exporting the Union's *acquis communautaire*²²⁵, Russian President Medvedev rather supports a document that is 'short, without too many details' and would leave provisions for cooperation in different sectors to special protocols or agreements.²²⁶ The EP on the other hand, reiterated after the June 2010 EU-Russia Summit that EU-Russia energy cooperation must be based on the principles of the Energy Charter and the Transit Protocol and incorporated into the new framework agreement in order to ensure transparent and fair mutual investment conditions, equal access and a rule-based market – which excludes the use of energy as a foreign policy tool.²²⁷

Integrating provisions on energy cooperation within a new PCA and cross-border extension of the EU's *acquis*, for example through the Energy Community Treaty (see *supra*, 1.3) is something Moscow is particularly opposed to.²²⁸ Indeed, one can expect that as the EU's dependence on external supplies grows, key gas exporters, particularly those that are part of the integrated Eurasian (EU plus non-EU) gas supply system based on fixed infrastructure, will want to remain outside the area which is governed by EU legal regulation.²²⁹ However, it will prove equally difficult for Russia to reach an agreement with the Union on terms incompatible with European law.²³⁰ Alternatively, preparing a new EU-Russia agreement with an energy chapter based on ECT principles is equally unlikely to bode well with Moscow, particularly as it viewed the Charter Secretariat as unable to play an active role in preventing and solving the January 2009 crisis.²³¹

Moreover, much has changed since the existing PCA and the Energy Charter were negotiated: the Union has grown from 15 to 27 Member States; the gap in 'level of market liberalisation' between the EU and Russia has increased over time; and politically the window of opportunity has significantly narrowed compared to the early 1990s when the fall of the Berlin Wall prompted euphoria on both sides.²³² The prospects of negotiating a new treaty based on ECT principles are therefore not optimal, particularly since the January 2009 crisis.²³³ Since that crisis, Russia has been increasingly vocal on the need to develop a completely new treaty; one that would replace the ECT in its entirety. Moscow continues to insist that such a treaty should

(ed.), *The Elephant and the Bear Try Again: Options for a New Agreement between the EU and Russia*, (Brussels: Centre For European Policy Studies).

²²⁵ A. Konoplyanik, (2009a), *supra* note 70, p. 261.

²²⁶ International Herald Tribune, 'Medvedev makes nice with the EU', 27 June 2008. Available at: http://www.nytimes.com/2008/06/27/world/europe/27iht-union.4.14050408.html?_r=1. Accessed on 9 December 2010; T. Romanova, (2008), *supra* note 12, p. 223; A. Konoplyanik, (2009a), *supra* note 70, p. 261.

²²⁷ European Parliament Resolution of 17 June 2010 on the conclusion of the EU/Russia summit (31 May-1 June 2010, P7_TA-PROV(2010)0234, point 10.

²²⁸ T. Romanova, (2008), *supra* note 12, p. 223; A. Konoplyanik, (2009a), *supra* note 70, p. 269; Interview of Russian Deputy Minister of Foreign Affairs Alexander Grushko on Relations Between Russia, and the EU and US, Granted to Interfax News Agency on November 10, 2008. Available at: <http://www.russianembassy.org.za/statements/text/nov08//relations.html>. Accessed on 9 December 2010.

²²⁹ A. Konoplyanik, (2009a), *supra* note 70, p. 266.

²³⁰ A. Konoplyanik, (2009c), 'Russia: don't oppose the Energy Charter, help to adapt it', *Petroleum Economist*, July 2009, p. 2. Available at: <http://www.konoplyanik.ru/ru/publications/articles/090618-PE-ECT-final.pdf>. Accessed on 8 December 2010.

²³¹ *Ibid.*, p. 270; R. Leal-Arcas, (2009), *supra* note 13, p. 359; O.H. Maican, (2009), *supra* note 2, p. 34; S. Seliverstov, (2009), *supra* note 187, p. 9. During said crisis, the ECT was indeed used very limitedly and proved unable to prevent or solve the dispute – although Ukraine is a full member of the Treaty. See S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 529.

²³² Interview with official from European Commission DG Energy, 8 October 2010; A. Konoplyanik, (2009a), *supra* note 70, pp. 272-274; R. Leal-Arcas, (2009), *supra* note 13, p. 362.

²³³ *Ibid.*

address the concerns of producer countries more substantially, and states the chances Russia would ratify the existing Charter are minimal (see also *infra*, this paragraph).²³⁴

The Treaty's inability to resolve crises and other issues²³⁵ set aside, two of Russia's most fundamental – and substantial – concerns with regard to the ECT relate to transit and the idea of the EU as a Regional Economic Integration Organisation (REIO).²³⁶ The first issue pertains to what is known as the 'contractual mismatch' problem. This is an issue which arises when the duration of a long-term export supply contract does not match the duration and/or volume of the agreement provided to the shipper by the owner/operator of the transport system within an unbundled market (*i.e.* the 'transit contract').²³⁷ The other issue stems from the nature of the EU within the ECT and the DTP. Whereas under the ECT transit refers to the crossing of the territory of both the EU as a whole *and* of its individual Member States²³⁸, pursuant to Article 20 DTP – as proposed by the EU – transit constitutes merely crossing the territory of the Union as a whole, and *not* of individual Member States as such.²³⁹

The contractual mismatch problem originates predominantly within the CIS countries, particularly with respect to Belarus and Ukraine. As these contracts were usually signed on an annual basis – the recent crises with both countries illustrate well which risks such practice entails.²⁴⁰ In other CIS countries, this problem was 'solved' through a practice called the 'right of first refusal' (RFR).²⁴¹ However, given the lack of alternative pipelines for most other CIS countries, the practice of RFR simply meant a continuation of business as usual, *i.e.* shipping the gas to Russia.²⁴² Gazprom suggested, as a way to overcome the problem of contractual mismatch within the EU context, granting a priority right for an existing supplier with a long term contract for rebooking the transport capacity in cases where the long term contract was still in

²³⁴ Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010; T. Romanova, (2008), *supra* note 12, pp. 223-224; S. Seliverstov, (2009), *supra* note 187, p. 8; Russian President Medvedev, in an interview with the Spanish press. *Russiatoday*, 'Europe needs new Energy Charter – Medvedev', 1 March 2009. Available at: <http://rt.com/news/europe-needs-new-energy-charter-medvedev/>; The Wall Street Journal, 'Putin Speaks at Davos', 28 January 2009. Available at: <http://online.wsj.com/article/SB123317069332125243.html>; R. Jozwiak, (2009), 'Chances of Russia ratifying energy charter are 'minimal''. *European Voice*, 4 February 2009. Available at: <http://www.europeanvoice.com/article/2009/02/chances-of-russia-ratifying-energy-charter-are-minimal-63821.aspx>. All accessed on 9 December 2010.

²³⁵ When the process of ratification was discussed in the Russian State Duma, Russian companies such as Transneft and Gazprom argued that the ECT would oblige them to open their network to lower cost gas from Central Asian countries. Calculations were made on how much they would lose. However, the Treaty does not foresee Mandatory Third Party Access (MTPA). This is clearly written down in both the ECT and the DTP. Therefore, one might argue that this argument is wrong in fact.

²³⁶ Interview with official from Energy Charter Secretariat, 13 October 2010; interview with official from Permanent Representation of Slovenia to the EU, 23 April 2010; A. Konoplyanik, (2009a), *supra* note 70, p. 280; A. Konoplyanik, (2009b), *supra* note 85, p. 470; O.H. Maican, (2009), *supra* note 2, p. 33; E.F. van der Meulen, (2009), 'Gas Supply and EU-Russia Relations', *Europe-Asia Studies* 61(5), p. 850.

²³⁷ Interview with official from Energy Charter Secretariat, 13 October 2010; A. Konoplyanik, (2009a), *supra* note 70, p. 280; A. Konoplyanik, (2009b), *supra* note 85, p. 470.

²³⁸ Art. 7 ECT.

²³⁹ Interview with official from Energy Charter Secretariat, 13 October 2010; interview with official from Permanent Representation of Slovenia to the EU, 23 April 2010; A. Konoplyanik, (2009a), *supra* note 70, p. 282; A. Konoplyanik, (2009b), *supra* note 85, p. 470; S. Haghighi, (2007), *supra* note 10, p. 330.

²⁴⁰ A. Konoplyanik, (2009b), *supra* note 85, p. 480.

²⁴¹ Right of first refusal (RFR) is a contractual right that gives its holder the option to enter a business transaction with the owner of something, according to specified terms, before the owner is entitled to enter into that transaction with a third party.

²⁴² Interviews with officials from Permanent Representations of Germany and Slovenia to the EU, 2 July and 23 April 2010.

place.²⁴³ However, the EU saw RFR as a means of granting preferential access rights to incumbents and discriminate against newcomers, whose only option would be to construct a new pipeline. Brussels subsequently rebuffed by idea on grounds of it violating the Union's internal competition rules.²⁴⁴ When the DTP was developed, discussions moved from a system of RFR to a principle that was thought to be more non-discriminatory and in line with what the EU was asking for.²⁴⁵ The idea is that when transit capacity is requested and cannot be granted due to a supply contract, the applicant party would be placed on a waiting list. In order to enter up on this waiting list, one has to undergo a non-discriminatory selection practice. If transit capacity could ultimately – for some reason – not be granted, it should be created. For now however, this idea has not yet been developed into a more concrete form, nor does the latest version of the DTP reflect it.²⁴⁶

The application of the DTP within the territory of the EU has been an issue since 2002, ever since the Union first proposed the new Article 20 DTP.²⁴⁷ The stricter nature of Article 20 DTP compared to Article 7 ECT, would limit the application of the DTP to cases where energy originates from one third country and passes through the EU's territory destined for another third country. Examples include shipments to areas such as Switzerland, Kaliningrad or deliveries to Turkey.²⁴⁸ Conversely, the members of the EU are considered transit countries if the energy originated from a third country and was destined for an EU Member State, crossing their territory in the process. This means that in this case, the DTP will not apply and the EU's own internal market rules on transit will apply instead.²⁴⁹ This exclusion of the DTP should be problematic only if EU law is not as protective as the DTP.²⁵⁰

However, this is where a vital problem lies. A few years ago, a new wording was introduced in Article 20 DTP, stating 'the rules of a REIO shall provide an *overall* standard at least equivalent to that resulting from the provisions of this Protocol'.²⁵¹ For Russia, this *overall* standard is not enough as it would have to be at least a *similar* standard.²⁵² A member of the industry advisory panel to the Energy Charter explained that 'Russian gas exporters cannot rely on the goodwill and even on the wisdom of the creators of EU Directives on Gas and prefer to have a say in discussing issues which are of vital importance for them'.²⁵³ Moscow has since never given up that the EU might be ready to surrender this provision, but for the EU this remains a *sine qua non*.²⁵⁴

²⁴³ Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010.

²⁴⁴ Ibid.; Interview with official from Energy Charter Secretariat, 13 October 2010; A. Konoplyanik, (2009b), supra note 85, p. 481; S. Haghghi, (2007), supra note 10, pp. 328-329.

²⁴⁵ The system was dubbed the 'Paris Opera System'. Interview with official from Energy Charter Secretariat, 13 October 2010.

²⁴⁶ Interview with official from Energy Charter Secretariat, 13 October 2010.

²⁴⁷ Ibid.; interview with official from Permanent Representation of Slovenia to the EU, 23 April 2010; Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010; A. Konoplyanik, (2009a), supra note 70, p. 281.

²⁴⁸ A. Konoplyanik, (2009a), supra note 70, p. 281; A. Konoplyanik, (2009b), supra note 85, p. 282; S. Haghghi, (2007), supra note 10, p. 332.

²⁴⁹ S. Haghghi, (2007), supra note 10, pp. 330-331.

²⁵⁰ Ibid., p. 333.

²⁵¹ Art. 20 DTP.

²⁵² Interview with official from Energy Charter Secretariat, 13 October 2010.

²⁵³ See T.I. Shtilkind, (2005), 'Energy Charter Treaty: A critical Russian perspective', *Oil Gas & Energy Law* 3(1).

²⁵⁴ Interview with official from Energy Charter Secretariat, 13 October 2010. Others admitted that the negotiation process on this matter has been long, but without much result. Interviews with officials from Permanent Representations of Slovenia, Romania and Estonia to the EU, 23 April, 12 May and 7 June 2010.

Prior to Russia's announcement to terminate provisional application, President Medvedev had launched its own 'alternative' to the ECT in April 2009. The proposal frames energy security in terms of unconditional state sovereignty over natural resources and a guarantee that access to international energy markets is non-discriminatory and competitive.²⁵⁵ A substantial part of the proposal deals with transit. It seeks to introduce the principles of establishing transit tariffs and obliging all parties to ensure the proper fulfilment of transit requirements by their entities.²⁵⁶ The document stems from Russia's dissatisfaction with the Charter prior and after the January 2009 crisis.²⁵⁷ Russia's 'producer concerns' are however difficult to translate into treaty form, as 'security of demand' is an elusive concept to define in legal terms.²⁵⁸ Indeed, the current proposal is considered very broad and incompletely formulated at this stage to be seen as a credible alternative to the ECT.²⁵⁹ The European Commission for its part had already ruled out abandoning the Energy Charter, claiming the EU should rely on existing arrangements and not question the present energy security system in Europe.²⁶⁰ The common line within the EU is that the proposal should be analysed *within* the ECT framework and benchmarked against the Charter.²⁶¹

The withdrawal from the ECT did little good to Russia's reputation for adhering to standards of international law. In fact, it deprives Russia of additional protection of its own investments abroad – something which ought to be of particular value to Moscow in light of its concerns over the EU's third legislative market package (see *supra*, 2.1).²⁶² However, Russian withdrawal does not mean the end of the Energy Charter as such.²⁶³ On the contrary, other countries will continue to enjoy its advantages – such as reduced energy-financing costs – giving them a possible competitive advantage over Russian firms. Also, it is in no way guaranteed that the rejection of the Charter means that Russia is able to create a – in its view – more effective instrument in the foreseeable future.²⁶⁴

In terms of investment protection, Russia's withdrawal did not have immediate consequences for investments which were done in the past. An arbitrary court set up for the Yukos Case ruled that, in spite of not having ratified the Treaty, Russia was in fact bound by the ECT for investments pre-dating 19 October 2009. This means that all investments made up to that date,

²⁵⁵ President of Russia, Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles), 21 April 2009. Available at <http://archive.kremlin.ru/eng/text/docs/2009/04/215305.shtml>. Accessed on 8 December 2010. On this proposal, see also: Bochkarev, A. (2010). Redrawing the global energy blueprint. *European Voice*, 12 February 2010. Available at: <http://www.europeanvoice.com/article/2010/02/redrawing-the-global-energy-blueprint/67151.aspx>; EUobserver, 'Russia invites Europe to join new energy charter', 21 April 2009. Available at: <http://euobserver.com/?aid=27970>; and Euractiv, 'Russia unveils new global energy treaty blueprint', 22 April 2009. Available at: <http://www.euractiv.com/en/energy/russia-unveils-new-global-energy-treaty-blueprint/article-181505>. All accessed on 8 December 2010.

²⁵⁶ Euractiv, 'Russia unveils new global energy treaty blueprint', *supra* note 255; O.H. Maican, (2009), *supra* note 2, p. 35.

²⁵⁷ A. Konoplyanik, (2009b), *supra* note 85, pp. 483-484.

²⁵⁸ Interview with official from Energy Charter Secretariat, 13 October 2010.

²⁵⁹ S. Nappert, (2010), *supra* note 195, p.11; A. Konoplyanik, (2009b), *supra* note 85, p. 484; A. Konoplyanik, (2009c), *supra* note 230, p. 3.

²⁶⁰ EUobserver, 'EU-Russia summit ends with prickly exchange over energy', 23 May 2009. Available at: <http://euobserver.com/?aid=28173>. Accessed on 8 December 2010.

²⁶¹ Interviews with officials from Permanent Representations of Romania and Slovenia to the EU, 12 May and 23 April 2010.

²⁶² A. Konoplyanik, (2009c), *supra* note 230, p.2.

²⁶³ Interviews with official from European Commission DG Energy, 11 March and 15 October 2010.

²⁶⁴ A. Konoplyanik, (2009c), *supra* note 230, p.2.

will continue to be protected for another 20 years.²⁶⁵ Also, one has to bear in mind that the application of transit rules are in any event a direct transcription of those transit rules under the WTO, which Russia may or may not join eventually.²⁶⁶ However, one should equally note that the WTO is not an energy-specific organisation and does not deal with transit through fixed infrastructure as such. This is the task for which the ECT and its related documents, such as the DTP were specifically designed.²⁶⁷

The unlikely chance that Medvedev's proposal will serve as a real alternative, coupled with the strong rules on investment protection enshrined within the ECT and the Treaty's long-standing history, provide it with enough value in the negotiations on a new EU-Russia agreement. Moreover, Moscow deems it deserves an equal place at the negotiating table and signing a new partnership agreement – whether or not based on the EU's *acquis* or principles of the Energy Charter – should not be viewed as a kind of reward that Russia gets for showing good behaviour.²⁶⁸ Indeed, rather than pursuing a new bilateral treaty and doing away with the ECT altogether, Brussels should try to duly take into account Russia's concerns on transit, balance these against the ECT, and subsequently draft a new EU-Russia Agreement that takes the ECT's strong points as the basis (see also *infra*, 3 concluding remarks).

2.3. COHERENCE IN EXTERNAL ENERGY RELATIONS

The range of energy disruptions, the difficulties with regard to acquiring equal market access and the protracted negotiations on a new EU-Russia agreement seem to make a case that the Union would have much to gain from presenting a united front to Russia.²⁶⁹ However, many of the difficulties the EU has faced in engaging Russia stem from a different order or priorities within Europe itself. Indeed, for a variety of reasons, including, EU Member States' national preferences over their energy mix, historical ties, and relative energy market position, there is a certain asymmetry in the way EU Member States would like to approach Russia on energy matters.²⁷⁰

Despite manifold statements which point out the advantages of multi-actor institutionalism, EU Member States have not always used their linkages and combined resources to effectively apply a greater combined weight.²⁷¹ Some state that this multiplicity of voices is the main reason as to why the EU has largely failed to develop a coherent and strategic approach to the reality of the EU's dependence on Russian natural gas.²⁷² This paragraph analyses the issue of coherence in external relations based on a number of high-profile cases where critics and interviewees alike have claimed this unity was largely absent.

²⁶⁵ Interview with official from European Commission DG Energy, 11 March 2010. Euractiv, 'Court rules against Russia in Yukos case', 1 December 2009. Available at: <http://www.euractiv.com/en/energy/court-rules-russia-yukos-case/article-187869>; EUobserver, 'Investors call for tough EU-Russia energy treaty', 2 December 2009. Available at: <http://euobserver.com/?aid=29084>. Both accessed on 8 December 2010; A. Konoplyanik, (2009c), *supra* note 230, p. 3; S. Nappert, (2010), *supra* note 195, p.13.

²⁶⁶ Interview with official from European Commission DG Energy, 11 March 2010.

²⁶⁷ A. Konoplyanik, (2009b), *supra* note 85, p. 485; EUobserver, 'Russia inches closer to WTO membership after EU deal', 25 November 2010. Available at: <http://euobserver.com/?aid=31352>. Accessed on 8 December 2010.

²⁶⁸ S. Nappert, (2010), *supra* note 195, p. 11; Russian President Medvedev, in an interview with the Spanish press. *Russiatoday*, 'Europe needs new Energy Charter – Medvedev', *supra* note 234.

²⁶⁹ K. Rosner, (2009), *supra* note 74, p. 166.

²⁷⁰ R. Alcaro and E. Alessandri, (2010), *supra* note 74, p. 196; E. Kirchner and C. Berk, (2010), *supra* note 74, pp. 867-877; interviews with officials from Permanent Representations of Estonia, the Czech Republic and Slovakia to the EU, 7 June, 19 April and 20 May 2010.

²⁷¹ S. Wood, (2009), 'Energy Security, Normative Dilemmas, and Institutional Camouflage: Europe's Pragmatism', *Politics and Policy* 37(3), p. 619.

²⁷² R. Leal-Arcas, (2009), *supra* note 13, p. 351.

The main question for the EU in this respect is how to rationalise energy policy, enabling the Union to be the central actor, as opposed to a set of disparate actors, *i.e.* EU Member States. There is a need for an overarching view on what the EU should be doing externally, transferable from one area to another, so that it has a coherent international energy policy which is largely independent of the specific country in which the Union acts.²⁷³ The European Commission is keen to point out in its 2020 Energy Strategy that, in practice, national initiatives do not leverage the strength of the size of the EU market and could better express the EU interest.²⁷⁴

Developing a coherent external energy policy hinges to a great deal on the extent to which institutions follow general rules as opposed to individual barter deals. The former is preferred by the European Commission and some Member States, whereas some of the larger Member States tend to prefer the latter (see *infra*, this paragraph).²⁷⁵ Pursuing individual barter deals, however, inadvertently creates possibilities for elites in supplier countries to pursue their own 'reciprocity rules', *i.e.* not limiting demands to capital, arguing more substantial trade-offs are necessary in order to get things done, such as asset swaps (see *supra*, 2.1). The monopolistic and quasi-statist character of such energy markets thus remains unchanged – potentially creating a vicious circle which is hard to break.²⁷⁶

A range of energy initiatives which were put forward since the early 2000s, and especially since 2006, to overcome this problem did not prosper in the end.²⁷⁷ Such proposals included for the European Commission to be vested with institutional competences over external energy issues;²⁷⁸ for a mandatory 'energy security clause' to be inserted into third country agreements;²⁷⁹ and for the application of 'enhanced cooperation', to create a so-called 'energy Schengen'.²⁸⁰ The recently adopted Regulation on Security of Gas Supply did little to change this tendency, as none of the European Parliament's amendments concerning inclusion of geopolitical risk assessments in third countries, and the High Representative of Foreign Affairs and Security Policy/Vice-President of the Commission (HR/VP) made it into the final document

²⁷³ Interview with official from European Commission DG Energy, 11 March 2010; interview with official from European Commission DG External Relations, 30 September 2010. See also European Parliament, Report on towards a common European foreign policy on energy, supra note 93, point 26.

²⁷⁴ COM(2010) 639 final, supra note 155, p. 17.

²⁷⁵ S. de Jong, J. Wouters, and S. Sterkx, (2010), supra note 9, p. 518.

²⁷⁶ See J. Grätz, (2009), supra note 10, p. 69; K. Hóber, (2009), supra note 13, p. 423; and R. Youngs, supra note 61, pp. 82-84, 86-87, 91 and 96. See also O. Geden et al., (2006), 'Perspectives for the European Union's External Energy Policy. Discourse, Ideas, and Interests in Germany, the UK, Poland and France'. Working Paper FG1. Berlin: SWP; T. Romanova, (2008), supra note 12, p. 227; and A. Checchi, A. Behrens, C. Egenhofer, (2009), 'Long-Term Energy Security Risks for Europe: A Sector Specific Approach'. CEPS Working Document No. 309/January 2009. Brussels: Centre for European Policy Studies; Interviews with officials from Permanent Representations of the Czech Republic and Latvia to the EU 19 April and 23 April 2010; and interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010.

²⁷⁷ R. Youngs, (2009), supra note 61, p. 27.

²⁷⁸ European Parliament, Report on towards a common European foreign policy on energy, supra note 93, point 29.

²⁷⁹ Such a clause would lay down a code of conduct and prohibition of disruption due to commercial disputes, and explicitly outline measures to be taken in the event of unilateral disruption, or any change in the terms of the contract or in the terms of supply by one of the partners. See European Parliament, non-legislative resolution, 3 February 2009, INI/2008/2239; European Parliament, Report on towards a common European foreign policy on energy, supra note 93, point 31.

²⁸⁰ President of the European Parliament, 'The future of European energy policy' – address by President Jerzy Buzek at the Stakeholder Conference on preparation of Energy Strategy 2011-2020. Available at: <http://www.europarl.europa.eu/president/view/en/press/speeches/sp-2010/sp-2010-September/speeches-2010-September-3.html>. Accessed on 9 December 2010; S. Andoura, L. Hancher and M. van der Woude, (2010), supra note 149, p. 105.

(see also *infra*, 2.4).²⁸¹ The absence in practice of said proposals, leads the EP to acknowledge there is still a lack of ‘critical awareness’ within the Union that an EU-led approach (former Community approach) is the way forward.²⁸² For the EU it is important that – in order to overcome this practice – it formalises the principle whereby Member States act in the benefit of the EU as a whole in bilateral energy relations with key partners, including, and in particular, Russia.²⁸³

Currently, some of the bigger EU Member States are still not convinced that a truly common energy policy is in their interests. Different energy exposures are largely seen as preventing a strengthened commitment to energy’s external dimension.²⁸⁴ Whereas some of the EU’s Central and Eastern Member States are positive towards a larger role for the European Commission²⁸⁵, countries such as France, Germany, the UK, Italy and the Netherlands²⁸⁶ – are not too eager on having their sovereignty limited as they view their market size and power as a sufficient defence against any threat posed by external dependency.²⁸⁷

Recently, a bilateral deal between British BP and Gazprom stoked some controversy among British parliamentarians, the US congress and environmental groups. The agreement, in which BP swaps 5% of its shares for a 9,5% stake in Russian Rosneft, allows the British company to participate in the development of three large offshore oil blocks in Russia’s Arctic territory.²⁸⁸ The agreement is similar to the one between Norwegian Statoil and French Total on the Shtokman gas field (see *supra*, 2.1). BP will not own the oil blocks, but merely acquired a right to develop them – making profitability questionable. British parliamentarians and environmentalists quickly dubbed the deal ‘Bolshoi Petroleum’, blatantly criticising BP for agreeing such a move after the recent Gulf of Mexico oil spill and amid talks about offshore drilling operations in or near the EU.²⁸⁹ Moreover, the US congress criticised the deal over

²⁸¹ Council of the European Union, Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963, Council Doc. 8304/4/10 REV 4, EP Amendments 33, pp. 27-28; 25, pp. 20-21; and 86 paragraph 4a (new), pp. 70-71.

²⁸² European Parliament, Report on towards a common European foreign policy on energy, *supra* note 93; interviews with officials from European Parliament Directorate-General Internal Policies, 30 March 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; R. Youngs, (2009), *supra* note 61, p. 27.

²⁸³ COM(2010) 639 final, *supra* note 155, p. 17.

²⁸⁴ Interview with official from European Commission DG Energy, 26 March 2010. See also A. Macintosh, (2010), ‘Security of Europe’s Gas Supply: EU Vulnerability’. CEPS Policy Brief No. 222, November 2010; and R. Youngs, (2009), *supra* note 61, p. 34.

²⁸⁵ Interview with official from Permanent Representation of the UK to the EU, 10 June 2010.

²⁸⁶ One must note however that, as a small EU country, the Netherlands does not pose the same market size and power as do Germany, France, the UK and Italy. However, as a natural gas exporting country, it is keen to keep this position and prefers good relations with Moscow. Increased supranational involvement in external energy policy is seen as negatively affecting this relationship. Interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interviews with officials from Permanent Representations of Poland and Lithuania to the EU, 13 May and 5 May 2010. See also K. Barysch, (2010), ‘Should the Nabucco pipeline project be shelved?’. Centre for European Reform Policy Brief. May 2010, p. 4.

²⁸⁷ E. Kirchner and C. Berk, (2010), *supra* note 74, p. 868; K. Barysch, (2010), *supra* note 286, p. 4; interviews with officials from European Parliament Directorate-General Internal Policies, 30 March 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interview with official from Permanent Representation of Lithuania to the EU, 5 May 2010

²⁸⁸ Euractiv, ‘Environmentalists blast UK-Russia ‘Bolshoi Petroleum’ deal’, 17 January 2011. Available at: http://www.euractiv.com/en/energy/environmentalists-blast-uk-russia-bolshoi-petroleum-deal-news-501325?utm_source=EurActiv+Newsletter&utm_campaign=90fe16380c-my_google_analytics_key&utm_medium=email; BBC News, ‘BP and Russia in Arctic oil deal’, 14 January 2011. Available at: <http://www.bbc.co.uk/news/business-12195576>. Both accessed on 18 January 2011.

²⁸⁹ On 28 April 2010, an explosion aboard the BP leased offshore oil platform ‘Deep Water Horizon’ caused it to sink into the Gulf of Mexico, killing 11 people in the process. The accident triggered the hitherto greatest offshore oil spill

concerns of its own national and economic security, given BP's ownership of essential US' oil assets.²⁹⁰

However, the event which arguably raised most consternation within the EU was the deal struck between Gazprom and German E-ON-Ruhrgas and BASF in 2006 to build a pipeline that links Russia and Germany via the Baltic Sea.²⁹¹ Construction on the 'Nord Stream' project as it was called began on 9 April 2010.²⁹² Many countries – mostly Central and Eastern European States – within the EU viewed the project as a flagrant example of quick bilateral geopolitics, lacking any form of solidarity, where discussions at EU level had largely been absent.²⁹³ The pipeline is seen by some as a move by Russia and Germany to deliberately pursue a more expensive subsea option at the expense of a cheaper overland route to bypass 'traditional' transit countries such as Ukraine, Belarus and Poland, which are seen as an 'unreliable link in the chain'.²⁹⁴ Conversely, Germany and Italy rather see Nord Stream as a purely industry driven project between commercial undertakings which should not necessarily be discussed at Council level.²⁹⁵ Solidarity in this respect should be understood as something that applies *between* EU countries, yet not necessarily in relation to decisions involving third countries on a bilateral commercial basis.²⁹⁶ Russia seems to take a more pragmatic stance, claiming it does not think the sea route means Poland and the Baltic States can not benefit from the pipeline; either in terms of construction, job creation, or the purchase of gas.²⁹⁷

in history. The EU has recently been discussing offshore drilling regulations. Initially, the Commission proposed a ban. This was vehemently opposed by Member States, notably the UK. The Commission's stance subsequently watered down. However, the topic is still under discussion, rendering BP's deal open to criticism. See Euractiv, 'Brussels climbs down on oil drilling moratorium', 14 October 2010. Available at: <http://www.euractiv.com/en/energy/brussels-climbs-down-oil-drilling-moratorium-news-498777>. Accessed on 18 January 2011.

²⁹⁰ Euractiv, 'Environmentalists blast UK-Russia 'Bolshoi Petroleum' deal', supra note 288; BBC News, 'BP and Russia in Arctic oil deal', supra note 288.

²⁹¹ EUobserver, 'Russia pledges future gas supplies to Europe', 13 February 2006. Available at: <http://euobserver.com/?aid=2088>. The project is characterised by high-level political visibility as shown by the personal participation of former German Chancellor Gerhard Schröder and Russian Prime Minister Putin. See EUobserver, 'EU needs Baltic Sea gas pipe, German ex-leader says', 8 February 2007. Available at: <http://euobserver.com/?aid=23448>. Both accessed on 9 December 2010.

²⁹² Its main proponents are Gazprom, German BASF/Wintershall Holding AG, German E-ON Ruhrgas AG and Dutch NV Nederlandse Gasunie. Recently French GDF Suez joined the project.

²⁹³ Interviews with officials from Permanent Representations of Latvia, Poland, Estonia, Slovenia and the Czech Republic to the EU, 23 April, 13 May, 7 June, 23 April and 19 April 2010.

²⁹⁴ Interviews with officials from Permanent Representations of Poland, Latvia and Slovenia to the EU, 13 May, and 23 April 2010. See also A. Cohen, (2006), 'The North European Gas Pipeline Threatens Europe's Energy Security', *Background (Heritage Foundation)* No. 1980; G. Feller, (2007), 'Nord Stream Pipeline Project Stokes Controversy', *Pipeline & Gas Journal*. Available at: http://findarticles.com/p/articles/mi_m3251/is_3_234/ai_n25003671/. Accessed on 9 December 2010; T. De Wachter, (2007), 'The Russian export of gas/oil and the Baltic: A political dependency?', *Globaal* 15(1), p. 9; J. M. Godzimirski, (2009), supra note 13, p. 3; and K. Hóber, (2009), supra note 13, p. 430. Increasingly, the Central and Eastern European States are trying to diminish their disadvantaged situation. Recently, Poland and Slovakia announced a feasibility study for a "North-South" pipeline between the two countries. Such an interconnector could give Central European customers access to LNG from the terminal under construction at Swinoujscie in Poland. See Euractiv, 'Slovakia, Poland look into 'Visegrad pipeline'', 17 January 2011. Available at: http://www.euractiv.com/en/energy/slovakia-poland-look-visegrad-pipeline-news-501292?utm_source=EurActiv+Newsletter&utm_campaign=573ea3cca9-my_google_analytics_key&utm_medium=email. Accessed on 17 January 2011.

²⁹⁵ Interviews with officials from Permanent Representations of Germany and Italy to the EU, 2 July and 24 June 2010.

²⁹⁶ Interviews with officials from Permanent Representations of Italy and the UK to the EU, 24 June and 10 June 2010.

²⁹⁷ Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010.

The discussions on the European Energy Program for Recovery (hereinafter: Recovery Plan)²⁹⁸ illustrate this difference in approach quite well. By March 2010, the Recovery Plan allocated a total of over €1.3 billion natural gas interconnectors and nearly €80 million to reverse flow projects, including support to big projects such as Nabucco (€200 million), the Italy-Turkey-Greece-Interconnector (ITGI) (€100 million)²⁹⁹, and the Skanled/Baltic Pipeline³⁰⁰ (€100 million to the Danish operator and €50 million to the Polish one).³⁰¹ Earlier in the negotiating process, Germany had voiced opposition to the Plan, insisting on a deal that funding would only run for two years, including a clause that all other projects which were not ready to go by the end of 2010 were not eligible for funding.³⁰² In that respect, Berlin had opposed the inclusion of Nabucco on the list, arguing that the project was only going to kick off in 2011, and that public money should not be spent on a completely commercial project.³⁰³ Poland, Romania, Austria, Hungary and Slovakia on the other hand had pushed firmly for Nabucco's inclusion in the Plan and increased funding, pressure to which Germany finally succumbed.³⁰⁴

It seems that the Central and Eastern European Member States feel they need the support of the European Commission to keep up on par with the bigger Member States (including the Netherlands) when it comes to energy.³⁰⁵ The signing of bilateral energy contracts with suppliers such as Gazprom is repeatedly mentioned as the single biggest undermining factor of a coherent external policy.³⁰⁶ Asked about whether the Commission could play a larger role in terms of coordination, some Member States are swift to point to the lack of competences at the EU level with regard to energy, claiming foreign policy is a Member State responsibility.³⁰⁷

²⁹⁸ The programme allocated nearly €4 billion to modernize Europe's gas and electricity energy infrastructure and production, initiate offshore wind energy projects, and promote carbon capture and storage initiatives. The grants can cover up to 50% of the eligible investment costs in the case of gas and electricity infrastructure and OWE projects, and up to 80% in the case of CCS. See Regulation (EC) No 663/2009 of 13 July 2009 establishing a programme to aid economic recovery by granting Community financial assistance to projects in the field of energy, OJ L 200/31 of 31 July 2009.

²⁹⁹ The ITGI project includes three segments, including expansion of the Turkish national grid for transmitting natural gas to Italy and Turkey, building a pipeline between Turkey and Greece, and building a further pipeline between Greece and Italy.

³⁰⁰ The Skanled/Baltic Pipeline is a proposed natural gas pipeline between Denmark and Poland. When completed, it will transport natural gas from Norway to Poland via Denmark.

³⁰¹ COM(2010) 191 final of 27 April 2010, ANNEX, pp. 8-10.

³⁰² EUobserver, 'EU leaders agree on energy projects', 20 March 2009. Available at: <http://euobserver.com/?aid=27813>; P.K. Baev and I. Øverland, (2010), supra note 168, p. 1083.

³⁰³ EUobserver, 'Two-year window likely for EU energy €5bn', 19 March 2009. Available at: <http://euobserver.com/?aid=27808>; Euractiv, 'EU leaders clinch deal on five billion stimulus plan', 20 March 2009. Available at: <http://www.euractiv.com/en/priorities/eu-leaders-clinch-deal-stimulus-plan/article-180502>. Both accessed on 9 December 2010.

³⁰⁴ Interview with officials from Permanent Representation of Romania to the EU, 12 May 2010; Euractiv, 'Poland defies Germany over Nabucco pipe', 18 March 2009. Available at: <http://www.euractiv.com/en/energy/poland-defies-germany-nabucco-pipe/article-180409>; Euractiv, 'EU leaders clinch deal on five billion stimulus plan', supra note 303. Both accessed on 9 December 2010. Slovakia now shares €30 million euro (instead of €25 million) for a gas interconnector with Hungary, and Bulgaria got €45 million instead of €40 million for another interconnector with Greece. Reverse flow infrastructure between a number of Central and Eastern European countries was allocated 80 million instead of € 75 million. In what looks like compensation, Germany got €50 million more for an offshore wind project in the North Sea. To make up for the increased sums for gas and offshore wind projects, a number of Western countries agreed that five carbon storage projects be downscaled to €180 million instead of €200 million, compared to previous proposals. See COM(2010) 191 final, supra note 301, ANNEX, pp. 8-13.

³⁰⁵ Interviews with officials from European Commission DG Energy, 11 and 26 March 2010.

³⁰⁶ Interviews with officials from Permanent Representations of Romania, Lithuania, Poland, the Czech republic, Latvia, Slovakia and Bulgaria to the EU, 12 May, 5 May, 13 May, 19 April, 23 April, 20 May, and 19 April 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interview with several officials from European Parliament Directorate-General External Policies, 5 March 2010. See also, K. Barysch, (2010), supra note 286, p. 5.

³⁰⁷ Interviews with officials from Permanent Representations of the UK and Italy to the EU, 10 and 24 June 2010.

Others merely point to the split in competences between the Commission and the Member State level and the extent to which Member States are willing to confer theirs – leaving the Commission sometimes unable to deliver on its promises.³⁰⁸

The persistent lack of coherence in the Union’s external energy policy and its perceived inability to form a “united front” against third country suppliers such as Russia has led some to believe that a new Treaty was necessary on which energy policy ought to be based. The entering into force of the Treaty of Lisbon sparked much debate on the future of EU energy policy and has caused others to put forward elaborate proposals in the direction of a more institutionalised external energy policy. The next paragraph discusses the implications of the Lisbon Treaty and other initiatives in more detail.

2.4. AN EXTERNAL ENERGY POLICY TREATY?

A recent proposal put forward by former Commission President Jacques Delors – in collaboration with EP President Jerzy Buzek – firmly criticises the EU’s inability to establish a common energy policy despite a dramatic increase in regulatory activity designed to establish a broad European energy market and fight climate change.³⁰⁹ The proposal makes the case for an ‘EU energy community’ based on a new treaty. The proposal includes such measures as an EU energy fund, and ‘purchasing groups’ of countries in order to give them greater negotiation leverage in relations with suppliers like Russia.³¹⁰ The proposal deems the new energy Title³¹¹ under the Lisbon Treaty unlikely to offer prospects of radical change from the present situation (see *infra*, this paragraph).³¹² Alternatively, it sets out two different paths: (i) enhanced cooperation, or the pooling together of countries that want the same things and gradually attract more members; and (ii) via a new European energy treaty altogether in order to accommodate all elements of the menu in one single legal instrument.³¹³

Initially, such enhanced cooperation could take the form of pragmatic and voluntary cooperation among some Member States concerning specific issues, such as the creation of a joint trading platform, the adoption of common technical standards, the pooling of R&D funds and/or the coordination of investments – a sort of ‘Schengen for energy’.³¹⁴ When asked about the proposal’s implications, Italy claimed the Council ‘took note’ of its release, aware of the political aim to create a common energy policy and the possibility for it to have some unifying value, but that Member States were careful not to ‘over-regulate’ matters.³¹⁵

In spite of the Delors group’s claim that the Lisbon Treaty is unlikely to provide for radical change, increased coherence in external relations is one of the central aims which underpin the Treaty.³¹⁶ Some argue therefore that the Lisbon Treaty’s creation of an energy Title may

³⁰⁸ Interviews with officials from Permanent Representations of Slovenia and the Czech Republic to the EU, 23 and 19 April 2010; interview with official from European Commission DG Energy, 26 March 2010.

³⁰⁹ S. Andoura, L. Hancher and M. van der Woude, (2010), *supra* note 149, foreword by Jacques Delors. See also EUobserver, ‘Delors tables energy community plan, slams EU leaders’, 5 May 2010. Available at: <http://euobserver.com/?aid=30017>; Euractiv, ‘Delors advocates new EU treaty’, 6 May 2010. Available at: <http://www.euractiv.com/en/priorities/delors-advocates-new-eu-treaty-news-493800>. Both accessed on 9 December 2010.

³¹⁰ *Ibid.*, pp. 110-115.

³¹¹ Title XXI, ‘Energy’, of Part Three, ‘Union policies and internal actions’, TFEU.

³¹² S. Andoura, L. Hancher and M. van der Woude, (2010), *supra* note 149, p. 99.

³¹³ *Ibid.*, pp. 100-105.

³¹⁴ *Ibid.*, p. 106.

³¹⁵ Interview with official from Permanent Representation of Italy to the EU, 24 June 2010;

³¹⁶ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 530.

strengthen the Union's self-perception as an energy actor and gradually turn European energy politics into a more *natural* undertaking, as Member States which are traditionally 'wary' of increased 'europeanisation' in this field could become more convinced of the possible added value of European energy policy.³¹⁷

That being said, such a chain of events is by no means certain. It presupposes both increased concerted external action in the energy field and that the benefits of such actions outweigh actions taken at Member State level. At this stage, it remains speculative whether the application of the provisions of the Lisbon Treaty will effectively lead to this (ideal-type) situation.³¹⁸ Others were more outspoken on the unlikely possibility that such a development would take place, agreeing largely with the Delors group's judgment.³¹⁹

One of Lisbon's novelties that warrants specific attention is the solidarity mechanism laid down in Art. 122(1) TFEU³²⁰ and touching in particular on energy:

"Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy."

During the January 2009 crisis between Russia and Ukraine (see *supra*, 1.4) the Council made repeated references to solidarity in its endeavours to quell the crisis. This could be seen as a 'test' of Member States' dedication to and concrete implementation of the Lisbon Treaty's solidarity provision, pending the latter's entry into force. However, for various reasons the measures did not deliver their full intended effects.³²¹ Partly this stems from the equivocal nature of the concept of 'solidarity' itself. As it is not a quantifiable notion, and once activated, its financial implications are unclear and cannot be derived from the Treaty; solidarity is thus subject to Member States' interpretation on how much weight is given to it in times of crisis.³²²

Lisbon's explicit mention of energy in connection with supply interruptions creates a legal basis which could enable the Union to intervene more actively in the future.³²³ In this light, the solidarity clause will undoubtedly play a role with respect to measures taken to ensure the security of supply at a time of crisis.³²⁴ It is however necessary here to point to some limitations. According to Art. 194(2) second para. TFEU measures necessary to achieve the objectives of Art. 194(1) TFEU:

³¹⁷ S. Fischer, (2009), *supra* note 14, p. 58; interviews with officials from Permanent Representations of the Czech Republic, Bulgaria, Romania and Lithuania to the EU, 19 April, 12 May and 5 May 2010.

³¹⁸ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 531; interview with official from European Commission Directorate-General (DG) Energy, 8 October 2010; interview with official from European Commission DG External Relations, 30 September 2010; interviews with officials from Permanent Representations of Poland and Belgium to the EU, 13 May and 22 April 2010.

³¹⁹ Interviews with officials from Permanent Representations of Germany, Italy and UK to the EU, 2 July, 24 June and 10 June 2010; interview with official from European Commission DG Energy, 11 March 2010.

³²⁰ Art. 122(1) TFEU is the former Art. 100(1) TEC.

³²¹ For a full account of the crisis and the impact of the EU's interventions, see S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, pp. 525-530.

³²² Interviews with officials from Permanent Representations of Bulgaria, the Czech Republic, Latvia, Slovenia, UK, Italy, Estonia and Germany to the EU, 19, 22, and 23 April, 24, 7 and 10 June, and 2 July 2010; interview with official from the European Commission Directorate-General for Energy on 11 March 2010.

³²³ S. Fischer, (2009), *supra* note 14, p. 57.

³²⁴ Yet, in line with the reference to the 'spirit of solidarity' in Art. 194(1) TFEU, it may also do so in promoting the interconnection of energy networks, as part of solidarity measures limiting a (future) crisis' impact. See also U. Ericke and D. Hackländer, (2008), *supra* note 14, p. 595.

“...shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) TFEU.”³²⁵

Although the extent to which Art. 194(2) second para. TFEU impacts on the ability for the EU to act is as of yet unclear, possible tensions exist between this provision and solidarity measures necessary in the event of an interruption in energy supply based on Art. 122(1) TFEU.³²⁶

When looking at Lisbon’s main constitutional changes it seems that the creation of a new HR/VP, who is both part of the Council³²⁷ as well as the Commission³²⁸, assisted by the Union’s own diplomatic corps, the European External Action Service (EEAS)³²⁹, seems to have been inspired to tackle precisely the challenge of coherence in external relations.³³⁰ In fact, the HR/VP’s ‘double hat’ was coined in order to bridge the Union’s external economic and political relations. With regard to the creation of the EEAS, this caused some authors to question whether its reach should extend to all aspects of external relations, or whether it should be confined to external political relations.³³¹ Although energy has a clear external dimension, the discussion on the establishment of the EEAS has focused on the Directorate Generals of the Commission dealing specifically with external relations (DGs Relex and Development) and the Policy Unit, the ESDP and crisis management structures, and directorates of DG-E of the Council Secretariat, letting it hang in the balance whether (elements) of energy policy will be part of the EEAS from the outset.³³²

³²⁵ Art. 192(2)(c) TFEU, situated in the preceding Treaty Title XX on Environment, provides for a special legislative procedure when the Council adopts ‘measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply’. The Council then has to decide unanimously after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. See also Declaration No 35 attached to the Lisbon Treaty, stating that the (Intergovernmental) ‘Conference believes that Article 194 does not affect the right of the Member States to take the necessary measures to ensure their energy supply under the conditions provided for in Article 347’. Art. 347 TFEU contains the age-old clause that ‘Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security’.

³²⁶ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 533.

³²⁷ Pursuant to Art. 18(3) TEU the HR presides over the Foreign Affairs Council.

³²⁸ Pursuant to Art. 18(4) TEU the HR is one of the Vice-Presidents of the Commission and shall ensure the consistency of the Union’s external action. The HR shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. The HR thereby effectively took over the portfolio of hitherto External Relations Commissioner.

³²⁹ Pursuant to Art. 27(3) TEU ‘[i]n fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States’.

³³⁰ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 534.

³³¹ G. Grevi and F. Cameron, (2005), ‘Towards an EU Foreign Service’. Issue Paper 29. Brussels: European Policy Centre (EPC), p. 3.

³³² Council Decision establishing the organisation and functioning of the European External Action Service, Council Doc. 11665/1/10 REV 1, Brussels 20 July 2010, ANNEX, pp. 1-6; S. Vanhoonacker and N. Reslow, (2010), ‘The European External Action Service: Living Forwards by Understanding Backwards’, *European Foreign Affairs Review* 15(1), pp. 7-8; S. Duke, (2009), ‘Providing for European-Level Diplomacy after Lisbon: The Case of the European External Action Service’, *The Hague Journal of Diplomacy* 4, pp. 218-219; J. Lieb and A. Maurer, (2007), ‘The ‘how’ of the EEAS: variables, priorities and timelines’, in: G. Avery et al., (2007). ‘The EU Foreign Service: how to build a more effective common policy’. Working Paper No. 28. Brussels: EPC, p. 67; A. Centioni and J. Rawlinson, ‘External

Under ‘normal circumstances’ (*i.e.* in a situation of uninterrupted energy supply) it seems clear that the HR/VP and the EEAS do not have direct authority over EU external energy policy.³³³ However, other EU Member States do envisage a role for the HR/VP and the Union’s diplomatic corps when it comes to external energy matters.³³⁴ Indeed, there is reason to believe that this could change under ‘abnormal circumstances’, such as in the event of a severe supply interruption like in January 2009, especially when such circumstances carry foreign and security policy implications.³³⁵

The Council Decision establishing the organisation and functioning of the European External Action Service reads in Article 2(1) that the EEAS shall support the HR/VP

“in fulfilling his mandates as outlined, notably, in Articles 18 and 27 TEU:

- in fulfilling his mandate to conduct the Common Foreign and Security Policy (“CFSP”) of the European Union, including the Common Security and Defence Policy (“CSDP”), to contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council and to ensure the consistency of the Union’s external action;
- in his capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council;
- in his capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union’s external action, without prejudice to the normal tasks of the services of the Commission.”³³⁶

The broad formulation of this provision seems to imply that energy (or parts of thereof) may well fall under the remit of the HR/VP and the EEAS. This is definitely the case insofar it constitutes a CFSP matter, thus falling under the responsibility of the HR/VP, a situation quite likely if a crisis contains not purely economic, but also political and security elements. Furthermore, in her role as Vice-President of the Commission, the HR/VP is responsible for ‘coordinating other aspects of the Union’s external action’³³⁷, which ultimately also includes energy.³³⁸

Action Service: where are we?’ *The Euros*, 22 March 2010, p.2. Available at: <http://www.theeuros.eu/External-Action-Service-where-are,3597?lang=en>. Accessed on 6 April 2010.

³³³ S. Andoura, L. Hancher and M. van der Woude, (2010), *supra* note 149, p. 13; interviews with officials of Permanent Representations of Belgium, Bulgaria, Slovenia, Germany, Italy, and UK to the EU on 22, 19 and 23 April, 2 July and 24 and 10 June 2010; interview with official . The respondent from the Czech Republic remarked in this regard that “...[A]s long as we don’t regard external energy policy as part of energy policy of the Union and split it under foreign policy aspects and energy aspects, there will always be a division”. Interview with official from Permanent Representation of the Czech Republic, 19 April 2010. The respondent from the Russian Mission to the EU noted that he believes the Commission and the Energy Commissioner will continue to play a vital role in determining the context of energy policy towards third countries, claiming “competition” between institutional actors is not beneficial. Interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010.

³³⁴ Interviews with officials from Permanent Representations of Lithuania, Romania, and Poland, 5, 12 and 13 May 2010; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010.

³³⁵ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 535.

³³⁶ Council Decision establishing the organisation and functioning of the European External Action Service, *supra* note 332.

³³⁷ See also Art. 18(4) TEU.

³³⁸ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, p. 535.

The EEAS is expected to support and work in cooperation with the General Secretariat of the Council, the Commission services, as well as with the diplomatic services of the Member States in order to ensure consistency between the different areas of the Union external action and between these and its other policies.³³⁹ Furthermore, both the EEAS and the Commission are to 'consult each other on all matters relating to the external action of the Union in the exercise of their respective functions'.³⁴⁰ This implies that the EEAS could have staff which is responsible for following up external energy policy, either as part of a geographic desk, or a thematic desk under the department of 'Global and Multilateral Issues' within the EEAS' central administration.³⁴¹

With respect to external representation, the extent to which an issue is dominated by either security or technical / market aspects, is likely to determine whether the President of the European Council (at the highest political level), the HR/VP, supported by the EEAS and aided by the Union delegations abroad, or the Commission takes the lead. Close cooperation between both the HR/VP and the Commissioner is crucial here.³⁴² During the negotiations on the new Gas Regulation (see *supra*, 1.4), the European Parliament seemed to be an advocate of this position:

"[w]here the Commission is notified by the Competent Authority that an early warning level has been declared in a Member State or where a threat of disruption of gas supplies might have a clear geopolitical dimension, the Union, represented at the highest level, shall take appropriate diplomatic actions having regard to the special role given by the Lisbon Treaty to the Vice-President/High Representative."³⁴³

The wording 'at the highest level' indicates that it is the task of the President of the European Council – without prejudice to the powers of the HR/VP – to represent the Union in case such diplomatic actions take place at the level of Heads of State and Government.³⁴⁴

However, the decision between what constitute 'security' and 'technical or market' elements has been subject to a fierce interinstitutional debate, as the creation of the EEAS prompted the Commission to worry that its role could be (partly) relegated to providing technical assistance, whereas the Council worried over a loss of influence of Member States over EU foreign policy.³⁴⁵ In any event, it is expected that negotiations on establishing Memoranda of

³³⁹ Art. 3(1) EEAS Decision, *supra* note 332.

³⁴⁰ Art. 3(2) EEAS Decision, *supra* note 332, excepting from this obligation the CSDP.

³⁴¹ See Art. 4(3)(a), first indent, EEAS Decision, *supra* note 332; ; interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010; interview with official from Permanent Representation of Poland to the EU, 13 May 2010; European External Action Service Provisional organisational chart.

³⁴² Interviews with officials from Permanent Representations of the Czech Republic, Belgium, and Germany to the EU, 19 and 22 April and 2 July 2010; interview with official from Permanent Mission Russian mission to the European Union, 26 May 2010; and interview with official from cabinet of Jacek Saryusz-Wolski, MEP, 26 April 2010.

³⁴³ Council of the European Union. Note from General Secretariat of the Council to Delegations on the Proposal for a Regulation of the European Parliament and of the Council concerning measures to safeguard security of gas supply and repealing Directive 2004/67/EC 11892/09 ENER 253 CODEC 963. Council Doc. 8304/4/10/REV 4. EP Amendment 86 paragraph 4a (new), pp. 70-71.

³⁴⁴ Pursuant to Art. 15(6) second para. TEU '[t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'. Interview with official from Permanent Representation of Belgium, UK and Germany to the EU, 22 April, 10 June and 2 July 2010

³⁴⁵ See G. Avery, (2009), 'Europe's foreign service: from design to delivery'. Policy Brief November 2009. Brussels: EPC, p. 3; A. Centioni and J. Rawlinson, *supra* note 332, p. 2; S. Vanhoonacker and N. Reslow, (2010), *supra* note 332, p. 7.

Understanding on external energy cooperation will continue to be led by the Commissioner for energy and its staff. However, in times of a supply interruption carrying both economic, political and security consequences, it is likely that the HR/VP – supported by the EEAS – will take up a more prominent role in diplomatic efforts aimed at resolving a dispute, with the Commission providing assistance where appropriate. When diplomatic action at the level of foreign heads of State or government is required, the President of the European Council will come into play.³⁴⁶

Nevertheless, the new system still needs to be tested in practice. Future crises and opportunities and the EU's actions to address them will tell us what roles will exactly be played by the President of the European Council, the HR/VP and EEAS and the Commission, and where the line between elements pertaining to CFSP and those which do not will be drawn.³⁴⁷

³⁴⁶ S. de Jong, J. Wouters, and S. Sterkx, (2010), *supra* note 9, pp. 536-537.

³⁴⁷ *Ibid.*, p. 537.

3. CONCLUSIONS AND RECOMMENDATIONS

As the above analysis demonstrated, the EU-Russia energy relationship is an intricate one, characterised by a high degree of mutual interdependence. In spite of this interdependence however, tensions between both parties have occasionally risen and the relationship demonstrates anything from a high degree of mutual trust. Much of the direction in which the future EU-Russia relationship will develop depends on the extent to which agreement can be reached on the issues which were analysed in section two.

In this final section, we draw several conclusions based on the above analysis and present thoughts and recommendations on how the EU-Russia energy relationship could move forward, away from the stalemate in which it currently finds itself. The section follows the same order as the previous one and focuses its recommendations, in succession, on the above identified issues.

Reciprocal market access remains one of the thorniest issues within EU-Russia relations. However, the fact that Europe is concerned about a lack of upstream access to Russian hydrocarbons and in exchange limits Moscow's participation within its internal market insofar as such participation is not in line with ownership unbundling rights, should not necessarily result in stalemate where each party is afraid to make the first move. From our analysis, it is fair to assume that hitherto Brussels has had little leverage in Moscow to 'persuade' Russia to change its position on the matter. Moreover, any such attempts were undermined by the dividedness between 'old' and 'new' Europe and the former's preference for doing business bilaterally, rather than in a concerted effort. Therefore, rather than trying to influence the Russian position and be hampered by internal dividedness, **it is more worthwhile for the Union to look into its own market structure instead.**

Looking back, it becomes clear the European Commission was already well aware of this when it put forward its Third Legislative Market Package (see *supra*, 2.1). Resistance from Germany and France in particular prevented the EU from moving towards a system of full ownership unbundling however. This has led to a situation where currently exceptions to full ownership unbundling are allowed of which Europe's larger energy corporations such as French GDF/Suez' and German E-ON-Ruhrgas and RWE are seen as profiting. Not surprisingly, when at the same time strong restrictions are in place against potential 'vertically integrated' third country entrants, Moscow perceives this policy as unfair and constituting a double standard. As long as this situation persists, Russia is unlikely to move on reciprocity. However, by granting access to competing firms, full ownership unbundling would all but rule out market abuse by big, vertically integrated companies; both EU ones, as well as Gazprom.³⁴⁸ Therefore, in the longer term **it seems more advantageous for the Union to instigate a new attempt at across-the-board' unbundling**, rather than focusing on the 'third way' as an intermediate measure.

A more immediate problem however is the **need to work towards an encompassing new bilateral EU-Russia agreement and find a solution to the future role of the Energy Charter Treaty (ECT)**. Next to key substantive issues such as the legal nature of a new PCA and the EU's status as a REIO in the Energy Charter Treaty (ECT), it seems that part of Russia's disquiet stems from that it perceives its concerns are not taken seriously enough by the EU. However, there seems little chance for Russia that the Union will change its position on the legal nature of such an agreement, or that it will abandon the rules of the ECT altogether. Taking this into account, a first step in rapprochement will have to be found in less controversial, but therefore no less important issues.

³⁴⁸ K. Barysch, (2007), *supra* note 286.

As a start, one such matter could be an attempt at **solving the broader issue of contractual mismatch** between long term supply contracts, and (often) shorter term transit contracts. The current discussions within the Energy Charter on an alternative transit allocation system whereby a party who requests transit is placed on a waiting list after a non-discriminatory review of its application, could potentially remedy this problem and avoid 'transit conflicts' such as the ones in January 2006 and 2009. This would be a great increase in European energy security, as well as a boost for Russia's tainted image as an energy supplier. Such a system could possibly assure the EU that its rules on competition are respected, and convince Russia that its concerns are heard, incumbents are treated equally, and construction of new transit capacity is not ruled out a priori.

Moreover, given that it is unlikely for Russian President Medvedev's proposal on an international energy treaty to replace the ECT to serve as a credible alternative, reaching a solution on the above issue could boost the Energy Charter's stature and potentially re-engage Russia in the process. In the longer term, it remains to be seen how such incremental 'victories' could aid both parties to increase mutual trust and reduce anxieties on both sides to work on the more controversial matters related to a new PCA and the role of the ECT therein.

Lastly, the issue of **coherence in external energy relations** is shown to be strongly related to the issues of reciprocity and the discussions on a new PCA and the role of the ECT, as individual Member State positions and actions can potentially undermine and reduce the efficacy of EU action and (legislative) initiatives. The recent proposal as put forward by the Delors' group (see *supra*, 2.4) for Member States willing to cooperate more strongly on energy to engage in '**enhanced cooperation**' has a certain value in this regard. As the analysis showed, there seems a split between certain of the Union's 'old' and 'new' Member States on how to engage third country suppliers like Russia. For that matter, it is unlikely to expect a change from the status quo – of dealing largely bilaterally with Russia – to come from countries such as Germany, France, Italy, the Netherlands or the UK.

Drafting a new energy treaty altogether is likely not going to receive the necessary support of the above mentioned Member States. Therefore, in the medium to long term, it would be more worthwhile for **those Member States who have the most to benefit from more concerted action at EU level** – including Poland, Latvia, Lithuania, Estonia, Hungary, Slovakia, Czech Republic, Bulgaria and Romania – **to engage in pragmatic and voluntary cooperation along the lines of a 'Schengen for energy'**. If, over time, this could develop into a more institutionalised practice, it could potentially attract other countries along the way and strengthen its presence within the EU system.

In the end, if coherence in external energy relations is not to be reduced to an 'empty phrase' which is continuously repeated, yet not acted upon, it is of great importance that the Lisbon Treaty will be utilised to its full potential. It is imperative in this regard that energy becomes a central element in the work of both the HR/VP, as well as the EEAS. For, ultimately it is good cooperation between the HR/VP, EEAS and the Commissioner for Energy on the one hand, coupled with Member State initiatives on the other that could go a long way into improving the current situation.

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