

NOTE & COMMENT

ENERGY CHARTER TREATY TRANSIT PROTOCOL: EUROPEAN GAS MARKET LIBERALIZATION AND ITS EFFECT ON THE EUROPEAN-RUSSIAN GAS TRADE

EMILIJA MARCINKEVICIUTE*

I.	INTRODUCTION	110
II.	EUROPEAN-RUSSIAN GAS TRADE	110
	A. Development of the Russian-European Gas Transit Relationship	111
	B. Mutual Benefits from Gas Trade.....	113
	C. Legal Framework of the Russian-European Gas Trade	113
III.	RUSSIAN GAS MONOPOLY	115
	A. OAO Gazprom	115
	B. Limited Access to Gas Reserves.....	115
	C. Licensing System	116
	D. Production Sharing Agreements.....	117
	E. Limited Access to Pipelines	119
IV.	ENERGY CHARTER TREATY TRANSIT PROTOCOL.....	120
	A. The Transit Protocol: Transit Principles Established	121
	B. Why Does Russia Oppose the Transit Protocol?	123
	C. Will Russia Ratify the Transit Protocol?	124
	D. Alternative Gas Imports From the Caspian Region	126
	E. Liquefied Natural Gas (“LNG”)	127
	F. Coal Gasification	127
V.	CONCLUSION	128

* LL.M., Fulbright Grantee, The University of Texas School of Law, 2009; LL.B. Mykolas Romeris University, 2008. Ms. Marcinkeviciute was born and raised in Lithuania an active participant in European energy security discussions. Ms. Marcinkeviciute became interested in energy law in the early years of her law studies and pursued this interest while studying energy law at the University of Texas School of Law. During her LL.M. program she served on the 2008–2009 editing staff of the TEXAS JOURNAL OF OIL, GAS, AND ENERGY LAW. Currently, Ms. Marcinkeviciute is working in the energy law team at Lideika, Petrauskas, Valiunas ir partneriai Lawin—a leading law firm in Scandinavia and the Baltic region. The author would like to thank Professor John Hays for his support and assistance while working on this article.

I. INTRODUCTION

The European Energy Charter Treaty—a multilateral agreement among European Union (“EU”) countries, the Russian Federation, and gas-producing former Soviet republics—was signed in 1994 and came into force four years later in 1998.¹ The purpose of the treaty is to regulate energy trade relations between the member states.² The treaty was expected to bring some certainty, a set of rules to govern energy relations, which at the time were not regulated internationally. This initiative of the EU was prompted by the growing concern over the security of European energy supplies, as half of the gas Europe demands is imported from Russia—Europe’s biggest gas supplier as well as the holder of the world’s largest natural gas reserves.³ These concerns stem from the fact that most of the gas imported to Europe comes from the Russian monopoly OAO Gazprom.⁴ Thus, the European-Russian gas trade, though existing for more than 40 years without major interruptions, hinders the development of a liberalized gas market in Europe. The Transit Protocol of the Energy Charter Treaty proposes to tackle these problems by introducing the principles of freedom of transit and non-discrimination in the context of allowing independent operators access to the OAO Gazprom-controlled gas pipeline system.⁵ Russia is reluctant to ratify the Protocol since ratification would mean that OAO Gazprom would have to share its current control of the gas industry, which it has enjoyed for more than half a decade.

II. EUROPEAN-RUSSIAN GAS TRADE

Little discussion focuses on the fact that European countries are not rich in natural gas resources. The biggest reserves are held in the Netherlands, Norway, and Great Britain, but even all these reserves

1. Energy Charter Treaty, Dec. 17, 1994, *available at* http://www.encharter.org/fileadmin/user_upload/document/EN.pdf; *see* Energy Charter, 1994 Treaty, <http://www.encharter.org> (follow “About the Charter,” then follow “1994 Treaty”) (last visited Nov. 18, 2009).

2. *Id.*

3. *See* Yuri Yegorov & Franz Wirl, *Energy Relations Between Russia and EU With Emphasis on Natural Gas*, 32 OPEC ENERGY REV. 301, 306 (2009), *available at* <http://www3.interscience.wiley.com/cgi-bin/fulltext/122261393/PDFSTART>.

4. C. Boyden Gray, *Europe Should Tackle Gazprom Monopoly*, Eur. Affairs, Winter/Spring 2009, *available at* http://www.europeanaffairs.org/current_issue/2009_winter_spring/gray.php. OAO Gazprom is a Russian Open Joint Stock Company and one of the largest energy companies in the world. *See* Gazprom, About Gazprom, <http://www.gazprom.com/about/> (last visited Nov. 18, 2009); *infra* Part III.

5. Andrei Belyi, *EU External Energy Policies: A Paradox of Integration, in* EUROPE’S GLOBAL ROLE: EXTERNAL POLICIES OF THE EUROPEAN UNION 213 (Jan Orbie ed., 2008).

combined would provide Europe with only half of its gas needs.⁶ Moreover, Europe has shown a great increase in the consumption of natural gas during the past several decades.⁷ Europe is dependent on natural gas imports.

Though Europe is not rich in natural gas, it has a neighbor that holds the world's largest proven natural gas reserves. Gas reserves of the Russian gas company OAO Gazprom, the world's biggest producer of natural gas, were estimated at 33.1 thousand cubic meters ("tcm") as of December 31, 2008.⁸ Given the fact that Europe needs a gas supplier while Russia needs a gas consumer, it is not surprising that Europe and Russia have an ongoing trade in natural gas. Quite surprisingly though, this trade has amounted to a long-lasting and stable relationship between the parties for more than 40 years.

In order to understand the current state of the gas trade between Europe and Russia, it is important to look at the origins of this relationship. This article will briefly focus on some of the historical aspects of European gas importation.

A. *Development of the Russian-European Gas Transit Relationship*

Until the end of World War II, Europe's energy supplies were based on coal, which was provided by domestic production.⁹ Soon after the War, European countries started to pay more attention to hydrocarbons as a possible alternative to coal.¹⁰ Huge reserves of oil, discovered in the Middle East before the War, provided Europe with these hydrocarbons at a very advantageous price.¹¹ European countries quickly forgot coal as ships with oil from Bahrain, Kuwait, and Saudi Arabia fulfilled their consumers' needs. At the same time, Europe was looking for possible gas fields, even though oil was still the main target.¹² Discoveries of gas fields in Italy, the Netherlands, Norway, and the North Sea resulted in the construction of pipeline networks between various European countries.¹³

6. Susanne Nies, *Oil and Gas Delivery to Europe—An Overview of Existing and Planned Infrastructures*, 2008 OIL GAS & ENERGY L.J. 3, at 28.

7. *Id.*

8. Gazprom, Production: Gas Reserves, <http://www.gazprom.com/production/reserves/> (last visited Nov. 18, 2009).

9. History.com, Energy Supply, World, <http://www.history.com/encyclopedia.do?articleId=208547> (last visited Nov. 18, 2009).

10. *Id.*

11. ENERGY INFO. ADMIN., U.S. CRUDE OIL WELLHEAD ACQUISITION PRICE BY FIRST PURCHASE (Oct. 1, 2009), http://tonto.eia.doe.gov/dnav/pet/hist/f000000_3a.htm.

12. See F. E. von Estorff, *Petroleum Developments in Europe in 1949*, 34 AM. ASS'N PETROL. GEOLOGISTS BULL. 1429 (1950), available at <http://search.datapages.com/data/bulletns/1949-52/images/pg/00340007/1400/14290.pdf>; SPE International, Oil and Gas in Austria, Apr. 26, 2004, <http://viennabasin.spe.org/article.cfm?id=18>.

13. See, e.g., World Factbook, European Pipelines Map—Crude Oil (Petroleum) Pipelines—Natural Gas Pipelines—Products Pipelines, http://www.theodora.com/pipelines/europe_oil_gas_and_products_pipelines.html (last visited Nov. 18, 2009).

Moreover, in 1956 gas transport began from Algeria, after extensive gas fields were discovered in that African country.¹⁴

At the same time, gas production in the U.S.S.R. was practically insignificant.¹⁵ During the first decade after the War, the U.S.S.R. was especially focused on the discovery of oil and the construction of oil pipelines.¹⁶ This situation changed when Nikita Khrushchev became the First Secretary of the Communist Party of the Soviet Union in 1953.¹⁷ At the time, gas was considered to be a “new and modern” energy resource.¹⁸ In the midst of the Cold War against the U.S., everything that signified “new and modern” was of a particular interest to the Soviet authorities.¹⁹ Consequently, the development of the gas industry found its way into the five-year plan of 1956 to 1960.²⁰ Moreover, in 1966 the exploration of gas fields, as well as the construction of gas pipelines, became one of the main tasks of the Soviet economy.²¹ In 1968 construction of a long-distance gas pipeline, Bratsvo (“Brotherhood”), linking Soviet gas fields with Poland, Germany, Austria, Finland, and other European countries was completed.²²

Europe was already showing a great interest in Soviet gas, since it was clear that the size of Soviet gas fields was far greater than the previously mentioned combined gas resources of Italy, the Netherlands, Norway, and the North Sea. This interest can be illustrated by the creation of the so-called “Gas for Pipes” deals: European countries would provide the U.S.S.R. with technology and currency needed to build gas pipelines, while the U.S.S.R. would sign contracts to supply gas for the European countries.²³

Consequently, during the first decades after the War, creation of the Soviet gas industry was underway—main gas transit routes were equipped with pipeline grids, gas fields were ready for drilling, and a consumer market was waiting nearby. As a result of the 1973 Middle East oil crisis, and much to the benefit of the Soviet gas industry, the consumer

14. MBendi Info. Services, Natural Gas Liquid Extraction in Algeria, http://www.mbendi.com/indy/oil/gas/_af/al/p0005.htm (last visited Nov. 18, 2009).

15. NADEJDA MAKAROVA VICTOR, GAZPROM: GAS GIANT UNDER STRAIN 9 (2008), http://iis-db.stanford.edu/pubs/22090/WP71_Nadja_Victor_Gazprom_13Jan08.pdf.

16. *Id.* at 70–71.

17. ROY MEDVEDEV, KHRUSHCHEV 65 (1984).

18. VICTOR, *supra* note 15.

19. *Id.*

20. *Id.*

21. *Id.*

22. See Stanislav Zakharovich Zhiznin, *Geo-Economic Aspects of Gas Transmission from Russia*, NEZAVISIMAYA, Mar. 11, 2008, available at http://en.ng.ru/energy/2008-0311/1_geoeconomic.html.

23. See *Welcome to Gazprom Export*, GAZPROMEXPORT, <http://www.gazpromexport.com/history/?pkey1=00004> (last visited Nov. 18, 2009).

market was no longer waiting for the gas—it was now anxiously calling for it.²⁴

B. Mutual Benefits from Gas Trade

With regard to Europe, the benefits of natural gas imports from Russia are self-evident. Before World War II, when there was no gas transit infrastructure, Europe was solely dependent on the usage of coal. The construction of gas pipelines between Russia and Europe allowed European countries to move from the use of coal to the use of natural gas.

From a historical perspective, this gas transit relationship can be characterized as a reliable one. For more than 40 years there have been no major interruptions of gas supply from Russia to Europe. Even during the great changes of 1989, when the fall of the U.S.S.R. brought a new regime to the Russian Federation, gas transit remained stable.²⁵ Historically, Russia could be considered a reliable partner to Europe in the gas trade.

At the same time, Russia also benefits from having Europe as its gas consumer. Gas exports are of extreme importance to the Russian Federation: natural resources constitute about 80% of Russian exports, and oil and gas account for 55% of all exports, making the Russian budget primarily dependent on the energy sector.²⁶ On the global scale, the largest importers of Russian natural gas are Germany, Italy, Turkey, and France.²⁷ Thus, Europe is the biggest gas market for Russian gas. European consumers are also important to Russia because Russia has no means of selling its gas to other consumers. The closest market would be China, but there is currently no gas transit infrastructure between the two countries.²⁸

C. Legal Framework of the Russian-European Gas Trade

The Russian-European gas trade partnership is based on Groningen-type, long-term contracts: take-or-pay contracts established during the

24. Dusko Doder, *Soviet Production of Gas, Oil Set Records Over 6 Month*, WASH. POST, Aug. 14, 1980, at A24.

25. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY STATISTICS: NATURAL GAS OVERVIEW 2007 (2008), <http://tonto.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=3&pid=26&aid=24>.

26. Ibrahim S. Arinc, *The EU-Russian Gas Interdependence and Turkey*, INSIGHT TURKEY, Oct–Dec. 2007, at 25.

27. *Id.* at 26.

28. Jim Bai & Chen Aizhu, *China, Russia to Sign Gas Pact as Putin Visits*, REUTERS NEWS, Oct. 12, 2009, <http://uk.reuters.com/article/idUKPEK24198320091012?sp=true>.

Soviet era between the supplier, the U.S.S.R. or Russia, and the buyer, the European countries.²⁹

The following clauses are the main characteristics of these contracts:

1. *Take-or-pay clause.* Grants financial stability for large-scale investments since it implements a penalty for a buyer if the minimum contractual quantity of gas is not purchased over a defined period of time.³⁰
2. *Gas price indexation.* Says that the market value of exported gas to a European buyer is determined by the price of a substitute, primarily oil.³¹
3. *Destination clause.* Imposes restrictions on the buyer ability to resell gas within Europe.³² This prevents the creation of a market that involves trade between operators. This is beneficial to the supplier because it prevents the initial buyer from gaining extra value by reselling gas to other markets.
4. *Term of the contract.* The duration of these contracts is comparatively long, lasting 25–30 years.

Thus, the question arises: Why do both the U.S.S.R. or Russia and Europe honor these agreements? An answer to this question lies in the essence of hydrocarbon business itself. Gas projects in most cases are large-scale projects, requiring great investments. It was and is both in Russia's and Europe's interests that Russia invests in the exploration of new gas fields and pipeline construction. If gas were to be supplied based on spot agreements, gas providers such as OAO Gazprom would not be willing to carry the risks of these multibillion dollar investments (such as the first gas pipeline Bratsvo project) without a long-term and secured consumer. Furthermore, these agreements provide Europe with a reliable, long-term gas supplier.

The answer to this question immediately raises another one: If the long-term gas trade contracts are mutually beneficial as well as historically proven to be reliable, why is Europe in a constant and quite intense search for an interrupted gas supplier? The answer to this question lies in the essence of the origin of Russian gas. Almost all of Russia's gas resources are held by the biggest gas company in the world,

29. Andrey Konoplyanik, *A Formula Approach May Be the Only Option for Guaranteeing Pricing Predictability and Transparency Between Gazprom and Naftogaz of Ukraine*, 2009 OIL GAS & ENERGY L.J. 2, at 52, available at <http://www.konoplyanik.ru/ru/publications/articles/ov7-2-article26.pdf>.

30. REBECCA A. GALLUN ET AL., FUNDAMENTALS OF OIL AND GAS ACCOUNTING 319 (2001).

31. HOUSE OF COMMONS TRADE AND INDUSTRY COMMITTEE, TWELFTH REPORT OF SESSION 2004–2005: FUEL PRICES, 2005, H.C. 279, 33.

32. HADI HALLOUCHE, THE GAS EXPORTING COUNTRIES FORUM: IS IT REALLY A GAS OPEC IN THE MAKING? 55 (2006), available at <http://www.oxfordenergy.org/pdfs/NG13.pdf>.

AO Gazprom.³³ Thus, while gas is a product of necessity rather than a luxury, the overdependence on gas imports is threatening when one takes into consideration that the main source for this gas is in the hands of a monopoly.

The next section of this article will focus on the main drawback of the origin of the Russian gas—the Russian gas monopoly.

III. RUSSIAN GAS MONOPOLY

A. OAO Gazprom

Little discussion focuses on the fact that the Russian gas industry is held in the hands of OAO Gazprom. OAO Gazprom is a publicly traded company, and the Government of the Russian Federation holds 51% of its common stock.³⁴ Because the government has a controlling share, it has a sure voice in the control of the company. OAO Gazprom operates as a natural monopoly. Natural monopolies are common in the natural gas business since gas is mainly transported through pipelines and only one pipeline is needed to transport gas from different wells.³⁵ OAO Gazprom owns about half of Russia's gas reserves as well as all of the main gas processing facilities.³⁶ All of the high-pressure pipeline networks as well as 75% of the low-pressure pipeline networks also belong to OAO Gazprom.³⁷ This monopoly also controls gas exports through its wholly owned subsidiary OAO Transgaz.³⁸

The question then is: Why does this monopoly exist? There are two main explanations for the creation of OAO Gazprom's gas monopoly: (1) foreign investment has very limited access to Russian gas reserves; and (2) foreign investors have no access to Russia's gas pipeline grid.

B. Limited Access to Gas Reserves

During the existence of the Soviet Union, all foreign investors were forbidden from participating in the U.S.S.R.'s economy. Consequently, prior to the collapse of the communist regime, there was no chance of foreign companies investing in Russia's gas industry.

33. Gazprom, *supra* note 8.

34. See GAZPROM, ANNUAL REPORT 2005, at 68 (2005), available at http://old.gazprom.ru/documents/Annual_Report_Eng_2005.pdf.

35. John R. Hays, The Challenge of Producer Access to Natural Gas Markets: Gathering and Other Pipeline Issues, 57th Annual Conference on Oil and Gas Law (The Inst. For Energy Law: Div. of the Ctr. for Am. and Int'l Law 2006).

36. Yuli Grigoryev, *The Russian Gas Industry: Its Legal Structure and Its Influence on World Markets*, 28 ENERGY L.J. 125, 126 (2007).

37. *Id.* at 125–26.

38. *Id.* at 132.

The collapse of the Soviet Union in 1989 promised a lot of changes in every aspect of Russian life, since the Perestroika brought a new regime to the country. In the beginning of the 1990s the doors to foreign investment were opened in many sectors of Russia's economy. However, Russian authorities declared that the gas sector was of extreme strategic importance for the nation, so it would not be opened for such investment.³⁹ The importance of gas to the Russian economy stems from the previously mentioned fact that revenue from gas exports constitutes a very significant part of the country's budget.⁴⁰ Gas prices that OAO Gazprom, being a state controlled company, can charge its domestic customers are subject to government regulations.⁴¹ Domestic prices do not reflect market prices because of government price regulations.⁴² Consequently, OAO Gazprom focuses on gas exports as its main source of income. The exclusion of foreign investment to this essential part of Russian industry has been supported by the legal system. There are two types of legal frameworks for investment in the gas sector in Russia: the Licensing System ("LS") and Production Sharing Agreements ("PSAs").

C. Licensing System

After the collapse of the Soviet Union, Russia had to transfer from the free usage of subsurface to paid usage.⁴³ In 1992 the Subsoil Law of the Russian Federation was introduced, creating the Licensing System for gas producers.⁴⁴ Under this system, which is also referred to as the Tax and Royalty System, gas companies sought licenses to explore for and produce gas.⁴⁵ Such gas companies were to pay royalties and taxes to the state under the normal tax regime in return.⁴⁶ However, at this time during privatization, the state refused to fund domestic gas companies.⁴⁷ In fact, in the 1980s, under the rule of Gorbachev, both oil and gas industries suffered from the lack of funding, since the state policy was to transfer the profits from hydrocarbon exports to subsidize other branches of industry, instead of investing them in oil and gas exploration and production.⁴⁸ Even though Russian companies were not willing to let foreign companies enter the Russian gas industry as potential

39. *Id.* at 127; see generally Patricia Fry Eldridge, *Russian Energy Legislation: Regulating State Monopolies to Allow the Development of Competitive Markets*, 13 ENERGY L.J. 1 (1991).

40. Andrew E. Kramer, *Russia Cuts Gas, and Europe Shivers*, N.Y. TIMES, Jan. 6, 2009, available at <http://www.nytimes.com/2009/01/07/world/europe/07gazprom.html>.

41. *Russia Passes Law to Liberalize Prices*, U.S.-RUSSIA BUSINESS COUNCIL, June 15, 2007, https://www.usrbc.org/government/russian_government/executivebranchrus/event/514.

42. *Id.*

43. Grigoryev, *supra* note 36, at 125–126.

44. *Id.* at 127.

45. *Id.*

46. *Id.*

47. *Id.*

48. Eldridge, *supra* note 39, at 5–6.

competitors, domestic gas producers did not have the capital for large-scale gas projects, so they still needed foreign investment to finance their projects.⁴⁹ Domestic companies were to keep control of the reserves and were to treat the foreign companies as capital-providing partners, rather than as competitive gas producers.⁵⁰ However, foreign companies were not willing to invest in Russian gas. Under the LS, the risk of the state changing its fiscal policy at any time was very high, and this prevented foreign companies from bringing their capital to the Russian gas industry.⁵¹ Domestic investors found themselves in a difficult situation: they did not have the financial resources needed for gas production projects, and foreign investment was not available to provide financial capital.⁵² A new mechanism was needed to find financing for the large-scale gas investment projects.

D. Production Sharing Agreements

President Boris Yeltsin initiated the law that implemented a new mechanism for subsoil usage. The Production Sharing Law was approved both by the State Duma as well as the Federation Council in 1995.⁵³ The Production Sharing Law provides the legal basis for PSAs, which allow for an agreement between an investor and the state.⁵⁴ The costs and risks arising from the production and the exploration of gas are borne by the investor.⁵⁵ The profits of the investing company are calculated under the following scheme: expenses of the investor are taken out of the profits from the sale of gas, and the remainder is divided between the investor and the state.⁵⁶

Underlying foreign investors' wish to work in Russia only under the PSAs is the fact that the capital of foreign companies is mostly welcomed for marginal reserves, that is, unspecified gas fields that are in remote areas.⁵⁷ Fields that are easy to exploit already belong to the Russian companies.⁵⁸ Thus, foreign companies' possible gas projects are high-risk ones, and only PSAs make development of such reserves profitable.⁵⁹

49. *Id.* at 10.

50. Andrei Konoplyanik, *Would Russian Oil Companies Really Like to Have a PSA Regime in Russia?*, 100 OIL & GAS J. 52 (2002).

51. Grigoryev, *supra* note 36, at 127.

52. *Id.*

53. *Id.* at 130.

54. *Id.* at 127.

55. *Id.* at 131.

56. *Id.* at 128; see also Dylan Cors, *Breaking the Bottleneck: the Future of Russia's Oil Pipelines*, 7 DUKE J. COMP. & INT'L L. 597 (1997).

57. Konoplyanik, *supra* note 50.

58. *Id.*

59. *Id.*

The main feature of this system to attract foreign investment is that PSAs maintain stabilization clauses that protect the investor from any changes in the law.⁶⁰ The stabilization clause provides that the legal situation at the time when these agreements are signed is the one that will be prevailing for the duration of the agreement, notwithstanding any legal or fiscal changes the government may introduce in the future.⁶¹ If such change causes harm to the investor, the investor is entitled to compensation by the state.⁶² Assurance of stability at the time the legal document was entered into was of great importance to investors who were to put their money in an unstable economy, which at the time was transferring from a planned economy to a market economy. Even now, two decades after the main economic reform, the stability of contracts provided by PSAs is considered one of the main attractions of foreign investment in the Russian gas industry, since foreign companies often perceive the politics and economy of Russia as unstable.⁶³

Another advantage of PSAs for foreign investors was that these agreements allowed investors to reimburse the money they put into the project in the form of a fungible product.⁶⁴ This was especially important because of the non-convertibility of the ruble.⁶⁵

However, even though the Production Sharing Law has established a legal basis for PSAs, the foreign investment in the Russian gas sector remains small for several reasons. First, even after the creation of the Production Sharing Law, the general legal environment for foreign investment in Russia is in fact not a supportive one. The main problem is that there is no comprehensive and unified legal basis governing investment in the Russian hydrocarbon industry. Foreign companies find their gas projects to be subject to various decrees and regulations which are overlapping and rapidly changing.⁶⁶ The Law on Foreign Investment of 1991 has drawn much criticism for the lack of instruments to protect foreign investors in their large-scale projects.⁶⁷

Second, the opposition of domestic companies to the PSAs, which could bring unwanted competition, led to the “killer amendments” to the Production Sharing Law itself.⁶⁸ Such opposition is the outcome of a

60. Grigoryev, *supra* note 36.

61. *Id.* at 129.

62. *Id.* at 131.

63. James W. Skelton, *Status of Russian Petroleum Legislation*, 30 HOUS. J. INT'L L. 315, 321 (2008); James Watson, *Foreign Investment in Russia: The Case of the Oil Industry*, 48 EUR.-ASIA STUD. 429, 436 (1996).

64. Konoplyanik, *supra* note 50.

65. *Id.*

66. Mark A. Stoleson, *Investment at an Impasse: Russia's Production-Sharing Agreement Law and the Continuing Barriers to Petroleum Investment in Russia*, 7 DUKE J. COMP. & INT'L L. 671, 676 (1997).

67. *Id.*

68. Grigoryev, *supra* note 36, at 130.

relatively simple rationale: domestic gas companies are interested in foreign investment when gas prices are low, and they oppose foreign participation once prices are high.⁶⁹ When prices are high the gas industry has its own sufficient funds, and there is no need to attract foreign capital and risk letting in new competitors. The situation in gas markets in the 1990s was much different from the one in the early 2000s. The steady rise in gas prices in early 2000 gave motivation for domestic gas companies to oppose the entry of foreign players in the Russian gas sector. Consequently, Russia's Ministry of Finance proposed amendments to the PSAs regime in 2003.⁷⁰

In general, these amendments restricted the possibilities to use PSAs. Though they were already hard to work, the amendments put legal limitations on PSAs: PSAs were to be available only when the projects could not be carried out under the LS and when such projects were considered necessary by the state.⁷¹ An investor who wishes to carry out a project under a PSA has to show the implausibility of using the LS.⁷² Consequently, foreign investors have been welcomed only in the very remote, high-risk, and unproven gas fields of Russia.

The procedure itself for obtaining PSAs is very complicated and time-consuming. It takes around five to seven years to create a PSA, which is a considerably long period of time compared to less than one year for the same procedure in other countries.⁷³

The number of actual PSAs also shows the position of foreign participation in Russia: only three of them are active as of the end of 2009.⁷⁴ Even these PSAs, namely Sakhalin-1, Sakhalin-2, and the Kharyaginskoye projects, are the so-called "grandfathered" projects since they were established under the Production Sharing Law prior to the amendments.⁷⁵ Furthermore, OAO Gazprom's statement that it would carry on the Shtokman project in the Barents Sea without the participation of foreign investments under the PSAs has further prevented the application of this mechanism.⁷⁶ The prospects of PSAs in light of a better capitalized Gazprom are therefore not good.

E. Limited Access to Pipelines

Even if foreign companies are allowed access to the Russian gas reserves, they would still find themselves in a difficult situation—there is

69. Stoleson, *supra* note 66.

70. Grigoryev, *supra* note 36, at 130.

71. *Id.*

72. *Id.*

73. Andrei Konoplyanik, *supra* note 50.

74. Grigoryev, *supra* note 36, at 128.

75. *Id.*

76. *Id.* at 130.

no infrastructure to transport gas to consumer markets. As already mentioned, the gas industry operates as a natural monopoly. It is inefficient for gas companies to build their own gas pipeline grid next to the existing one, since one pipeline system is sufficient to gather gas from a number of wells.⁷⁷ Even if foreign companies had access to the gas reserves, they would still need access to the OAO Gazprom-owned gas pipeline system in order to transport the extracted gas.

In various legal systems, such access to a monopoly's gas pipeline grid is provided under the Third Party Access ("TPA") and Common Carrier ("CC") principles. These principles were introduced in many legal systems as a measure to protect independent producers from the monopoly of pipeline operators and owners.⁷⁸ Countries that have introduced TPA principles recognize the right of independent producers to use the gas pipeline when there is excess capacity and the gas to be transported meets specific quality requirements.⁷⁹ Legal systems that recognize the CC principles allow independent producers to transport their product in spite of pipeline availability; the operator has an obligation to create capacity for an independent producer by reducing the throughput of other parties to such an extent that every party is granted access.⁸⁰ The CC principles were introduced in Russia in 1997.⁸¹ However, no institutional monitoring body has been established, so implementation of the CC principles was left to the sole authority of OAO Gazprom.⁸²

IV. ENERGY CHARTER TREATY TRANSIT PROTOCOL

It follows from what has already been said that in the early 1990s, when the collapse of the Soviet Union brought a new regime to the Russian state and the Cold War came to an end, two things appeared to be true in the gas industry of both Russia and Europe. First, both parties were experiencing a mutually beneficial relationship from the gas trade and wished it to continue. Second, the new Russia needed European investors to bring capital and modern technologies to its hydrocarbon industry. In the midst of such a relationship, Europe saw an opportunity to start an intergovernmental process, named the Energy Charter, which was aimed at creating a multilateral framework for cooperation between states on energy questions.⁸³ The Energy Charter, a political declaration aiming to create and strengthen international cooperation, was created in

77. Hays, *supra* note 35.

78. Grigoryev, *supra* note 36, at 132.

79. *Id.* at 133.

80. *Id.*

81. *Id.* at 132.

82. *Id.* at 132–133.

83. Ria Kemper, *New Charter to Govern International Energy Transit*, 100 OIL & GAS J. 9 (Mar. 4, 2002).

1991.⁸⁴ The multilateral, legally-binding Energy Charter Treaty was signed in December of 1994 and came into force in April of 1998.⁸⁵ The Treaty has 51 member states, including the member states of the EU, the Russian Federation, and some Central Asian energy states like Turkmenistan, Kazakhstan, Azerbaijan, and others.⁸⁶

Though there is little discussion as to the fact that these member states need such an international document to help regulate interstate energy questions, major disagreements surround the Transit Protocol of the Energy Charter Treaty.⁸⁷ The Protocol is seen as an essential part of the Treaty since transit issues today are more in need of regulation than ever.⁸⁸ Former Soviet transit states have now emerged as new independent actors, unleashing themselves from the direct control of Moscow authority.⁸⁹

The development of new energy production areas in the Caspian Sea region and in Central Asia has created a corresponding increase in the importance of energy transit as an economic policy for those surrounding countries.⁹⁰ Negotiations on the Transit Protocol were launched in December of 1999.⁹¹ As of the end of 2009, a decade later, these negotiations have not led to ratification of the Protocol. Russia is one of only six states that have not yet ratified the Treaty and, thus, has not “acceded to the Transit Protocol.”⁹²

Consumer markets increasingly depend on energy imports through reliable transit routes. “Stable arrangements for transit have an important role to play in this regard.”⁹³

The article will now point out the main disagreements between Russia and the EU regarding the Transit Protocol and will analyze the prospect of the ratification of the Protocol.

A. The Transit Protocol: Transit Principles Established

The Energy Charter Treaty Transit Protocol establishes freedom of transit and is modeled after the freedom of transit rules under the World

84. Energy Charter, 1991 Charter, <http://www.encharter.org/index.php?id=7> (follow “1991 Charter”) (last visited Nov. 18, 2009).

85. *Id.* (follow “About the Charter”).

86. *Id.* (follow “Members and Observers”).

87. Ria Kemper, Secretary General of the Energy Charter Secretariat, Dinner-Debate at the European Union Energy Forum: Recent Developments Within Energy Charter (Nov. 4, 2003), available at <http://www.europeanenergyforum.eu/archives/european-energy-forum/energy-management-and-policy/recent-developments-within-the-energy-charter>.

88. *Id.*

89. Kemper, *supra* note 83.

90. *Id.*

91. Energy Charter, Transit Protocol, <http://www.encharter.org/index.php?id=37> (last visited Nov. 18, 2009).

92. Kemper, *supra* note 83.

93. *Id.*

Trade Organization (“WTO”), originally designed under the rules of the General Agreement on Tariffs and Trade (“GATT”).⁹⁴ Article V of GATT provides for three main transit principles:

1. Freedom of transit: “There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties.”⁹⁵
2. Non-discrimination of transit: “No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit, or destination, or on any circumstances relating to the ownership of goods, of vessels, or of other means of transport.”⁹⁶
3. Non-discrimination regarding charges: “With respect to all charges, regulations, and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.”⁹⁷

These GATT principles are enshrined in Article 7(1) of the Energy Charter Treaty:

Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without discrimination as to the origin, destination, or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.⁹⁸

The Transit Protocol further expands the implementation of these principles, putting the achievement of free and non-discriminatory transit as an objective of the Protocol. Moreover, the Protocol establishes the dispute resolution system for conflicts arising out of energy transit. Article 21 provides that if parties cannot settle the dispute through diplomatic channels, they will bring the dispute to *ad hoc* arbitral tribunals.⁹⁹

94. Energy Charter, *supra* note 91.

95. General Agreement on Tariffs and Trade art. V, Oct. 30, 1947, 55 U.N.T.S. 187.

96. *Id.*

97. *Id.*

98. Energy Charter Treaty art. 7, Dec. 17, 1994, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

99. Draft Energy Charter Treaty Transit Protocol art. 21, available at http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf.

The Energy Charter Treaty Transit Protocol is considered the first multilateral agreement specifically regulating transit questions of the energy sector in the European and Central Asian regions.¹⁰⁰

B. Why Does Russia Oppose the Transit Protocol?

The Transit Protocol, once ratified, would impose important duties on Russia as an operator of gas pipelines. Russia would have to provide access to available capacity to independent producers and ensure that such access is granted on transparent and non-discriminatory terms.¹⁰¹ OAO Gazprom would have to carry out negotiations regarding such access in good faith.¹⁰² Charges for access would have to be objective, reasonable, and transparent.¹⁰³ With a legal document in place, companies would have an instrument to rely on when protecting their interests. In other words, the Transit Protocol establishes a set of rules for energy transit leaving less space for whimsical decisions of OAO Gazprom that are possible under current Russian domestic legislation.

Russia argues that the Transit Protocol would violate its national interests.¹⁰⁴ Russian authorities argue that by forcing Russia to grant pipeline access to other gas producing countries, namely Kazakhstan and Turkmenistan, Russia would have to become a transit country.¹⁰⁵ Russia, specifically OAO Gazprom, currently is the dominant force in the gas trade in the former Soviet republics.¹⁰⁶ Because these Central Asian states are landlocked and, therefore, do not have access to the transport infrastructure, they are not able to sell their gas directly to consumers. Instead they are selling the gas to OAO Gazprom, which then resells it to consumers at a higher price.¹⁰⁷ By providing these Central Asian states with transport infrastructure, Russia would create its own competitors in the gas industry. Naturally, this would lessen the monopolistic powers of OAO Gazprom.

Another reason for Russian skepticism toward the Protocol is that Russia would be compelled to resort to arbitration tribunals in all disagreements with formerly Soviet transit states, such as Ukraine. This

100. Bryan Clark, *Transit and the Energy Charter Treaty: Rhetoric and Reality*, WEB J. CURRENT L. ISSUES (1998), available at <http://webjcli.ncl.ac.uk/1998/issue5/clark5.html>.

101. Sergei Kolchin, *Why Russia Refuses to Ratify Energy Charter*, RIA NOVOSTI, Jul. 4, 2006, available at <http://www.bilkent.edu.tr/~crs/energycharter.htm>.

102. Energy Charter Treaty art. 11, Dec. 17, 1994, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

103. Energy Charter Treaty art. 10, Dec. 17, 1994, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.

104. Kolchin, *supra* note 101.

105. *Id.*

106. *Id.*

107. *Id.*

would render self-help measures, such as simply stopping gas deliveries, illegal.¹⁰⁸

Ratification of the Protocol by Russia would bring many essential changes to the existing energy transit order in Russia, the former Soviet republics, and the EU. New independent players would come into the forefront of gas trade. Those are gas-rich countries like Kazakhstan, Turkmenistan, and Azerbaijan, which as of the end of 2009 are still hindered by not having access to the pipeline system. New players would bring competition, and Europe would be able to finally liberalize its gas market.

C. Will Russia Ratify the Transit Protocol?

The main question regarding the future of the Transit Protocol and Energy Charter Treaty itself is: Will Russia ratify the Protocol? There is little discussion that the refusal of Russia to ratify the Protocol would mean the failure of this multi-lateral treaty in itself. As the Secretary General of the Energy Charter Secretariat, Dr. Ria Kemper, put it: “[A]ny intergovernmental process dedicated to promoting energy cooperation with the countries of the FSU [former Soviet Union] can achieve substantial results only if Russia is a full-fledged participant.”¹⁰⁹

There are both positive as well as negative signs regarding an answer to this question. As for the positive ones, Russia is as dependent on Europe as Europe is dependent on Russia. As mentioned above, European consumers make up the biggest market for the Russian gas industry. Russia has not yet built a pipeline for supplying gas to China, the second largest consumer market.¹¹⁰ However, Russian Energy Ministry experts have recently confirmed that, “Russia sees little incentives for natural gas supplies to China since this country is lacking economic fundamentals that would allow gas to be sold on market conditions.”¹¹¹ Consequently, since European consumers are essential to Russia it is highly probable that Russian-European energy cooperation will continue.

Another point to mention is that, sooner or later, OAO Gazprom will have to turn to remote, difficult-to-extract gas fields. Some experts argue that the west Siberian gas fields will have been significantly depleted by 2015, and that the newest, proven reserves are located mostly in offshore

108. *Id.*

109. Kemper, *supra* note 83.

110. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: CHINA: OIL (2008), <http://www.eia.doe.gov/cabs/China/Oil.html>.

111. Thompson Financial News, *Update 1: Russia Sees Europe Gas Exports up 40 pct by 2015*, FORBES.COM, June 10, 2008, <http://www.forbes.com/afxnewslimited/feeds/afx/2008/10/06/afx5513508.html>.

fields.¹¹² Financial investments will be needed for such projects, so Russia will have to find a way to attract such investments. Liberalizing gas markets and giving access to foreign investment and technologies will be inevitable in the future. According to some estimates, Russia will need about \$140 billion of new investments in 2000–2020 to keep increasing hydrocarbon output.¹¹³ Taking into consideration the drop of oil and gas prices in 2009, the need for outside capital might seem even more realistic.

Ratification of the Treaty would also help Russia establish itself as a candidate for accession to the WTO, since it would show Russia's commitment to allow foreign companies to enter its markets.¹¹⁴ Membership at the WTO is one of the priorities of Russia's international policy.¹¹⁵

On the other hand, one might argue that the need for a secured gas market and the necessity to attract foreign investment would still not force Russia into ratification of the Transit Protocol and abandonment of its monopoly power. The European market will not run away. In fact, the Russian Energy Ministry expects gas exports to Europe to increase by 37.8% by 2015.¹¹⁶ Europe is projected to be 80% dependent on imported natural gas, and it is specifically OAO Gazprom who owns one-third of the world's natural gas reserves.¹¹⁷ Russia is well aware that Europe's dependence not only will not disappear but also will in fact increase in the upcoming decades. Russia has not refused the dialogue in itself. Such dialogue has already produced some results: in 2004 the Center for Energy Technology was set up in Moscow, and negotiations for building a new gas pipeline in northern Europe have been conducted.¹¹⁸ Domestic energy-saving measures, which would help save additional resources for export to Europe, have been introduced under the recommendations by the EU countries.¹¹⁹ However, there are few signs that Russia would be willing to consent to the Transit Protocol, which would inevitably lead to a game-changing outcome—liberalization of energy markets. Russia has called for amendments to the Protocol, namely to the establishment of the principles of freedom of transit and non-discrimination.¹²⁰ As Russia's

112. See Viatcheslav Morozov, *Energy Dialogue and the Future of Russia: Politics and Economics in the Struggle for Europe*, in THE EU-RUSSIA ENERGY DIALOGUE: EUROPE'S FUTURE ENERGY SECURITY 43 (Pami Aalto ed., 2008).

113. *Id.*

114. Kemper, *supra* note 83.

115. *Id.*

116. Thompson Financial News, *supra* note 111.

117. Gawdat Bahgat, *EU Seeks Energy Security in Stronger Supplier Ties*, 103 OIL & GAS J. 22 (2005).

118. *Id.*

119. See Energy Charter Treaty, *supra* note 1.

120. Kemper, *supra* note 83.

Minister for Industry and Energy, Viktor Khristenko, put it: “Russia is conducting intensive but difficult negotiations on the Transit Protocol.”¹²¹ He also added that Russia will not ratify the Protocol unless amendments are made.¹²²

Thus, it seems only one thing is clear—the interdependent relationship between Russia and Europe will cause the continuation of the Russia-EU energy dialogue. It can be argued that there is little chance for this dialogue to produce great changes in this relationship. Europe’s dependence on Russian gas imports is more of an established fact rather than a speculation. Europe will probably not be able to force Russia into any agreement the latter considers a threat to its power. Nevertheless, Russia will have to make compromises in order to attract foreign investments to its gas industry. The EU-Russia energy dialogue can be expected to be concentrated on a simple scheme for bargaining—Europe’s investments in return for Russia’s oil and gas.¹²³

Though there is little hope for Europe to become gas-independent (especially gas-import independent), Europe should nevertheless look for alternatives to the imports of natural resources from Russia. This article does not intend to give in-depth insight into the possible alternatives to gas imported from Russia but will provide a brief overview on such resources.

D. Alternative Gas Imports From the Caspian Region

Europe could mitigate its dependency on Russian gas imports by increasing imports from other producing countries. Gas industry experts agree that Europe should find a way to reach gas from the Caspian region.¹²⁴ Countries like Azerbaijan, Kazakhstan, Uzbekistan, and Turkmenistan have large resources of gas, but they are forced to sell their gas to OAO Gazprom, which later resells it, since these Central Asian states have no access to the OAO Gazprom’s pipeline system.¹²⁵ This gas cannot reach Europe because pipelines from the Caspian region were constructed to the north and west and no connection to European countries is available.¹²⁶ However, Azerbaijan’s gas already reaches Europe through the South Caucasus Pipeline, which was constructed in

121. Kolchin, *supra* note 101.

122. *Id.*

123. Bahgat, *supra* note 117.

124. *Id.*

125. See Vladimir Socor, *Gazprom Firming up its Hold on Central Asian Gas*, EURASIA DAILY MONITOR, Sept. 27, 2005, [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=30913](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=30913).

126. INT’L ENERGY AGENCY, CASPIAN OIL AND GAS 21 (1998).

2007.¹²⁷ Europe is now looking for other projects that could connect it to the Caspian region.¹²⁸

E. Liquefied Natural Gas (“LNG”)

The European Commission is already negotiating future LNG infrastructure projects that would allow additional gas to be transported to European markets.¹²⁹ Europe is planning to more than double its LNG regasification infrastructure by 2015, so that LNG capacities would reach 25 billion cubic feet per day.¹³⁰ Spain and Italy are expected to be the biggest importers of this energy source in Europe.¹³¹ In order for Europe to be able to increase its LNG capacity, the number of import terminals needs to be increased. As of the end of 2009, there are 14 LNG terminals available in Europe.¹³² Europe has a geographical advantage for LNG imports—gas from North Africa, mainly Algeria and Libya, and the Middle East could be transported once Europe has available terminals.

F. Coal Gasification

Coal gasification is another alternative for Europe. Europe has considerable amounts of coal reserves, mostly lying in the subsoil of Poland, the United Kingdom, and Germany.¹³³ Coal has not been used extensively in the past, primarily because of environmental issues.¹³⁴ However, new technologies and methods allow the use of coal in an environmentally friendly way.¹³⁵ Coal gasification is one such method. Concerns over continued dependence on the importation of oil, and more importantly, increasing environmental restrictions on conventional fossil fuels, are driving the development of alternative energy sources.¹³⁶ However, it is only now, when the world is experiencing volatile prices of

127. Beyond Petroleum, South Caucasus Pipeline, <http://www.bp.com/sectiongenericarticle.do?categoryId=9006670&contentId=7015095> (last visited Nov. 18, 2009).

128. Judy Dempsey, *EU-Sponsored Pipeline to Open Up to Russian Gas*, N.Y. TIMES, Feb. 6, 2008, available at <http://www.nytimes.com/2008/02/06/business/worldbusiness/06iht-pipe.4.9807226.html>.

129. KING & SPALDING, LNG IN EUROPE: AN OVERVIEW OF EUROPEAN IMPORT TERMINALS 3 (2006), available at http://www.kslaw.com/library/pdf/LNG_in_Europe.pdf.

130. Andres Cala, *Europe Looks to LNG*, ENERGY TRIB., Mar. 20, 2008, <http://www.energytribune.com/articles.cfm?aid=830>.

131. See KING & SPALDING, *supra* note 129, at 14, 20.

132. See *id.* at 7.

133. JOHN COLE & FRANCIS COLE, THE GEOGRAPHY OF THE EUROPEAN COMMUNITY 114 (1993).

134. George Jahn, *Crisis Crimps Eastern Europe’s Environmental Aims*, U.S.A. TODAY, Oct. 22, 2008, available at http://www.usatoday.com/weather/environment/2008-10-22-eastern-europe-environmental-aims_N.htm.

135. U.S. Dep’t of Energy, Clean Coal Technology and the Clean Coal Power Initiative, <http://www.fossil.energy.gov/programs/powersystems/cleancoal/> (last visited Nov. 18, 2009).

136. Cf. Michael Valenti, *Coal Gasification: An Alternative Energy Source is Coming of Age*, MECH. ENG’G, Jan. 1992, at 39, 39.

gas, that coal gasification projects are gaining more and more attention in Europe.¹³⁷ Coal gasification involves the conversion of coal into a synthetic gas by heating it under pressure.¹³⁸ Later this gas is burned as a fuel.¹³⁹ The main advantage of this technology compared to the simple burning of coal is that coal gasification results in clean coal.¹⁴⁰ Integration Gasification Combined Cycle power plants are used for this technology.¹⁴¹ Though Europe does not have such power plants yet, the European Commission is carrying out a promotion for coal gasification projects.¹⁴² There are already plans to launch the construction of power plants in the Netherlands, Spain, Germany, and Italy.¹⁴³

V. CONCLUSION

Europe and Russia have a long-lasting relationship in the gas trade. For more than 40 years Europe has imported gas from Russia without many interruptions, even during the reforms of 1989. The relationship is mutually beneficial. It provides Europe with a reliable source of gas supplies, which is particularly important for European consumers, since Europe is not gas-rich. Russia, on the other hand, has a secured consumer market. European countries are the biggest consumers of Russian gas. Revenue from gas exports are an essential part of the Russian federal budget.

The main source of discussion of European overdependence on Russian gas imports stems from the fact that almost all of this gas is provided by a monopoly power, OAO Gazprom. OAO Gazprom's monopoly is a result of the policy of the Russian state regarding access for independent companies to Russian gas reserves as well as gas pipeline system. Limited access to gas reserves is an outcome of various restrictions on the use of PSAs as a tool for foreign investors' participation in the Russian gas industry.¹⁴⁴ The absence of recognition of TPA and CC principles has resulted in limited access to gas pipeline systems for independent operators.¹⁴⁵

European efforts to liberalize its gas markets took the form of the European Energy Charter Treaty, a multi-lateral treaty among European

137. Rajat Kumar, *Coal Gasification Technologies in Europe*, FROST & SULLIVAN, Dec. 2, 2004, <http://www.frost.com/prod/servlet/market-insight-top.pag?docid=28897380>.

138. *Id.*

139. *Id.*

140. *Id.*

141. Valenti, *supra* note 136.

142. Kumar, *supra* note 137.

143. *Id.*

144. Grigoryev, *supra* note 36.

145. *Id.*

No. 1] ENERGY CHARTER TREATY TRANSIT PROTOCOL 129

countries, Russia, and former Soviet Republics regarding energy issues.¹⁴⁶ The treaty has been signed, but has not been ratified by Russia.¹⁴⁷ The main issue of disagreement is the Treaty's Protocol on transit.¹⁴⁸ The Protocol calls for the implementation of the principles of freedom of transit and the non-discriminatory treatment of independent companies in regard to pipeline access.¹⁴⁹ Russia is reluctant to consent to the protocol, since abiding by its principles would pose a threat to OAO Gazprom's position as controller of the gas industry in the region.¹⁵⁰

Though the Russian-European energy dialogue is expected to be carried on because of their interdependence in the gas trade, the prospects of Russia ratifying the Protocol look bleak.

Europe should search for alternative sources of energy. Though these alternatives will not make Europe gas-import independent, they would help European consumers lessen their dependence on Russian gas imports.

146. Andrei V. Belyi, *A Russian Perspective on the Energy Charter Treaty (ARI)*, REAL INSTITUTO ELCANO, June 16, 2009, http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/europe/ari98-2009.

147. Alex M. Niebruegge, *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, 8 CHI. J. INT'L L. 355, 360 (2007).

148. Belyi, *supra* note 5.

149. *Id.*

150. Belyi, *supra* note 146.