The EU-Russia Energy Relationship: Will the Yukos Decision Trigger a Fundamental Reassessment in Moscow?

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Introduction—The Yukos Decision: pyrrhic victory or harbinger of change?

The ruling on jurisdiction in favour of the majority of Yukos shareholders in *Hulley Enerprises Ltd v Russian Federation*[1] in respect of a $100 billion claim for expropriation may well trigger a fundamental reassessment in Moscow of the EU–Russia energy relationship. Furthermore, although the Russian Federation—for a series of tactical reasons—has sought to distance itself from the investor protection and transit provisions of the Energy Charter Treaty (ECT), there are now a series of even more compelling reasons for Russia to reconsider that decision. These reasons include capital scarcity, access to cheap transit corridors and the impact of unconventional gas, which the Russian Federation would be ill-advised to ignore.

It could at first sight be argued that in fact the November 30 decision in favour of Yukos shareholders is the pyrrhic victory of pyrrhic victories. Some observers take the view that while the ruling may improve the morale of Yukos shareholders this decision is not going to have much real-world effect. First, the decision is only a decision on jurisdiction, it is not a decision on the merits, and due to substantial questions concerning expropriation it will not result in a final ruling for at least another couple of years. Even if a ruling is obtained in the favour of Yukos it will be unenforceable in Russia. It could be enforced outside Russia but the Russian state will rely on sovereign immunity to frustrate the bringing of any effective legal claims. Furthermore, the Kremlin can argue that as it has walked away from the ECT by withdrawing from the Treaty this July, the ECT can no longer have any further binding effect on the Russian Federation.[2]

However, on closer examination it is difficult to support the proposition that the ruling by the Hague-based arbitration panel in favour of the Yukos shareholders is not both significant for the progress of the case and has broader implications in respect of the value of the ECT for European businesses. The shareholders can move on to the substantive merits of the case, and should Russia refuse to comply with any award, ultimately seek recovery from a wide range of Russian state-owned company assets across Europe and North America acquired over the last decade. The legacy provisions of the ECT ensure that the Yukos ruling will apply to a wide range of existing energy investments in Russia for the next 20 years.[3] Furthermore, given the scale of Russian capital needs in its domestic energy sector and the commercial threats posed by unconventional gas and LNG to its European gas sales, the Kremlin may well recognise the need for a reassessment of its approach to the Charter. It may come to the conclusion that given the threats to the development of the Russian energy market and its European gas sales a new deal on the ECT between the European Union and Russia is in fact far more vital to Moscow than Brussels.

The *Hulley Enterprises Ltd v Russian Federation* decision on jurisdiction has significant legal effects

Although the ruling applies only to jurisdiction and not to the substantive merits of the case, it has significant legal effects. The panel ruled that the Russian Federation was bound by Art.45 of the ECT[4] which provides that states may make themselves

1 PCA Case No. AA226, November 30, 2009.

2 For a brief discussion of the implications see *http://www.encharter.org/index.php?id=18* [Accessed February 15, 2010].

3 Article 45(3)(b) ECT.

4 Article 45 provides:

"(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Art.44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on

bound by provisional application of the Charter from date of signature. In other words states who accepted Art.45 must apply the Energy Charter Treaty in its entirety as a fully legally binding treaty even though the Treaty had not been ratified.

The Russian Federation deployed an extensive legal argumentation against the Yukos shareholders. It was able successfully to defeat the shareholders on the issue that no declaration was required in respect of Art.45(2) nor under Art.45(1) before it could rely on the conflicting national laws limitation clause contained in Art.45.[5] However, on the application of the limitation clause itself, the Russian Federation was unable to sustain its argument. The Tribunal took the view that:

> ''by signing the ECT, the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent ''with its constitution, laws or regulations.''[6]

It is perhaps not surprising that the Russian Federation lost on provisional application. In *Kardassopoulos v Georgia* in 2007, Georgia lost on a very similar ECT provisional application point.[7] The fact that both Georgia and the Russian Federation were taking on a very strong *pacta sunt servanda* argument was reflected in the view of the Tribunal:

> ''Under the *pacta sunt servanda* rule and Article 27 of the VCLT (Vienna Convention on the Law of Treaties), a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal's opinion, this cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force.''[8]

However, notwithstanding this jurisdictional victory for the Yukos shareholders it may well look at first sight as if there are no real consequences of this ruling. It is only a ruling on jurisdiction not on the merits, and the Russian Federation withdrew from provisional application of the ECT on October 19, 2009.

While this withdrawal does have legal effect on all new energy investments made after October 19, it has no effect on all *prior* investments. Under the legacy provision of the ECT contained in Art.45(3)(b) on withdrawal from provisional application, the binding effect of the Charter remains in place for 20 years. In other words the Russian Federation is bound by the ECT for all existing investments until October 19, 2029.

It is the legacy provision which makes the Yukos decision of November 30 so significant. As a consequence of the ruling case it is now very clear that Russia is fully bound by the ECT for all energy investments made prior to October 19, 2009. As a consequence the decision has significantly strengthened the legal protection of a wide range of European companies with energy investments in Russia, from BP, to Shell, to Total, to RWE and E.ON.

It could be argued that this legal protection is relatively meagre in that the prospect of victory in the Russian courts is minimal. However, this overlooks the point that an ECT ruling can be enforced outside Russia against substantial Russian state-owned foreign assets. Ironically, the political and industrial strategy adopted by former President—now Prime Minister—Putin over the last decade makes execution against Russian assets easier than many investment cases against sovereign states. The principal assets owned by most states outside its own jurisdiction are diplomatic, cultural and military assets—all protected by sovereign immunity. However, the strategy adopted by Premier Putin has been to acquire significant state shareholdings in a range of Russian energy and commodity businesses, and then encourage those firms to go on to acquire significant overseas assets. This strategy may well permit firms like Gazprom to capture more of the energy value chain and increase Russian commercial and political influence. Unfortunately, by creating classes of assets outside Russia that are owned by state-owned Russian companies that are not able to benefit from sovereign immunity, the Kremlin has created attractive targets for seizure by Yukos shareholders and any other expropriated foreign energy investors who can benefit from the ECT. Execution could be enforced against Russian assets in any court in Europe or North America with a significant chance of success.

It is unlikely that Western energy companies will suddenly be waving the ECT over the heads of Russian Federation officials. However, the ruling is likely to

which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.''

5 As the Tribunal commented, ''based on the ordinary meaning of Article 45(1) in its context, . . . that the Russian Federation may, even after years of stalwart and unqualified support for provisional application and, until this arbitration, without ever invoking the Limitation Clause, claim an inconsistency between the provisional application of the ECT and its internal laws in order to seek to avoid the application of Part V of the ECT'', *Hulley Enterprises*, para. 284.

6 *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, *http://www.encharter.org/fileadmin/user_upload/document/Hulley_interim_award.pdf* [Accessed February 15, 2010], at [301].

7 ICSID Case No. ARB/05/18 (2007). See also Hutcheon and Spencer, ''Provisional Application of the Energy Charter Treaty'' in Born and Scherer (eds), *The European and Middle Eastern Arbitration Review* (London: Global Artibtration Review, 2008).

8 *Hulley Enterprises*, *http://www.encharter.org/fileadmin/user_upload/document/Hulley_interim_award.pdf* [Accessed February 15, 2010], at [313].

provide them with a degree of assurance and leverage. At the very least it will provide energy investors with a safeguard that if all reasonable prospects to develop their investments in the Russian energy markets were cut off by the authorities they would have an effective remedy executable outside Russia.

The worst of all possible worlds: the burden but not the benefit of the ECT

In fact there is a strong case for saying that, by withdrawing from provisional application, the Russian Federation has managed to achieve the worst of all possible worlds. As a result of its signature of the Charter, acceptance of provisional application, and the Yukos ruling, it now bears the burden of significant investor protection provisions for the next 20 years—while at the same time by withdrawing from the ECT it has thrown away the advantage of encouraging new investment gained by full compliance with the Charter.

This is also just about the worst time possible to withdraw from any investor protection treaty. As a consequence of the economic crisis the amount of international capital available for investment will in future be significantly reduced. As the IEA says in its recent *World Energy Outlook*:

> ''the global financial system remains fragile amid fears of further losses as asset values continue to fall. There is little prospect of a quick return to the days of cheap and easy credit. In general, financing energy investment will certainly be more difficult and costly in the medium term than before the crisis took hold.''[9]

Even as the global economy improves, tougher banking regulation and capital adequacy requirements imposed by governments fearful of another devastating financial bubble will shrink the amount of capital available for energy investment.

Russia particularly has requirements for massive injections of foreign investment and know-how to rebuild its energy infrastructure. In a recent report by KPMG on the Russian electricity industry, the authors undertook detailed interviews with commercial actors across the sector and came to the conclusion that existing projections of approximately $440 billion up to 2030 as the necessary level of investment were a significant under-estimate.[10] The report suggests that Russia needs to invest between $500–$550 billion by 2020 to replace decaying generation capacity and networks, as well as to actually increase overall generation capacity. Even with a demand for $440 billion, by 2030 significant foreign investment would have been required. A greater capital requirement for the Russian electricity market with a much shorter time frame places an even greater strain on international capital markets. Failure to invest significantly in the sector is likely post-crisis to restrain Russian economic growth and create public concern at the prospect of more blackouts due to decaying grid networks.

It is not only in the electricity sector that huge sums—well beyond the means of even a Russia able to deploy revenues from high oil prices—are required. In the gas market, the declining supergiant fields such as Urengoy, Medvezhye, Yamburg and Bovanenko in the Nadym Pur Taz region face depletion. In order to avoid a supply crisis, Gazprom has to develop new fields.[11] Traditionally, Gazprom has looked to supergiant fields in the Yamal peninsular for the next development phase of the Russian gas market. It is estimated that Gazprom needs to invest approximately US $200 billion, most of which is upfront in the building of roads and pipelines across Siberia, before a single molecule of gas reaches consumers.[12]

Furthermore, domestic sources of capital are likely to be limited. The domestic Russian banking system prior to the financial crisis was unable to provide the scale of capital required for development of the natural gas and oil sectors. The Russian energy majors relied on their own cash flows and foreign capital.[13] Given the damage suffered by Russian banks in the crisis it is difficult to see how those banks are going to be able easily to provide the scale of capital required to the energy sector. It is also difficult to see how the energy majors such as Gazprom can easily generate the cash themselves on the scale necessary to complete the investment and infrastructure projects it needs to keep the gas supply flowing. Gazprom particularly has difficulties, as it is dragged down by $40 billion of corporate debt[14] and has seen a collapse in revenues of 37 per cent in 2009[15] and is now facing the longer-term threat of gas-to-gas price competition.

Russian gas will need cheap transit options to compete in a changing EU market

The ECT is not only important for investor protection. There is also the question of ensuring effective and cheap transit access to the European market. This is particularly important for Gazprom as it generates two-thirds of its revenues from the EU market (even though it only sells one-third of its gas to the EU states).

However, Gazprom's business model is now under immense pressure from the development of a more liquid European gas market which will require Gazprom's board and the Kremlin to fundamentally rethink their approach to the EU gas market. In particular, the concept of expensive undersea pipelines targeted at valuable high-priced European markets now has to be seriously questioned. There is a very powerful case for arguing that Gazprom should abandon Nordstream and Southstream and instead

9 WEO (Paris: IEA, 2009), *http://www.worldenergyoutlook.org/* [Accessed February 15, 2010], 138.
10 *Think Bric! Key Considerations for Investors Targeting the Power Sector of the World's Largest Emerging Economies-Russia* (Moscow, KPMG: 2009).
11 Riley, *The Russian Gas Deficit: Consequences and Solutions* (Brussels: CEPS, 2006).
12 Milov, *Russia and the West: The Energy Factor* (Washington DC: CSIS, 2008), 10.
13 *Current Trends in the Russian Financial System*, ed. Balling (Vienna: SUERf/BWG, 2009), 105.
14 *Gazprom, Is It Time to Hit the Reset Button?* (Washington DC: EPRINC, 2009), 9.
15 *Russian Gas to Europe: Part Deux* (Washington DC: EPRINC, 2009), 9.

seek a legal regime which will ensure it has access to cheap transit across Ukraine and Belarus to keep its gas prices low and competitive against new competition in the EU market. This view supports the argument for a return to the draft ECT Transit Protocol and the negotiation of a much tougher Protocol than the one currently on the table[16].

Gazprom's business model has been based on arranging long-term supply contracts linked to the oil price with vertically integrated domestic energy incumbents, particularly in central—and eastern—European states, but increasingly across Western Europe, in Germany, Italy and France. The received view had been that the fall in OECD gas production will reinforce the market power of Gazprom and its commercial relationship with domestic incumbents such as E.ON, ENI and GDF. In such a scenario the development of new pipeline infrastructure, such as Nordstream and Southstream, to sell gas directly into Gazprom's most profitable market will give the firm a significant commercial advantage. The pipelines will also sidestep the problems faced by Gazprom in ensuring gas supply across the Ukrainian pipeline network.[17]

This received view and the Gazprom business model do not take account of the changes taking place in the EU gas market. Europe is facing a flood of cheap gas over the next few years. According to the IEA *Natural Gas Market Review 2009* over the next couple of years the amount of global LNG production will increase from 240 billion cubic metres (bcm) to 370bcm.[18] As the review says this is ''an astonishing increase without precedent in the LNG world.''[19] At the same time European regasification capacity, which already stands at 95bcm has a further 70 bcm of capacity under construction.[20] In other words, European regasification capacity is on its way to surpass total Russian imports into the EU of approximately 150bcm.

Secondly, to compound the effect of this very significant increase of LNG gas supply, American technological development has seen the take off of unconventional gas production largely from shale gas.[21] Unconventional gas now constitutes 50 per cent of US gas production.[22] As a consequence there has already been a fall in 2008 by some 10bcm of LNG imports into the United States from the Atlantic basin.[23] There is now a very strong likelihood that the most of the LNG in the Atlantic basin will be shared between Europe and the Pacific, with very little American competition.

Thirdly, and very significantly over the medium term, unconventional gas resources also exist in Europe. The IEA's *World Energy Outlook 2009* estimates that there is approximately 35tcm of unconventional gas in tight sands, coal beds and shale, this is equivalent to two-thirds of the total Russian gas reserve across Europe.[24] While not all of this will be accessible for geological, environment and planning considerations, it is unlikely for instance that Gaz de France will be allowed to extensively drill under the entire Paris Basin, a substantial proportion of that 35tcm will be able to be exploited. Therefore, in a relatively near-term period unconventional gas resources will begin to develop in Europe. Already a range of local energy firms in co-operation with American firms have begun to survey for unconventional gas[25].

In addition, a mixture of legislation in terms of the third energy package[26] and antitrust litigation undertaken by the European Commission, which has already forced settlements opening up the German gas and electricity networks,[27] will make it much easier for the new gas sources to access the European market. What is often overlooked in assessments of the third energy package is that whilst full ownership unbundling has not been achieved in the legislation, the impact of the legislation combined with the Commission's antitrust action is very likely to bring about substantive liberalisation and the break up of the remaining vertically integrated networks.[28] LNG importers and unconventional gas producers for instance may well use EU liberalisation rules to force access to local networks and undercut prices offered by incumbent gas suppliers saddled with long-term supply contracts of Siberian gas under contracts linked to the oil price.

Gazprom's traditional business model is already under serious pressure. In addition to the collapse in

16 *Final Act of the Energy Charter Conference in Respect to the Energy Charter Protocol on Transit*, October 2003. Available at *http://www.encharter.org/fileadmin/user_upload/document/CC251.pdf* [Accessed February 15, 2010].

17 For example, in 2001 then Deputy Prime Minister Dubina acknowledged that in 2000 alone 8.7bcm of Russian gas had been siphoned off from the export pipelines. Pirani, *Ukraine's Gas Sector* (Oxford: OIES, 2007) 22.

18 ''Executive summary'' in *Natural Gas Market Review*, (Paris: IEA, 2009), 13.

19 ''Executive summary'' in *Natural Gas Market Review*, (Paris: IEA, 2009), 14.

20 *Russian Gas to Europe: Part Deux* (Washington DC: EPRINC, 2009), 8.

21 For a discussion of the potential of shale gas, see the *Modern Shale Gas Primer* (Washington DC: DOE, 2009) *http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf* [Accessed February 15, 2009]. For a discussion of the EU market and geopolitical implications, see Riley, *The Unconventional Gas Revolution: A Gamechanger in European Energy Security?* (Brussels: CEPS, 2010) (forthcoming).

22 WEO (Paris: IEA, 2009), *http://www.worldenergyoutlook.org/* [Accessed February 15, 2010], 50, 138.

23 ''Executive summary'' in *Natural Gas Market Review* (Paris: IEA, 2009), 13.

24 WEO (Paris: IEA, 2009), *http://www.worldenergyoutlook.org/* [Accessed February 15, 2010], 138, 397.

25 *The Hunt for Shale Gas in Europe* (2009) Alexander's Gas & Oil Connections, *http://www.gasandoil.com/goc/news/nte100127.htm* [Accessed February 15, 2010].

26 The key legislation being Directive 2009/73/EC of the European Parliament and of the Council of July 13, 2009 concerning common rules for the internal market in natural gas and Regulation (EC) No 715/2009 of the European Parliament and of the Council of July 13, 2009 on conditions for access to the natural gas transmission networks.

27 In respect of E.ON's electricity network see ''Summary of Commission decision of November 26, 2008 relating to a proceeding under Art.82 of the EC Treaty and Art.54 of the EEA Agreement. Case Comp/39.388-German Electricity Wholesale Market and Comp/39.389 Electricity Balancing Market'' OJ 2008 C36/8. In respect of RWE's gas network see Commission Decision of March 18, 2009, relating to a proceeding under Art.82 of the EC Treaty and Art. 54 of the EEA Agreement Case Comp/39.402-RWE Gas Foreclosure.

28 One particularly overlooked point is that the bundle of transparency obligations and third party access rights in the third package can be deployed by the Commission to pressure the remaining incumbents to unbundle their networks.

EU industrial gas demand, the oil-linked Gazprom contracts are now more expensive than the LNG spot price. Hence incumbent importers are restricting themselves to acquire only the minimum requirements under Gazprom take or pay contracts. They are either buying on the spot market or seeking price reductions from Gazprom.[29]

These pressures could be dismissed as temporary phenomena caused by the economic crisis. Once the economy recovers gas demand will be restored and along with it higher gas prices. However, the point overlooked in this argument is that the flood of new gas onto European markets has only just begun. The additional LNG production is only just beginning to go on stream, and unconventional gas production is probably four or five years away from having a significant impact on the market.

With greater access to new sources of gas and significant market opening Gazprom needs to rapidly rethink its business model, and particularly the Nord-stream and Southstream pipeline strategy. The danger for Gazprom is that if it proceeds with both pipelines is that it will saddle itself with irrecoverable costs. A much more effective commercial strategy is to ensure safe access to the already existing amortised Ukrainian and Belarusian gas pipeline network. With such access Gazprom can use the enormous capacity of the Ukraine pipeline network to compete directly with other cheap gas producers entering the European market.[30]

Clearly, Gazprom has had significant problems with gas security on the Ukraine network. However, it would be possible to envisage an internationalisation of the regulation of the Ukrainian pipeline network by going back to the draft ECT Transit Protocol and negotiating a much tougher regime, including investment obligations, a surveillance authority and a transit tribunal.

While it would be possible to negotiate an international regime outside the ECT, the political reality is that the Russian Federation would be reducing its leverage by doing so. If any non-ECT international regime route were adopted, Russia would find itself in an agreement with the EU and Ukraine. Within an ECT framework it would be able to balance the power of the EU with the 51 members of the ECT as well as the ECT Secretariat. Furthermore, a substantial amount of work has already been undertaken in respect of the draft Transit Protocol.

The danger for Gazprom is that if it does not address the impact of radical change in the EU gas market and the viability of its existing business model it may price itself out of the market. Ironically Gazprom's own business model will have achieved the aim of US President Ronald Reagan, to make Russia the gas supplier of last resort to Europe.

29 See the commentary on the switch to spot prices and the pressure on the oil price link: ''The evolution of gas prices'' in (Paris: IEA, 2009) *Natural Gas Market Review*, 22, 23; and *Russian Gas to Europe: Part Deux* (Washington DC: EPRINC, 2009), 6–7.

30 The Ukrainian export pipeline network has enormous capacity. It is the largest gas transport network in the world with an annual nameplate capacity of 280bcm and an output capacity of 175bcm. The actual export figures of Russian gas via Ukraine are substantially below the maximum output capacity at approximately 115 bcm: Pirani, *Ukraine's Gas Sector* (Oxford: OIES, 2007), 73.

Return to the ECT: if it did not exist Russia and the EU would have to invent it

This article argues that there are now compelling pressures over and above the immediate issues in the Yukos case for Russia to reassess the position it has taken in relation to the Charter. In respect of the case itself, it is likely that ultimately neither side will actually want the embarrassment and media feeding frenzy of execution of arrest warrants of Russian assets all over North America and Europe, and a private settlement will be arrived at.

However, the recent ruling may well give the Russian policy establishment the opportunity to rethink its approach to the Charter. Given the problem of capital scarcity post the end of the economic crisis and the huge need for investment in the energy sector, providing reassurance for investors is vital. It is also vital for Russia to have concrete international guarantees for Russian gas in transit to its main customer base. With the advent of new gas competitors from LNG and unconventional gas, the expensive alternative pipeline strategy is unworkable.

It is also clear that President Medvedev's April 2009 proposal for a more flexible international energy agreement is not now an adequate basis for settling the rules of energy transit and investor protection even for Russia. This is especially so given the capital scarcity that now affects international markets and greater gas liquidity in EU markets, which will significantly affect Russian interests.[31] The fact that the ECT already exists, is the only multilateral energy investment treaty, and has legally binding investor protection provisions, is a powerful argument for developing the Charter rather than starting again, with all the consequent delay that that would involve.

Furthermore, Russia does have significant leverage which it can bring to bear to reform the ECT in return for the compliance with its core rules in terms of market access to Russian energy markets. The Russian Federation should be able to negotiate a revised ECT which, while it recognises investor protection rules, gives Russia and the European Union (now granted partial competence under the Lisbon Treaty amendments in relation to investor protection rules[32]) a greater role in the development of the ECT. In relation to transit, Russia should seek the development of a much tougher transit regime to minimise transit concerns. This should include a surveillance authority to ensure safe carriage and a tribunal to penalise delinquency.

For any state as dependent on energy resources for export income as Russia, a multilateral investment treaty such as the ECT is vital. Without such a treaty foreign capital is far less likely to be willing to invest and transit of energy product to market is insecure. It is time for Moscow to rethink the approach it has been taking to the Charter.

31 *Conceptual Approach to the New Legal Framework for Energy Cooperation (Goals and Principles)*, The Kremlin, April 2009. See *http://eng.kremlin.ru/text/docs/2009/04/215305.shtml* [Accessed February 15, 2010].

32 Article 207(1) TFEU.