Reciprocity as a factor of the energy investment regimes in the EU–Russia energy relations

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The impact of the new EU legal and political framework for energy trade and investments on non-EU actors has been significant. This impact can mainly be observed in the adoption of the *acquis communautaires* by countries which are not EU members. The reciprocity principle is one of the major instruments in exporting the EU *acquis*. At first, it was applied between EU Member States. If a country opens its market, it then follows that country has access to other Member States' markets. The reciprocity principle allows for the protection of markets against others who have not liberalized their energy sectors to the same degree. In that view, reciprocity is a political instrument, which moderates the market opening in the strategic sectors of economy. The recent proposal of a third liberalization package casts a sharp light on transferring the principle of reciprocity to third countries.

At the same time, it is important to note that reciprocity is viewed differently by the largest non-EU gas supplier to Europe, namely Russia. From the Russian perspective reciprocity is related to the status of the long-term supply regime which exists in gas trade. At the same time, investment reciprocity stems from any political accord between the actors involved.

Discrepancy in understanding the term 'reciprocity' has become one of the major features in EU–Russia energy relations. This paper will demonstrate that reciprocity represents a way to close the door to investments by both Russia and the EU. In both cases, reciprocity is a zero sum game which is talked about, by contrast, as a positive sum game. The reciprocity regime limits in particular the impact of the Energy Charter Treaty (ECT) which is still not ratified by Moscow. At the same time, the reciprocity can become a source for further EU–Russia energy cooperation.

1. Historical development of energy regimes

In order to integrate a political dimension into the analysis of the juridical concept of reciprocity, this paper borrows a definition of the term 'regime' from international relations theory. A most comprehensive view, put forward by Stephen Krasner,[1] defines a regime as the convergence of the expectations of actors in international relations. It relates the

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1 S Krasner, 'Structural causes and regime consequences: regimes as intervening variables' (1982) 36 Int'l Org 1–21.

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definition of regimes to political practices. Reciprocity as such is an international practice emerged in parallel with the Most Favored Nation (MFN) principle. The first use of the term 'reciprocity' stems from the US Reciprocity Act of 3 March 1815, which permitted the taxation of foreign ships entering American ports at the same terms that a foreign nation charged American ships at its own ports.[2] Later, with the development of the MFN, reciprocity became a contingent factor in inter-State relations as the lowering of domestic restrictions in one country led to the lowering of domestic restrictions in another country. By contrast restrictive policies might provoke retaliation in kind.[3] Hence, reciprocity can either restrict or enlarge the MFN application.

International economic interdependency can be either positive (MFN) or negative (mutual retaliations). Therefore, the economic context is the main impacting factor on the definition of reciprocity which can also be either positive or negative. In order to provide a comprehensive overview of existing practices in EU–Russia gas relations, this paper proposes a short historical analysis of different reciprocity regimes.

Cold war: Regime of political accord between opposite ideological systems

Gas exports from the USSR to Western Europe started at the end of the 1960s with the commencement of German Ostpolitik. In spite of the bipolar ideological divide, and particularly US reluctance to Ostpolitik, the East–West European gas trade started to take shape. The ideological divide did however have an impact in that the gas trade was based on a specific political accord, which backed the state monopoly for the gas sector of both exporters and importers of natural gas. This initial gas trade regime was based on long-term gas supplies. The long-term financial commitments were aimed at providing sufficient pay-back for the considerable required investments into energy infrastructure. Every state (in the East and in the West) had a monopoly on investment, trade and transit activities. Indeed, European gas trade was exempted from the competition rules of the market economy. Its structure was borrowed from the export system of the Netherlands and is still often defined as the Groningen model. In both Dutch and Soviet cases the gas trade was based on long-term commitments of buyers on the basis of 'take-or-pay' contracts.[4]

The long-term gas supply regime includes destination clauses which specified so-called onward restrictions on gas resale from any given geographic point. The producer country transfers the ownership of the natural gas over after the delivery point. Mutual investments between East and West were obviously inexistent.

Within the new context the political accord needed to be amended since the collapse of the USSR. Both the EU and Russia attempted to create a multilateral legal framework for energy relations in the form of the ECT. Furthermore, the EU enlargement to the East changed the nature of the gas trade. More specifically old delivery points came into the EU's territory and the EU internal market has put under question the destination

[2] L Brune and R Burns, *Chronological History of US Foreign Relations*, Consulting ed (2nd edn vol 1 2003) 86.
[3] R Keohane, 'Reciprocity in international relations' (1986) 40 Int'l Org 1–27.
[4] A Konoplyanik, *Russian–European Energy Relations and the Role of the Energy Charter* (State University-Higher School of Economics, November 2007).

clauses. These changes did not put under question the nature of the long-term gas trade, but introduced new issues in the EU–Russia energy relations.

From 1990s to the new century: Seminar diplomacy and its limits

Since the end of Cold War a new dimension of East–West relations incorporated a co-operative semantic understanding of the definition of security. The new European order was created based on Pan-European principles of multilateralism which can be observed in text of the 1990 Charter of Paris. This Document is often seen as a starting point for the 'New Europe', one without any ideological division, *steadfast commitment to democracy based on human rights and fundamental freedoms; prosperity through economic liberty and social justice*.[5] Europe's new image is related to the 'security community', where multilateralism and 'seminar diplomacy' aim to integrate 'academic and diplomatic discourse in practice'.[6]

Likewise, a number of moves have also been observed toward the creation of a multilateral regime in energy investment, trade and transit. The first multilateral declaration on energy cooperation was signed immediately post the break-up of the Soviet Union in December 1991. After three years of tough negotiations, the European Energy Charter evolved into a legally binding ECT. The ECT represents the most inclusive international legal regime for the investment in the energy sector by creating protection mechanisms for energy investments.[7]

Both Russia and the EU are willing to ensure their investment protection outside their geographical areas. Both the EU and Russia might, however, be reluctant to provide non-discriminatory access to investment in network infrastructures. At the same time, provisions on foreign investments are based on compromise, which explains the flexibility of the ECT provisions.

Indeed, the ECT provides hard law mechanisms for the post-investment protection. Article 10(7) introduces MFN treatment in energy investments which becomes a ground for positive reciprocity. However, in relations between energy producing states and investors the MFN clause left a number of issues open. For instance, Prof T Wälde pointed out that the MFN clause can constitute a factor undermining the negotiation between an investor and a producing state: ''can a company making a new investment [. . .] request, by application of the MFN clause, the same financial treatment [. . .] that was negotiated before or after with another company; and possibly ratified by the legislation?''.[8] The question raised by T Wälde demonstrates that the MFN clause cannot be defined without a clear political compromise.

[5] Charter of Paris for a new Europe (1990).
[6] The concept of 'seminar diplomacy' is defined by E Adler, 'Imagined (Security) Community' (1997) 26(2) *Millennium* 275–7.
[7] C Bamberger and T Wälde, 'The Energy Charter Treaty' in M Roggenkamp *et al* (eds), *Energy Law in Europe* (2nd edn 2007) 150–7.
[8] C Bamberger and T Wälde, 'The Energy Charter Treaty' in M Roggenkamp *et al* (eds), *Energy Law in Europe* (2nd edn 2007) 161.

Then, art 26 of the Treaty regulates dispute settlement mechanisms in investor-State investment issues:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III.

According to T Wälde and W Ben Hamida, these provisions do not specify the meaning of 'dispute relating to an investment'. This ambiguity might lead to the pre-investment phase being brought into the consideration of arbitration[9] because art 10(1) iterates the general investment protection mechanism for both pre- and post-investment phases:

> Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favorable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.

Once again, the flexibility of the ECT investment dispute settlement mechanism left room for specific agreements on strategic issues. However, we can notice that the principles of the Energy Charter have not been fully accepted by the producing states, in particular Russia. The situation changed significantly by the end of 1990s when the multilateral 'seminar diplomacy' was replaced by more assertive EU integration and less pro-western orientation in Russian foreign policy. In the new political context Russia perceived the Energy Charter as an instrument of pressure used by the EU to convince Russia to implement the multilateral legal framework in energy relations. However the ECT creates favorable legal conditions for non-EU investors (including Russian energy companies) compared to other legal frameworks. For example, Bilateral Investment Treaties between Russia and the EU Member States would result in cases being brought before national courts but none before the European Court of Justice. The novelty of the aforementioned article is the fact that it provides an explicit legal ground for non-EU investors to sue the European Community via the international dispute settlement mechanism.[10]

Russia refused to ratify the Treaty but applies it in accordance with its art 45 as long as the provisions of the Energy Charter do not contradict the Russian Constitution and domestic legislation. This provision could actually create a legal ground for the ECT

[9] T Wälde and W Ben Hamida, 'The Energy Charter Treaty and Corporate Acquisition' in G Coop and C Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (2008) 172–85.

[10] C Bamberger and T Wälde, 'The Energy Charter Treaty' in M Roggenkamp *et al* (eds), *Energy Law in Europe* (2nd edn 2007) 175.

investment dispute mechanisms between Russian investors in the EU and the European Community.

Nevertheless, the absence of clarity in political relations with Europe hampers Russian international law commitments in energy. First, Moscow has been particularly concerned about the Energy Charter's transit provisions. The largest Russian gas Co, Gazprom, has warned against a transit corridor from Central Asia to Europe through Russia which would cause Russia to lose control over energy flows. Moreover, Gazprom considers that the transit dispute settlement mechanism foreseen by art 7(7) is imperfect and cannot be applied in its relations with Ukraine, which remains the largest transit country from Russia to Europe. According to Gazprom, art 7(7) attributes too much power and responsibility to the conciliator who can decide on tariffs and supplies for a period of up to six months. Gazprom prefers to deal bilaterally with the Central Asian producers as well as with Ukrainian transit obligations.[11]

Second, Gazprom always preferred to have bilateral deals with European companies on investment issues via the so-called 'package agreements'. Package agreements constitute a political compromise over access to investments upstream for European companies in Russia *v* the access to downstream in particular European states for Gazprom. Considering its current strategy, Gazprom might not use the ECT investment provisions in case of investment disputes with the European states.

At the same time, the Energy Charter was progressively marginalized in the EU's general energy strategy as well. For instance, the Energy Charter is not mentioned in major EU documents on energy policy and energy security (White Book of 1996; Green Book of 2000; it is however stated in the Green Book of 2007 only regarding EU–Russia relations). The main reason for that attitude lies in the very ontology of the EU. The EU is a combination of a single economic block and an intergovernmental organization.[12] As an economic block, it insists on the Regional Economic Integration Clause hence exempting itself from the ECT provisions on transit.[13] As an international organization, the Union exports its own practices to third countries. Interestingly, the EU tends to substitute its own framework to the ECT. This trend has been accelerated with the politicization of energy security in Europe.

Post-2006: Securitization of energy relations

It is important to point out that since the beginning of the 21st century a new political context for energy relations has emerged. The main feature which distinguishes this new period is the securitization of energy relations. As has been demonstrated by academics of the Copenhagen School security can only be analyzed as a relative concept which can be defined by various political levels: from states and intergovernmental organizations to private and sub-state actors.[14] Therefore, security is not always linearly linked

[11] Cf A Belyi and U Klaus, 'Dispute resolution mechanisms in energy transit – missed opportunities for Gazprom or false hopes in Europe?' (August 2007) 25(3) JENRL 205–24.

[12] A Young, 'The incidental fortress: single European market and world trade' (2004) 42(2) JCMS 393–414.

[13] A Konoplyanik, 'Energy charter protocol: on the way to agreement' (2004) 1 OGEL 2.

[14] J De Wilde, 'Security Levelled Out: The Dominance of the Local and the Regional' in P Dunay *et al* (eds), *New Forms of Security: Views from Central, Eastern and Western Europe* (Dartmouth) 88.

to a threat: it can be over-exaggerated and become an object of extreme politicization. The Copenhagen School also notes that one political event can become a starting point for the extreme politicization of any given threat. For instance, 11 September was a bifurcation point for US security policy which became a subject of an extreme process of politicization.

Indeed, energy security can be defined in relation to perceptions of perils associated with a political atmosphere in inter-state interactions. The political perspective on energy security between the EU and Russia has differed substantially. The trend toward liberalization of gas markets occurred in many European countries whereas it was halted in Russia. Liberalization and the internal European energy market are considered as solutions through the diversification of energy supplies and the improvement of competitiveness of the energy sector. By contrast, gas supply concentration at the upstream level is considered to be a threat to energy security. Security concerns in Europe were raised in the aftermath of the Russian–Ukrainian crisis of January 2006 and reinforced after January 2009 dispute. The instability in transit of gas constituted a bifurcation in EU security policy toward Russia's energy supplies.

The Russian issue became the most complex and important factor of the EU's external energy policy.[15] Both Energy Councils[16] following the publication of the 2006 Green Paper put relations with Russia as the main focus of discussions. The European position can be summarized as active support of the ratification of the ECT by Russia and a continuation of the EU–Russia Energy Dialogue and Permanent Partnership Council of Energy.[17]

The Russian view on energy security differs substantially. Russian gas producers, which operate the world's longest pipeline network, refuse to put gas supply logic in question. Energy security from a Russian perspective lies in controlling the energy chain which provides pay-back for capital intensive investments. Rigid long-term agreements, though recognized as vital by European supranational powers, may enter into contradiction with the liberalization process. Indeed, they provide a possibility for the existing suppliers to protect the market against the newcomers. The Russian counter-argument is based on the principle of the 'right of first refusal' for gas pipeline capacity if it serves long-term supply contracts.

The year 2006 was marked by the Russian G-8 chairmanship when energy security was placed at the top level of the agenda. Russia used the G-8 framework to defend the conception of security of demand, in addition to security of supply, which supports the existence of long-term supply agreements and highlights risks of the gas speculations.

Currently, the issue of energy reciprocity emerged in the context of the conflict of values between the EU and Russia on the one hand and in the context of the securitization of energy supplies on the other. This in turn has had a clearly negative impact on the political accord which has remained the basis for the gas trade between the EU and Russia.

[15] A Belyi, 'EU External Energy Policy' in M Roggencamp *et al* (eds), *Energy Law in Europe* (OUP 2007) 191–220.

[16] Energy Council 7 June 2006 (MEMO/06/231, 07 June 2006); Energy Council 22–23 November 2006 (MEMO/06/442, 22 November 2006).

[17] European Commission Newsletter (No 184 – Weekly – 9 June 2006), (No 203 – Weekly – 24 November 2006).

In the absence of a bilateral EU–Russia agreement the reciprocity principle emerges as the principle of the access to energy resource and infrastructure. In this context the restriction of investments in the energy sector in order to gain a political leverage on the other became the main feature in the EU–Russia energy relations.

2. The European perspective on reciprocity

The liberalization of the EU gas market has been making progress and a new system whereby national markets expand beyond their borders has emerged. Reciprocity is one of the major political issues discussed within European law. Since the first electricity and Gas Directives, reciprocity played the role of a compromise between the rules of liberalization process and political restrictions to cross-border market opening. Furthermore, the reciprocity principle was practically integrated into the Energy Community Treaty of 2005 as the Treaty aims at the implementation of the energy *acquis* by some non-EU states. Finally, the third energy package attempts to expand the reciprocity principle to other countries, including Russia.

For the EU, reciprocity is mainly a subject of access to the downstream markets. Indeed, being the world's most integrated market, the EU attempts to use this as a political leverage on Russia.

Reciprocity in the EU legislation and jurisprudence

The EU Gas Directive[18] is the legal framework which is aimed at opening up of the gas market. The reciprocity principle is a political moderation of the market opening which has been part of the bargaining process between proponents and opponents of liberalization. Article 23(2) of the Directive relates the market opening to the practice of reciprocity, which is often stated in the national legislations:

> To avoid imbalance in the opening of gas markets: (a) contracts for the supply with an eligible customer in the system of another Member State shall not be prohibited if the customer is eligible in both systems involved; (b) in cases where transactions as described in point (a) are refused because the customer is eligible in only one of the two systems, the Commission may, taking into account the situation in the market and the common interest, oblige the refusing party to execute the requested supply, at the request of one of the Member States of the two systems.

Reciprocity is an instrument which allows for a reduction in discrepancies at the level of market liberalization between the EU Member States. In particular, unbalances exist between those states where markets are fully operating (Germany, UK, Scandinavian states) and those where vertical monopolies still dominate (France, Greece), or where the liberalization process took place but market fragmentation is too weak (Spain, Italy).

[18] Directive 2003/55/EC of the European Parliament and Council of 26 June 2003 concerning common rules for the internal market in natural gas repealing Directive 98/30/EC, OJ 2003 L176/57.

Outside the energy sector the EU applies reciprocity by sanctioning non-EU monopolies.[19] This jurisprudence of the European Court of Justice introduces the right of the European Community to restrict the access to non-EU monopolies.

Exporting the EU liberalization model

In spite of the clearly unfinished nature of the internal energy market, the EU positions itself as the most successful liberalization model to the third countries at the political level.

A step forward toward exporting the EU model has been outlined by the Energy Community Treaty[20] of southeastern Europe which introduces a qualitatively new relation with the EU on one hand and the non-EU countries of southeastern Europe on the other. Later, in 2006, the accession to the Treaty was proposed to Norway and Ukraine, which enlarges the scope of the EU energy policy impact. The Treaty aims to establish a common regulatory space and to improve the energy security of a single regulatory space. For the EU member states as well as the countries which recognize the EU legislation the EU regime constitutes an important factor in the centralization of their regulatory policies.

In political terms, the Treaty integrates southeast Europe into the EU regime of practices. For instance, it requires all the contracting parties to apply the *acquis communautaires*. Here the EU is in the process of creating an expanded Energy Community, based on common rules and practices, going beyond the borders of the Union. In this case reciprocity for the nations of southeastern Europe means access to the attractive EU markets.

Article 3(c) of the Energy Community Treaty stipulates ''the creation for the Parties of a market in Network Energy without internal frontiers, including the coordination of mutual assistance in case of serious disturbance to the energy networks or external disruptions, and which may include the achievement of a common external energy trade policy''. It demonstrates that the EU is moving toward a coherency of energy policy beyond EU borders.

Freedom of investment into the energy sector is provided by art 5: *The Energy Community shall follow the acquis communautaire described in Title II, adapted to both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties, with a view to ensuring high levels of investment security and optimal investments.*

Then art 7 of the Treaty prohibits any form of discrimination within the scope of the Treaty. It would actually exempt reciprocity as it is part of the *acquis* which are implemented under the Treaty. Again, the legal ground of the Treaty is counterweighted by the political dimension of reciprocity.

Reciprocity in relations with Russia

The EU gas liberalization model is unequivocally refuted by Russia. The EU often expressed unhappiness about the imbalance: Russian companies are increasingly present in the EU market, whereas European companies are denied access to the networks in Russia due to the monopoly of exports allocated to Gazprom.

[19] EC (Case No IV/M. 877), *The Boeing-McDonnell Douglas Decision* [1997] OJ L336/16.
[20] Treaty Establishing the Energy Community, signed October 2005, in force since 1 July 2006.

Already in January 2007, the European Commission's communication stated ''economic evidence shows that ownership unbundling is the most effective means to ensure choice for energy users and to encourage investment. This is because separate network companies are not influenced by overlapping supply/generation interests as regards investment decisions. It also avoids overly detailed and complex regulation and disproportionate administrative burdens''.[21]

A few months later, in September, the European Commission proposed a new initiative on full ownership unbundling accompanied by restrictions on non-EU investments into transmission/distribution grids. Although ownership unbundling is still controversial within the EU and still divides its Member States it is perceived by Russia as one of the most radical moves against Gazprom. This so-called Gazprom clause suggests that non-EU companies are denied an access to the privatization of transmission and distribution networks.

The two proposals are linked together: the foreign investment restriction can be successful if the cross-ownerships of companies are avoided by full ownership unbundling. Full ownership unbundling will first force gas suppliers (EU and non-EU) to sell out their assets in transmission and distribution networks. Then, transmission and distribution grids become a 'European strategic sector' where foreign (non-EU) investments are restricted. Consequently the EU internal market trend does envisage protection from foreign third party investments.

The third energy liberalization package proposal of the European Commission[22] states the following:

> The present proposal requires the effective unbundling of transmission system operators and supply and production activities not only at national level but throughout the EU. It means in particular that no supply or production company active anywhere in the EU can own or operate a transmission system in any Member State of the EU.

Ownership refusal would be an additional political pressure on non-EU monopolies which are moreover denied a 100 per cent capacity booking in cross-border transmission networks. Previously in the long-term contracts concluded between Gazprom and the transit states capacity is reserved to the gas shipper. For example, Gazprom concluded long-term contracts with Poland, where it reserves 100 per cent of capacities. Consequently, if Poland wants one day to switch a supplier for the same pipeline network, it would have to consult Gazprom. At the same time, the Third Party Access rule adopted by the EU Directives and in the Regulation 1775/2005[23] does not allow to book the total capacity. The Gazprom right to book 100 per cent of capacity is also irrelevant with the anti-hoarding mechanisms of the Regulation.

[21] European Commission, Communication to the European Parliament and the Council, 'Internal Market', SEC (2006) 1709, 10 January 2007.

[22] European Commission, Explanatory memorandum of the third energy liberalization package of September 2007.

[23] Regulation (EC) 1775/2005 of the European Parliament and Council of 28 September 2005 on conditions for access to the natural gas transmission networks, 2005 OJ L289/1.

The idea of the European Commission is about using reciprocity to press non-EU and non-Energy Community Treaty members to implement market opening. It is interesting to observe, politically speaking, that the companies full ownership unbundling is not a subject of a consensus. By contrast the reciprocity clause with Russia became the subject of consensus as it is integrated in the negotiation package of the European Commission.[24]

3. Reciprocity in Russian view

Russia relates reciprocity to the political accord which remains necessary for the long-term investments and trade. Energy for Russia is a strategic sector access to which needs to be agreed to on political and legal grounds. Since the Russian financial crisis of 1998 and the oil price hikes after 1999 one can observe an increase of economic nationalism in Russia. Russian upstream assets are considered as the major instrument to increase its influence on the world arena. Therefore, in Russian view, reciprocity cannot be separated from the access to the upstream.

Definition of the control in Russian legislation

Currently, Russia is developing new legislation on investments, where notion of control is introduced.[25] Russia has adopted two Laws which give state control over investments into natural resources. They are the Strategic Investment Law[26] and the Subsoil Law.[27] The Strategic Sector Law applies to investments above certain thresholds by non-Russian investors. Its art 6 lists 42 activities to which the Law is applied. The Law integrates the meaning of control over natural resources and pipelines into Russian legislation. The meaning of control links the energy sector to national security. Control is defined as having more than 50 per cent of the voting share in a strategic enterprise and in the energy sector the limit can be about 10 per cent. Therefore, any investment into the energy sector should be subject to particular approval.

The Russian Subsoil Law goes further. Article 9 stipulates that the holder of production license must be a Russian Co. Then it goes on to define a foreign investor and, interestingly, the definition involves the place of residence of the investor instead of ownership. Moreover, the Subsoil Law does not make clear if there is a difference between Russian state and non-state investors.

Therefore according to Russian legislation, a foreign investor is one who is resident outside Russia. The Law allows the Russian regulator to limit or to increase the presence of a foreign investor in a strategic enterprise. There comes a quantitative definition of reciprocity which depends on the amount of the investment allowed for a foreign Co. Under this quota allocation mechanism, Russia allowed a number of foreign investments to its energy sector: through the inter-company package agreements.

[24] Cf Conclusions of the Energy Council 10 October 2008, according to which the EU Member States are allowed to limit non-EU investments.

[25] Parallel can be drawn with the US Foreign Investment and National Security Act (Eff on 24 October 2007), where definition of control is likewise present. Cf R Nowinski and Thanfield Chambers, 'Recent changes to Russia's subsoil laws'. *8th Seminar CGES* (London 26 June 2008).

[26] Law of Russian Federation of 29 April 2008 N 57 – ФЗ.

[27] Law of Russian Federation of 03 March 1995 N 27 – ФЗ, amended 18 July 2008 N 120 – ФЗ.

Reciprocity and the third party access to gas networks

Russia's position toward third party access has been developed since the 1990s. According to Russian legislation on pipeline access Gazprom is required to provide access to the available capacity and is required to provide any information on technical specification of gas, availability of input points, etc.[28] Third parties can have access to the Gazprom network but Gazprom purchases gas if it is designated for export.

Prior to 2006, there was no legal monopoly of Gazprom on gas exports. Gazprom had bound itself to 'ensure a reliable supply of natural gas to customers in Russia and to foreign customers'.[29] In 2006, however, the situation changed when the Russian State Duma established a legal monopoly on gas exports.[30] The law iterates the export monopoly of Gazprom, including non-pipe gas, such as liquefied natural gas and Condensate. The new Gas Bill consequently refutes the principles of the ECT. Indeed, the Bill enters into contradiction with art 22 of the ECT which requires state-owned enterprises to implement the Charter's principles of transit. The objective of the Law is to reinforce a single natural gas export 'corridor' in the whole FSU, in order for Russia to harden its positions in negotiations on the ECT.[31] The latter becomes inapplicable in Russia because it contradicts the new bill.

In the meantime, projects of gas capacity market have been introduced in order to create efficient conditions for congestion management in Russia. The system practically allows Gazprom to allocate the available capacity to the companies, which have allocated downstream access in Europe to Gazprom.

4. Conclusion

The trends within the EU and Russia are complementary. In both cases, one can observe the emergence of foreign investment restriction practices. Both the EU and Russia move toward a mixture between the market-based approach outlined by the Energy Charter and a monopoly on investments which had existed during the 'seminar diplomacy'. Moreover, European and Russian gas sectors have evolved in different directions: values defended in the EU regime are mainly backing the free-market in energy trade mixed with energy security measures, whereas Russia relates its energy policy with an internal and external security, but is ready to attract foreign investments in order to have access to capital and technologies. The clash of values is inherent to the shape of current energy investment protection practices.

The difficulties in energy relations stem from the ever-evolving transition process in both Russia and the EU. In both cases the early stage of cooperation has been characterized by political moves toward the open economy and freedom of investments. In both cases, the political representatives prefer to keep the semantic of an open economy, which is limited, however, to the investments into gas sector.

[28] J Stern, *The Future of Russian Gas and Gazprom* (OUP 2005) 179.
[29] J Stern, *The Future of Russian Gas and Gazprom* (OUP 2005) 183.
[30] Law of Russian Federation of 18 July 2006 N 117 – ФЗ.
[31] CERA report, 'Is It a Gas? Conflicting Interpretations of New Russian Export Law Signal Clash of Powerful Commercial and Political Interests', Decision Brief (October 2006).

Negative reciprocity becomes an inherent factor of the international practice and hence a regime in EU–Russia gas trade. The main conflict of interests which emerges can be defined as follows: the EU sees reciprocity as a tool to export the liberalization model beyond its own 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.

Once the energy investment becomes a matter of security, there is a context for a negative reciprocity, where restrictions are substituting the MFN. At the same time, reciprocity represents a possibility for a further political negotiation, which could further clarify the application of the MFN in the various phases of the investment process. It means that through a political agreement between the EU and Russia, reciprocity could become a positive practice of the MFN in defined areas of investments into gas infrastructures.