Risks and Benefits for the Russian Federation from Participating in the Energy Charter:

Comprehensive Analysis

Occasional Paper

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Energy Charter Secretariat
Knowledge Centre 2014
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Boulevard de la Woluwe, 56
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ISSN: 2295-9440

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On Russia’s participation in the Energy Charter

The Russian Federation signed the European Energy Charter – a political declaration on the development of multilateral international cooperation in the energy sector – in 1991. In 1994 followed the signing of its legally binding framework – the Energy Charter Treaty (ECT) and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA). The ECT entered into force in 1998. Russia used the possibility of the ECT provisional application² and repeatedly returned to the consideration of this issue at the level of the State Duma (in 1997³, 2001⁴ and 2006⁵) accompanied by broader discussions in academia and business community, however, the document was never ratified.

In 2009 Russia terminated the provisional application⁶, stated its intent not to become an ECT Contracting Party (CP)⁷ and presented a Conceptual Approach to the New Legal Framework for Energy Cooperation, which laid the foundation of the Draft Convention on Ensuring International Energy Security of November, 2010.⁸ However, Russia remains a signatory to the ECT and participates in the Charter Process, although it has not paid its contributions to the budget of the Organization for 2010 – 2014. The status of Russia in the Energy Charter and, in particular, the prospects of its further participation are not fully defined.

In 2009 the Conference decided on the modernization of the Charter Process (largely driven by the Russia’s actions). Since 2012 one of the key areas of modernization has been consolidation – strengthening relations with countries that have signed the ECT, but have not ratified it: Australia, Belarus (provisional application), Iceland, Norway and Russia. The consolidation is aimed at a closer cooperation with these countries and, ideally, the ECT ratification by them. In this respect, it is worth reverting to the discussion on the risks and benefits for Russia from participating in the Charter and clarifying the position on this issue, which was mostly formulated in 2009 against the backdrop of the gas conflict between Russia and Ukraine. The last five years have brought about some considerable changes in the situation around the Charter participants, such as the implementation of the Third Energy Package (TEP) by the European countries, Russia’s accession to the WTO and the initiation

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¹ The Energy Charter (Charter) officially means the 1991 declaration, but it is also often understood as an international organization (the Energy Charter Conference with a Secretariat based in Brussels) and is used in this latter sense hereinafter (unless otherwise specified).
² “…to the extent that such provisional application is not inconsistent with its constitution, laws or regulations” (Article 45.1 of the ECT).
³ Parliamentary Hearings on the ECT and PEEREA, held 17.06.97. Briefing Note: http://duma2.garant.ru/analit/1997/vs97/05-02-04.htm.
⁷ Contracting Parties (CP) of the ECT include those countries that have signed and ratified the ECT.
of the Eurasian Economic Union (EEU). Furthermore, the new Ukrainian crisis has increased the interruption risks of Russian gas supplies to Europe and forced the European Union (EU) to intensify the search for ways to reduce energy dependency on Russia.

Turning to Russia’s interaction with the Charter at the present stage, the following work plan could be proposed:

- To describe the role and special characteristics of the Charter and the ECT (objectives, tasks, sectoral and regional scope, alternative organizations).
- To define Russia’s interest in participating in an organization such as the Charter and possibilities for its interaction with the Charter.
- To summarize existing arguments for and against Russia ratifying the ECT.
- To evaluate their relevance in current circumstances (taking into account development outlooks) and identify potential new risks and benefits, as well as points of contention.
- To formulate recommendations concerning the possibility and modalities of Russia’s further participation in the Charter.

**Special characteristics of the Charter and the ECT**

The European Energy Charter Declaration of 1991 seeks to “improve security of energy supply and maximise the efficiency of production, conversion, transportation, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis”. It encompasses such areas of energy-related cooperation as access to resources and their development, access to markets, trade liberalization, investments protection, safety, scientific research and development, energy efficiency, education and training. The Declaration hinges upon the principles of nondiscrimination, market-oriented price formation and environmental protection. Building on the Declaration and seeking to strengthen the rule of law on international energy issues and minimize risks associated with energy-related investments and trade the ECT was developed. The Treaty creates a level playing field of rules to be observed by all participating governments in order to contribute to long-term cooperation based on complementarily and mutual benefit. It focuses on five priority areas: (1) trade in energy materials and products (EMP), such as coal, crude oil, natural gas and electricity, and energy-related equipment, (2) ensuring unrestricted transit, (3) investments promotion and protection, (4) resolution of disputes, and (5) increasing energy efficiency.

The Energy Charter is not the only international organization regulating energy cooperation (Figure 1), although it has a clear focus on trade, transit, investments, dispute settlement and energy efficiency.
Figure 1
International energy-related organizations by sectoral and geographical scope

A special characteristic and core value of the Charter is a legally binding nature of the ECT, first of all, with respect to investments protection. To date, the Energy Charter is the only organization that provides general framework for the development and implementation of the binding regulation covering a wide range of energy-related issues for energy consuming, producing and transit countries.

By now 53 countries, including a supranational entity – European Union (EU), have signed the Energy Charter Declaration and the ECT. However, 5 countries have not ratified the ECT yet.\(^9\) By its regional scope the ECT is predominantly presented by European and former Soviet Union countries. The Energy Charter observers (signatories to the Declaration only) include North American countries, Indonesia, Jordan, Syria, Mauritania, Morocco, Pakistan, Serbia and Montenegro. Observers by invitation (16 countries) include China, Venezuela and largest oil and gas producing countries of the Middle East and North Africa. Furthermore, 11 international organizations have an ECT observer status (World Bank, WTO, IEA, OECD and etc.). Within the framework of the modernization process the Charter aims at expanding its geographic scope. Its expansion scope is quite broad, including, first of all, major growing consumers (China, India, Southeast Asian countries) and traditional producers (countries of the Middle East and North Africa), and followed by other African countries and countries in South and Central America.

\(^9\) Contracting Parties (CP) of the ECT include countries that have signed and ratified the ECT.
Russia’s interest in a multilateral agreement governing relations in the energy sector and various possibilities for Russia’s interaction with the Charter

The Conceptual Approach, put forth by Russia in 2009, demonstrates its discontent with the existing frameworks of bilateral and multilateral cooperation that “have failed to prevent and resolve conflict situations, which makes it necessary to efficiently improve the legal framework of the world trade in energy resources”10, and with that stresses the interest of Russia in an agreement regulating global energy cooperation.

Pursuant to the Draft Energy Strategy until 203511 the priorities of the current Russian foreign energy policy include: reflecting national interests in the evolving system of energy markets, export diversification, ensuring stable conditions, strengthening the positions of Russian companies abroad and facilitating efficient international cooperation on risk-related projects (attracting investment and technology). In order to increase energy security of Russia it is necessary to provide indiscriminate access to foreign markets and minimise non-commercial risks of foreign economic activity of Russian companies. Russia’s Draft Energy Strategy once again raises the issue of developing legal framework for international energy-related cooperation by promoting the Draft Convention on Ensuring International Energy Security.

The Eurasian Economic Union Agreement (EEUA)12, signed in May, 2014, envisages the coordination of energy policy of its Member-States (Russia, Belarus and Kazakhstan13) and phased formation of common energy markets ensuring market-oriented price formation, competition, nondiscrimination of economic entities, removal of administrative and technical barriers, favourable conditions to attract investments, development of transport infrastructure, harmonization of national norms and operation rules of technology and commercial infrastructure. Common electricity market is scheduled to be set up by 2019, and market of oil/petroleum products and gas - by 2025. They will be governed by uniform rules of access to energy transportation systems and common rules of customs and tariff regulation. Until then the EEUA Member-States will be guided by existing bilateral agreements. The issue of EEUA internal and export tariffs formation is subject to further negotiations. The role of the ECT in the EEUA is not clear (the text of the Agreement does not contain direct references to the Treaty): currently Kazakhstan is a CP of the ECT, Belarus applies the ECT provisionally and Russia terminated its provisional application.

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13 Armenia and Kyrgyzstan are considering the issue of acceding to the EEUA until the end of 2014.
As regards the long-term energy cooperation, Russia and the EU aim to achieve by 2050 “a Pan-European Energy Space, with a functioning integrated network infrastructure, with open, transparent, efficient and competitive markets...”.\(^{14}\) It also requires legal framework, which could be established by an international agreement governing energy-related relations.

Based on the above mentioned national, regional and international strategic goals of Russia, it can be concluded that Russia is interested in a multilateral agreement governing energy-related relations, and ways to develop cooperation between Russia and the Energy Charter can be outlined:

- To withdraw from further participation in the Charter Process and turn to bilateral agreements and/or to the promotion of the Russian Convention.
- To maintain the status of a Signatory (de facto status quo, provided national contributions are paid) and use the Charter as a negotiation platform.
- To ratify the ECT and acquire the status of a CP.

**Review of arguments for and against Russia ratifying the ECT**

Russia’s initial interest in the Charter participation was to get guidelines in order to develop market legislation in the energy sector, as well as to expand opportunities to attract investment and technology needed to restore the levels of oil and gas production. European countries, in their turn, tried to guarantee the stability of energy supplies and support market transformations in the eastern direction. At the time the Treaty was perceived as a way to “secure investments for the East in return for the reliability of supplies for the West”.\(^{15}\) However, at the first Parliamentary hearings on the ECT in 1997 it was decided to suspend the ratification until Russia accedes to the WTO. Since then a lot of arguments for and against Russia ratifying the ECT have been introduced. They often migrate from one study to another and are seldom reassessed or adjusted to changing circumstances and in some cases they are not exactly accurate, thus distorting the perception of the ECT provisions.

The analysis of previous studies and documents on Russia’s participation in the Charter, prepared at different times\(^{16}\) (not intended to ensure a full coverage), suggests that the following most prevailing arguments for Russia ratifying the Treaty can be identified:

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1. Development of trade in EMP and accelerated accession of Russia to the GATT/WTO system of agreements.
2. Minimization of violations in the field of transit supplies due to common EMP transit rules and mechanism of transit dispute settlement.
3. Enhanced investment appeal of Russian energy sector – as a result of implemented clear-cut coordinated rules concerning foreign investments, reduced non-commercial risks and available mechanisms of dispute resolution.
4. Protection of investments of Russian companies in the energy sector of the countries that have ratified the ECT based on the developed mechanisms of investment disputes resolution.
5. Expanded access to foreign capital – through the reduction of non-commercial risks.
6. A possibility to contribute to the further development of rules of international cooperation in the energy sector.
7. Establishment of legal framework for the development of single regional (CIS, EEU) and international energy space.

It can be noted, that major advantages of Russia’s participation in the Charter are still associated with the investments promotion and protection, although now it involves not only the attraction of investments into the energy sector of the country, but also the protection of Russian investments abroad. The list of arguments against Russia ratifying the ECT is longer and more varied, although less correct:

1. The Energy Charter is an organization of energy consuming countries.
2. Uneven representation of energy consuming, producing and transit countries creates risks during voting.
3. The ECT does not address the issue of trade in nuclear fuel with the EU.
4. The ECT restricts the possibilities to demand a mandatory purchase of domestically produced goods from a foreign investor.

5. The ECT requires a third party access to the JSC Gazprom pipelines for cheap gas from Central Asia.

6. The ECT implies equal internal and export/import tariffs, which would force Russia to extend internal preferential treatment to transit supplies or to increase internal tariffs associated with a greater pressure on consumers and deteriorating conditions for independent gas suppliers.

7. Auction-based tariff formation contradicts the idea of reliable and predictable gas supply.

8. Treatment of the EU as a Regional Economic Integration Organization (REIO) exempts it from the most of the transit provisions.

9. Objections to the first refusal right prejudice JSC Gazprom with respect to its access to European pipelines and benefit European companies regarding their access to Russian pipelines.

10. The ECT seeks to disrupt the system of long-term contracts for the supply of Russian gas to the European countries.

11. The ECT does not cover maritime transport and submarine pipelines.

12. The ECT did not contribute to the settlement of transit disputes between Russia and Ukraine.

13. In the event of transit dispute settlement the ECT vests a conciliator with excessive powers.

14. The ECT opens up a long-term and free access to Russian natural resources.

15. The ECT contributes to the flow of investments into extractive rather than manufacturing industries, which will make Russian economy even more commodity-oriented.

16. Encouraged by the ECT transparent transit rules and practices increase competition, which is fraught with reduced prices at the external market and a loss of a part of this market by Russia.

It can be concluded from this list that Russian opponents to the ECT ratification find major risks in the field of the EMP transit. Now that the existing positive and negative aspects of Russia’s participation in the Charter have been summed up, they may be clarified and redefined, as well as new arguments may be identified. It would be more appropriate to do it based on the ECT priority areas.

Assessment of key risks and benefits for Russia participating in the Charter at the present stage

The Energy Charter constituency and voting procedure

Main claims to the Energy Charter as an organization reflecting the interests of energy consumers are linked to its constituency. In particular, Russian Conceptual Approach stresses that it would be advisable to “elaborate an instrument, which, unlike the existing Energy Charter-based system, would include all major energy-producing (exporting) countries, countries of transit, and energy consumers (importers) as its Parties”. Indeed, as IEA
reported in 2011, 47 CP of the ECT\textsuperscript{17} account for around 20\% of global primary energy consumption (PEC) and 41\% of its import compared to 10\% of global PEC produced and 15\% of its export. Out of these 47 countries only 6 countries export energy and, with the exception of Denmark, they are located in Central Asia and Transcaucasia. Nevertheless, the following factors can be highlighted.

First of all, the Energy Charter documents draw on a package of EU legal instruments of that time, GATT norms (WTO), NAFTA provisions and practice of bilateral investment treaties (BIT)\textsuperscript{18}. Apart from Contracting Parties, other countries that had signed but not ratified the ECT (with an active contribution of Russia), as well as USA and Canada elaborated the Declaration of 1991 and the ECT – it is reflected in the content of the documents. Despite the fact that four out of these seven countries are major energy exporters (Canada, Australia, Norway and Russia), the rationale behind their decision not to sign/no to ratify the documents should not be reduced to the content of the Charter and the ECT without regard to individual circumstances of each of them. For example, from the very beginning Norway officially indicated the impossibility to ratify the ECT due to the contradictions between some of the provisions on dispute settlement and its Constitution, although it participates in the subsidiary and governing bodies of the Energy Charter and states that it de facto adheres to the ECT.\textsuperscript{19} In the course of the EU accession negotiations Iceland already expressed its intent to ratify the ECT documents\textsuperscript{20}, although the negotiations have been put on hold. According to some estimates, the U.S. was not satisfied with the lack of national treatment at the pre-investment stage. Canada’s accession to the Charter could have been impeded by the provisions on the observance of the Treaty by sub-national authorities (Article 23 of the ECT), or rather its concerns about a limited capacity of the government of the country to have an impact on them. It can be noted, that after the statement of the U.S. on its refusal to sign the ECT, Canada carried on consultations with its provinces for a time.\textsuperscript{21} Furthermore, U.S. and Canada, as well as Australia always have high investment appeal rankings (for example, FDI Confidence Index), i.e. they did not face the need to increase their investment appeal. Finally, being geographically remote, these countries have looser trade and investment ties in the energy sector with the key constituency of the Energy Charter. Secondly, an example of WTO can be cited. It started as a small club of mostly developed countries and now it is one of the largest international organizations consisting of 159 members (155 out of which are

\textsuperscript{17} The IEA Database lacks data on Lichtenstein and Afghanistan.


\textsuperscript{19} For example, this position is taken in the Statement of Norway on Energy Security in the OSCE of 2007, http://www.norway-osce.org/NR/rdonlyres/50D598465FB3440FAF91B0C29EC4444A/71034/pcde10028norwayonenergysecurity646pc1801.pdf


INTERNATIONALLY RECOGNIZED COUNTRIES). And, thirdly, as it has been referred to above, the Charter seeks to expand its geographical scope. Thus, the argument that the Charter is a consumer-oriented organization with prejudice to energy producers cannot be objectively justified.

Now come the risks related to voting. The voting procedure stipulated by Article 36 of the ECT envisages \textit{unanimity by consensus} for key decisions: on amendments to the Treaty (with the exception of structural and institutional articles); on accessions to the Treaty; on the approval of association agreements; on technical changes to the Annexes and modifications to Annexes on the list of EMP, on exemptions, regulating the application of the WTO provisions, and on the distribution of expenditures in the Charter. The Contracting Parties shall make every effort to reach agreement by consensus on any other less important matters, however, if agreement cannot be reached by consensus, decisions shall be taken by three-fourths majority of the votes of the CP (for budgetary matters – by the majority of CP, whose assessed contributions represent, in combination, at least three-fourths of the total assessed contributions). It may be noted that over 20 years of the ECT existence and up till now the voting procedure has not been used even once.

\textbf{Russia’s accession to the WTO and trade provisions of the ECT}

The ECT trade provisions (supplemented by the Trade Amendment adopted in 1998) are aimed at ensuring that the CP that are not yet members of the WTO update its rules to the energy sector ("by reference"). Russia became a member of the WTO in August, 2012, and is now guided by the WTO rules when cooperating with the ECT CP on energy-related trade (EMP and energy-related equipment), including on the settlement of trade disputes. Today it is rather difficult to assess the extent, to which provisional application of the ECT contributed to Russia’s accession to the WTO (no special studies of the kind have been carried out), and Russia has never resorted to the mechanism of trade disputes settlement envisaged by Annex D to the ECT.

The ECT ratification would allow Russia to establish a similar to the WTO energy-related trade regime with current and “potential” CP that have not acceded to the WTO yet, which, however, would be of rather limited (taking into account the amount and composition of countries outside WTO) and temporary nature (until their accession to the WTO).

The CP of the ECT that have not acceded to the WTO yet include Azerbaijan, Belarus, Bosnia and Herzegovina, Kazakhstan, Turkmenistan and Uzbekistan. Belarus, Kazakhstan and Uzbekistan, on equal terms with Russia, are members of the CIS free trade area (the agreement entered into force in September, 2012), the rest of the CP are not members thereof.

In 1992 the Government of the Russian Federation and the Government of the Republic of Azerbaijan signed the Agreement on Free Trade and the Protocol on Exemptions, which are

\footnote{The WTO Members and Observers, March 2, 2013. \url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm}}
in effect at the moment, followed by the Protocol on Gradual Lifting of Exemptions from the Free Trade Regime in 2004. In 1993 the Government of the Russian Federation concluded the Agreement on Free Trade with the Government of Turkmenistan, although there is no information as to the current status of this Agreement and of the Protocol to it. Bosnia and Herzegovina reached only the Agreement on Trade and Economic Cooperation with Russia (2004).\(^{23}\)

From the beginning trade in nuclear materials between Russia and the EU was excluded from the ECT general regime by the Joint Memorandum on Nuclear Trade signed by the delegations of the Russian Federation and European Communities (Annex G(4) to the ECT).

The possibilities to demand from foreign investors to purchase products of domestic origin, to limit imports and etc. contradict not only Article 5 of the ECT, but also WTO rules serving as guidance for it (Article III and Article XI of the GATT and Agreement on trade-related investment measures). Therefore with Russia's accession to the WTO this argument against the ECT cannot be used any more.

**Revision of consequences entailed by Russia after the adoption of the ECT transit provisions**

Transit issues are of utmost importance for Russia. Export supplies of considerable volumes of Russian hydrocarbons are associated with transit: at the beginning of 2009 transit share in the export of Russian gas far abroad exceeded 75%, accounted for 45% for oil and 30% for the export of coal.\(^{24}\) Dependence on transit countries creates high risks for Russian export and Russia tries to reduce them – by developing transport infrastructure and acquiring a share in the capital of foreign pipelines and grids. At the same time Russia can be considered a transit country itself, and this dual position should be taken into account when it comes to the ECT transit provisions.

While WTO establishes the general frameworks for the freedom of transit and non-discrimination based on the flag of vessels/the place of origin/destination/ownership (Article V of the GATT), the ECT focuses on their application in the energy sector: freedom of transit of EMP with the help of Energy Transport Facilities without distinction as to their origin/destination/ownership or discrimination as to pricing on the basis of such distinctions (Article 7.1 of the ECT) and treatment by the CP of Energy Materials and Products in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area (Article 7.3 of the ECT). In addition, the ECT addresses the issues of establishing new capacities (Articles 7.4 and 7.5 of the ECT), ensuring uninterrupted transit (Article 7.6 of the ECT) and sets out a procedure of transit dispute

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\(^{23}\) Legal Department of the Ministry of Foreign Affairs of Russia, List of Bilateral International Agreements of Russia. [http://www.mid.ru/BDOMP/spd_md.nsf/](http://www.mid.ru/BDOMP/spd_md.nsf/)

\(^{24}\) Chichkin, A. Transit share: How to Reduce the Risks Associated with the Transportation of Russian Goods / Russian Gazette, 20.01.09.
resolution (Article 7.7. of the ECT). In that context, the ECT is sometimes described as GATT plus.  

- ECT Transit provisions and third party access

The first and the most important clarification regarding the ECT transit provisions is found in Understanding 1.b(i) to the Treaty, according to which "The provisions of the Treaty do not oblige any Contracting Party to introduce mandatory third party access". Therefore the ECT not only does not provide for a mandatory third party access and cannot and should not be treated as an alternative to the EU energy-related legislation, but it also explicitly envisages the possibility to deny access (contrary to the WTO rules).

It provokes further interest and requires additional study as to the possibility and probability of extending the WTO rules (Article V of the GATT) to the transit of EMP. The position of Russia is that WTO principles do not apply to the pipeline transport (this argument might emanate from the Protocol on the accession of Russia to the WTO, according to which with regard to 39 service sectors, including pipeline transport, Russia does not undertake any commitments and can introduce limitations up to closing access to its market for foreign companies),  

however, the issue of correlation of goods and services with respect to the pipeline transit remains open. If WTO rules do cover transit of EMP, then transit issues shall be subject to the WTO jurisdiction, which even taking into account more elaborate transit provisions of the ECT reduces the scope of the latter (since from its inception the ECT was positioned as a preparation of its State Parties for the accession to the WTO in the areas, where its provisions are applied).

Article 7.1 of the ECT further states that "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 distinction as to the origin, destination or ownership of such Energy Materials and Products...", which echoes the provisions of Article V of GATT. Article 7.1 of the ECT is subject to various interpretations and cause of relevant concerns of Russia. In particular, the postulation of freedom of transit in certain cases can be used during international/regional negotiations as an argument for expanding access to the system of Russian pipelines. As an early example the EU Common Strategy on Russia of 1999 can be cited, which says that "promotion of Russian ratification of the Energy Charter Treaty and continuation of consultations on a multilateral transit framework will enhance cooperation between Russia and its neighbours over access to the Russian pipeline system".  

The latest example is related to the development in 2013 of the Draft Agreement on transit by

26 Special Project of the Moscow World Trade Centre “Russia in the WTO”. On the outcomes of the negotiations on Russia’s accession to the WTO: http://wto.wtcmoscow.ru/about_wto/wto/russia_commitments/  
pipeline transport of the CIS countries, when representatives of Ukraine proposed to establish a regime of freedom of transit by the pipeline transport in line with the ECT provisions, implying “equal” access to the Russian system (based on the comments of Ukrainian politicians). Russia did not support the Ukrainian proposal explaining it by the fact that Russia is not a CP of the ECT and that the issues of nondiscriminatory access and tariff formation can be regulated within the framework of package/bilateral agreements. The Agreement on transit in the CIS countries has not been agreed yet.

It must be emphasized that a CP is under no obligation to give access to its capacities for transit (the ECT envisages the adoption of necessary measures to facilitate transit), but if such a decision is made, the rules of granting access should be nondiscriminatory. It may be recalled that at the beginning of 2000 a 5-level argumentation system in favour of this position was developed.

The ECT provisions stipulating that the Contracting Party shall not place obstacles in the way of new capacity being established in the event that transit cannot be achieved on the commercial terms (Article 7.4 of the ECT) is supplemented with the requirement (Article 7.5 of the ECT) that it should not “endanger the security or efficiency of its (of a Contracting Party) energy systems, including the security of supply”. Therefore even so, Russia still has a possibility to defend its interests, although it might require greater effort.

The lack of clear definition of the ECT “provisional application” might suggest that Russia virtually applied transit provisions in 1990s and 2000s, which, firstly, did not lead to transit disputes and, secondly, did not prevent it from building a system of gas purchase and transportation agreements with Central Asian countries and Azerbaijan.

In 2000s one of the key obstacles to Russia’s accession to the Charter was the position of JSC Gazprom, which had estimated potential harm from the ECT ratification forcing it to give access to the existing capacities and domestic tariffs for the cheap gas of competitors and leading to the loss of a significant share of the European market amounting to 9–10 billion USD (4.5–5 billion USD, according to alternate estimates). Russia maintains a rather firm stand on the transit of gas, which can compete with the Russian one, through its territory. Furthermore, JSC Gazprom is still retaining the monopoly of the pipeline export of gas and inside the country. The restriction of gas transit through the territory of Russia gives significant near-term benefits to the country, although increasing the risks of infrastructure being developed bypassing Russia in the longer term, making losses resulting from growing competition inevitable and reducing profits from transit.

30 Some kind of liberalization of access to gas transportation system for independent producers has been observed recently.
The situation with the Central Asian gas has also changed. If in 2008 the amount of the Central Asian gas purchased by Russia (for re-export) exceeded 65 bcm with the average purchase prices of 150 USD per thousand m³, then afterwards these countries have moved to market pricing. Therefore the weighted average gas purchase price for the JSC Gazprom on the border of supplying states increased to 275 USD per thousand m³ in 2013, while the purchase volumes decreased to 30 bcm. Allocation of free capacities, i.e. those not occupied with the gas of the JSC Gazprom, for the transit of Central Asian gas, with account of the current volumes of Russian purchases and the equality of transit and export tariffs, would bring about 350-400 million USD to the Russian budget in 2013.

Therefore Central Asian gas is not as cheap any more as it used to be in the early 2000s. It could be imagined that those countries will offer a little more favourable conditions to European consumers (in order to diversify their supplies), but a significant reduction of the prices is hardly probable. For example, even according to the scenario that envisages the highest volumes (of the realistic ones) of gas production by new players (primarily, Iran, Qatar, Australia, East African states and Turkmenistan), additional global supply will cause reduction of prices to 20% in the European Region by 2040 (compared with about 400 USD per thousand m³ in 2010 prices in the basic scenario) and to 10% in the Asia Pacific Region (compared with almost 500 USD per thousand m³).

According to the JSC Gazprom, Europe’s needs of additional gas imports will be 168 bcm by 2025 and rise to 225 bcm by 2035. The Outlook of the ERI-AC is more cautious – it envisages the growth of the regional gas imports by 125 and 135 bcm correspondingly. According to the JSC Gazprom, in 2013 Russia supplied 161.5 bcm of gas to Europe; Russian supplies can amount to 140-180 bcm by 2025 and 155-195 bcm by 2035, so the planned increase of Russian supplies (the upper limit) will provide about 10-15% of increment in the European gas demand by 2025 and about 15-25% by 2035.

Export possibilities of Central Asian states (primarily, Turkmenistan) are expected to reach 80 bcm by 2025 and 100 bcm by 2035 and those of Azerbaijan are 30 and 35 bcm correspondingly, but they are facing infrastructural limitations – so far, the Russian territory remains the only way for transiting Turkmenian gas to Europe. The limitation of this transit has already led to active development of the gas relations between Turkmenistan and China, enhancing competition on the Eastern direction, which is promising for Russia: Turkmenistan is going to supply 65 bcm of gas to China by 2020. There is a TAPI project of constructing a

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31 According to the JSC Gazprom Annual Reports.
gas pipeline with the capacity of more than 30 bcm from Turkmenistan to India, the implementation of which would turn the gas producing country further to the East.

Currently, the Trans-Anatolian gas pipeline (TANAP) focused on the second stage of the Shah Deniz gas field (10% of the project belongs to the Lukoil Overseas) with the initial designed capacity of 16 bcm, 10 billion of which are meant for Europe, can be considered the most realistic project of expanding gas export from the Caspian region (by 2020) to Europe. Theoretically, it can be expanded to include the supplies from Turkmenistan, which would require construction of the Trans-Caspian Gas Pipeline (with the designed capacity of 30 bcm) on the Caspian Sea bed, but its legal status is not determined. For its part, the EU speaks more and more insistently about the necessity to reduce dependence on the Russian gas by means of developing its own production, increasing the LNG import (including from the US), diversifying the sources of the supplies, etc.\textsuperscript{36}, which increases the probability of supporting projects alternative to the Russian ones (even if Russia ratifies the Energy Charter Treaty).

Russia’s accession to the Charter does not exclude the possibility to further develop bilateral gas purchase and transportation contracts between Russia and Central Asian states, as well as Azerbaijan, and will contribute to regulation of conditions for performing transit shipments (especially in the case of approving the Transit Protocol). On the whole, in light of Russia’s accession to the WTO, Central Asian gas price increase and enhanced competition in the Eastern direction of gas supplies, the "transit" threats of Russia's accession to the Energy Charter Treaty now seem a little exaggerated.

- Unsettled issues of the draft Transit Protocol

The Transit Protocol, consultations on which began in 1998, was aimed at clarifying and specifying the provisions of Article 7 of the Energy Charter Treaty in order to ensure reliable and continuous transit, to promote a more efficient use of the infrastructure and to contribute to its construction or modification. Agreement was reached for most of the Protocol’s text by the end of 2002, including: the definition of available capacity for transit; the rules on their utilisation; the establishment of transparent and non-discriminatory infrastructure development procedures; good-faith negotiations on the supply of energy materials and products to the transit country; provisions on government charges, technical and accounting standards, metering and measuring, measures in case of accidental interruption, reduction of stoppage of transit, international energy swap agreements as well as principles of objective, reasonable and non-discriminatory tariff setting.

The latter need to be described in more detail. Insufficient clarity of wording in Article 7(3) allows use of transit tariffs for comparison with internal (aimed for own consumption) and not with import/export tariffs. While the last formal version of the Protocol (2003) contained Understanding 12 stating that "the application by a Contracting Party of the provisions of

Article 10 of the Transit Protocol and of Article 7(3) of the Energy Charter Treaty may, due to the nature of the transportation of Energy Materials and Products, not necessarily result in tariffs for Transit of Energy Materials and Products, which are identical in monetary terms to the tariffs for transportation of such Energy Materials and Products within the area of that Contracting Party”, this understanding is absent in its last informal version (2010). The uncertainty about the principles of tariff setting, which remains in the Energy Charter Treaty, needs clarification.

In 2003 the negotiations on the Transit Protocol were suspended, in 2011 the mandate on the negotiations was nullified and the EU argued that their continuation was inopportune (due to the lack of progress). Consequently, three issues (de facto between the EU and Russia) remained outstanding:

1. long-term capacity booking and creation of transit infrastructure;
2. the cost-reflectiveness of tariffs arising from auctions;
3. the clause having the effect that the Protocol would not apply to energy flows within the EU ("REIO-clause").

It has to be highlighted that these issues are directly related to the non-agreed Transit Protocol and not to the Energy Charter Treaty and therefore cannot be used as an argument against the Energy Charter Treaty. However Russia remains very interested in settling the issues of the international transit of Energy Materials and Products, especially within its geographic region, which accounts for the necessity to resume negotiations on transit. Before Russia ratifies the Energy Charter Treaty, it would be reasonable to agree on the main outstanding moments on transit issues and formalise these arrangements.

The contradictions mainly exist between Russia and the EU and are related to the continuing liberalisation of the European energy market (within the Third Energy Package). The requirement to provide free access to pipelines to third parties, as well as the intention to "destroy" long term contracts, are related to the Third Energy Package but not to the Energy Charter Treaty, which was created in the early 1990s, when the liberalisation of the European markets was significantly lower. The Energy Community initiated by the EU in 2005 is aimed at expanding the current European energy legislation beyond the EU ("acquis communitaire"). Just as it would be incorrect to consider the Energy Charter Treaty a tool to promote the Third Energy Package, so it would be incorrect to search for opportunities in the Treaty to counter the development of the European legislation. It would be more constructive to use the Charter to look for compromise solutions between countries with more and less liberalised energy markets or move “insoluble” contradictions to the bilateral level. Although the latter could slightly reduce the attractiveness of the Charter for Russia, it would allow moving forward in creation of more general rules. In particular, clarification of issues related to transit tariff setting would contribute to the reduction of disputes in this area, which Russia occasionally faces.
Finally, Article 7 of the Energy Charter Treaty does not contain any specific provisions for sea transport and underwater pipelines, referring to the existing regulation in these areas (Declaration 3).

- Transit dispute settlement

One of the main purposes of the Energy Charter Treaty in energy transit is not to allow any interruptions or reductions of the existing transit flows in the event of any disputes over this transit. For that purpose, alongside with the standard dispute settlement mechanisms between the Contracting Parties as described in Article 27 of the Energy Charter Treaty (arbitration), Article 7(7) of the Energy Charter Treaty provides a special mechanism of conciliatory settlement, which is less formalised and more rapid. It comes down to appointing a conciliator, who has the right to decide on the interim tariff and other terms and conditions to be observed for transit until the dispute is resolved (but for no longer than one year). In 1998 the Conference approved a set of Rules and Procedures for conciliatory settlement and the compensation of a conciliator.

Without the Energy Charter Treaty, the possibilities to resolve transit disputes are limited with Article V of the GATT (referred to above) and the conditions of bilateral agreement, which significantly increases potential value of the Treaty. Nevertheless, the Energy Charter Treaty mechanisms were not applied in practice to resolve the gas conflict between Russia and Ukraine in 2009, which resulted in accusations of the Charter's inaction and inefficiency. But in order to employ the mechanisms of the Energy Charter Treaty, in particular, those of the conciliatory settlement, at least one of the parties in the conflict had to apply to the Charter (send a notification with the summary of the merits of the dispute to the Secretary General). This did not happen, so the Secretariat of the Charter had no basis to interfere into the conflict. In particular, none of the European states which suffered from the interruptions of the gas supplies addressed the Secretary General, despite the fact that they all were Contracting Parties to the Energy Charter Treaty. At the time Russia applied the Energy Charter Treaty on a provisional basis, which a little impedes the assessment of its capabilities, but the country had the opportunity to ask for comments and send a written notice for the consideration of the Charter. Additional uncertainty is due to the fact that the conciliatory settlement is used “only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties” (Article 7(7) of the Energy Charter Treaty).

Due to the aggravation of the situation between Russia and Ukraine in March 2014, an Energy Security Contact Group, which would serve as a neutral platform for information exchange, was established within the Charter. In the course of the meetings the Charter proposed to create a system for collecting the relevant data on the physical flows of gas, oil and electricity in order to build confidence between the Parties – the Early Warning Mechanisms (in addition to the existing ones). At the same time the Charter is considering amendments to the Rules and Procedures of the conciliatory settlement. In this regard the issues of the mandate of the
conciliator and enshrining the general principles of setting an "interim tariff" could be discussed. It is important that such a process be as transparent and objective as possible.

**Investment provisions of the Energy Charter Treaty and protection of Russian investments**

It must be noted that the Energy Charter Treaty recognises “*state sovereignty and sovereign rights over energy resources*” (Article 18(1) of the Energy Charter Treaty) and therefore does not envisage “*free and long term access to the natural resources*” of Russia. Moreover, while the Energy Charter Treaty commits to accord to foreign investors a treatment “*which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable*” (Article 10(3) of the Energy Charter Treaty), it is focused on the post-investment stage, i.e. it primarily protects the already realised investments. For the receiving party it means that the change in the existing treatment (introduction of discriminatory measures towards the realised investments) could cause proceedings, set forth in Part V of the Energy Charter Treaty “Dispute Settlement”. Moreover, the Energy Charter Treaty protection extends to the whole supply chain of the energy sector and not only to the production stage.

The Energy Charter Treaty does not exclude the possibility of nationalisation but only in the cases when it is done in the public interest, without discrimination, under due process of law and accompanied by the payment of prompt, adequate and effective compensation (Article 13(1) of the Energy Charter Treaty).

It was planned that a supplementary treaty would be dedicated to the pre-investment stage (Article 10(4) of the Energy Charter Treaty), but so far the Contracting Parties to the Energy Charter Treaty endeavour to limit to the minimum the exceptions to the “most favourable treatment” (Article 10(5) of the Energy Charter Treaty) or may make commitments to accord such a treatment in some or all economic activities in the energy sector (Article 10(6) of the Energy Charter Treaty). At present there are no such countries (Annex VC remains empty) and Russia, which continues to provide information on the investment regime to the Charter, is characterised by the highest number of exceptions among the Energy Charter Treaty signatories as of year-end 2012 – 8.37

Russia’s initiative to promote pre-contractual non-discrimination (within the Conceptual Approach) can be welcomed, but it must be admitted that in the period of high energy prices, which is characterised by growth of resource nationalism38, the approach is difficult to implement, primarily in oil and gas producing countries. In Russia itself, the national regime of access to the oil and gas resources is being tightened since 2000s39 – foreign capital is more

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38 See, for example, the Energy Bulletin N7 of the Analytical Centre for the Government of the Russian Federation, October 2013.
39 For example, the law “On Procedures for Foreign Investments in the Business Entities of Strategic Importance for Russian National Defence and State Security” and amendments to the law “On Subsoil Resources” have
and more oriented on the cooperation with state companies and on the role of minority shareholders. Therefore, current investment provisions of the Energy Charter Treaty are convenient enough for Russia. In order to support the pre-contractual non-discrimination of the Charter, it could be proposed to research/develop model contracts facilitating interaction between a foreign investor and a national government in oil and gas sector (by analogy with the model agreements developed by the Charter for trans-border pipelines). While private companies actively participate in the development of the “best contractual practices” (the activity of the Association of International Petroleum Negotiators (AIPN) could be given as an example), such initiatives are almost non-existent at the level of national governments.

The Energy Charter Treaty contributes to the improvement of the investment climate, which is a relevant task for Russia. according to the Heritage Foundation the level of property rights protection in the country remains low, which points at high risks of expropriation and wide spread of corruption. Russian energy sector needs significant investments: according to the draft Energy Strategy of Russia, in 2011-2035 they should amount to 2.5-2.8 trillion dollars (in fixed prices of 2010). It appears that the ratification of the Energy Charter Treaty would contribute to attracting investments into Russian energy industry and provide safeguards of compensation of investments in case of their expropriation. Mitigation of risks of investing into Russian energy projects (discrimination, unjustified expropriation, losses due to conflicts, limitations of payment transfers, violation of individual investment contracts), can, in its turn, put downward pressure on the cost of the attracted capital. However the Energy Charter Treaty does not solve general problems of weak investment climate in Russia; while existence of resources remains one of the winning arguments for international oil and gas companies to invest (the fact is confirmed by the experience of a number of Latin American states which have gone through nationalisation of the energy sector).

Agreements on promotion and mutual protection – Bilateral Investment Treaties (BIT) – are an alternative to the Energy Charter Treaty as safeguards for protection of the realised investments. From the perspective of development of the international law, stable and universal mechanism of promotion and protection of investments provided by the Energy Charter Treaty for the energy area is a step forward. Bilateral Investment Treaties, being focused on a model sample, maintain specific features and are concluded for a certain period limited the access of foreign capital to the strategic industries, while the amendments to the law "On Production Sharing Agreements" have practically stopped the process of concluding new agreements of this type in Russia.

In 2010 improvement of investment climate was made an independent line of activity of the Ministry of Economic Development of Russia, at year-end 2011 a National Entrepreneurial Initiative to Improve the Investment Climate was initiated, etc.

2014 Index of Economic freedom, http://www.heritage.org/index/country/russia

According to Article 10(1) of the Energy Charter Treaty, a violation of a particular investment contract is considered a violation of the Energy Charter Treaty, but for a number of states (Annex IA: Australia, Hungary, Canada and Norway) international arbitration is not allowed in such cases.
of time but, as a rule, with the possibility of tacit extension. For example, the Model Agreement of the Russian Federation on Promotion and Mutual Protection of Investments (approved by the Enactment of the Government of the Russian Federation N456 of 09.06.01) lays down that an agreement concluded in accordance with this model remains in force for 15 years with tacit extension for periods of five years when the period expires (in the absence of a written notice from one of the parties of quitting the agreement). Conclusion and ratification of the BIT can take a long period of time. That being said, accession to the Energy Charter Treaty does not mean abandoning the advantages of bilateral agreements (both active and future ones): if there exist the Energy Charter Treaty and a Bilateral Investment Treaty at the same time, an investor is able to use the most favourable provisions from both documents (Article 16 of the Energy Charter Treaty).

Currently Russia has active Bilateral Investment Treaties with more than 60 states, in 2010 it ratified Agreements on Promotion and Mutual Protection of Investments in the member-states of the Eurasian Economic Community (EurAsEC), and the new Treaty on the Eurasian Economic Union (EAEU) also contains special provisions on the legal treatment and protection of investments including procedures for investment dispute settlement (Section VII). Nevertheless, such agreements do not exist or are inactive between Russia and some states, which are Contracting Parties to the Energy Charter Treaty: Azerbaijan, Afghanistan, Bosnia and Herzegovina, Georgia, Ireland, Latvia, Liechtenstein, Malta, Portugal, Turkey, Estonia. Such an agreement is not concluded between Russia and the EU either. Russia is able to begin/resume negotiations on concluding Bilateral Investment Treaties with these Contracting Parties (indefinite period) and either achieve or not achieve the conditions offered by the Energy Charter Treaty.

The provisions of the Energy Charter Treaty on promotion and protection of investments have a lot of features in common with the relevant Model Agreement of the Russian Federation in terms of definitions, scope and opportunities for dispute settlement, however, like the Treaty on the EAEU, they enshrine the right of the Contracting Parties to use or introduce exceptions from the national treatments for foreign investors and their investments (the Energy Charter Treaty, as stated above, does not exclude this but calls for their minimisation).

Against the backdrop of the general considerations of improving the investment climate and attracting investments, and the corresponding obligations for the Russian side, it must be highlighted that the Energy Charter Treaty provides similar opportunities for the protection of Russian investments in the member-states, based on the principle of mutuality. According to the Energy Charter Treaty, an investor has the right to appeal to the international arbitration, if there is a change in regulation which causes deterioration of conditions for the realised investments. This has special significance for the Russian investments into the EU gas infrastructure during the full-scale adaptation of the Third Energy Package measures (with account of the absence of a BIT between Russia and the EU), but it also remains relevant for foreign assets/projects of Russian companies in other Energy Charter Treaty states (for
example, an issue of expanding the capacities of the “Blue Stream” is being settled with Turkey).

It could be proposed to organise a broader discussion with Russian energy companies about their knowledge of and interest in the investment protection mechanisms within the Energy Charter Treaty including the dispute settlement opportunities, as compared with the existing opportunities within the Bilateral Investment Treaty.

It is very important that, having applied the Energy Charter Treaty provisionally, Russia will be under obligation to protect investments made on its territory in the period of the provisional application of the Energy Charter Treaty for the following 20 years (i.e. up to 2029).\(^\text{43}\) The Permanent Court of Arbitration in the Hague, guided by the clear provision of Article 45 of the Energy Charter Treaty, held in 2009 that Russia remains bound by these obligations under the Energy Charter Treaty despite the termination of the provisional application. The country had an opportunity to avoid them by delivering the necessary request to be included into Annex PA, i.e. publicly refusing the responsibility, but Russia did not use the opportunity. Consequently, now Russia will have to defend all the possible suits incriminating violations of the investment provisions of the Energy Charter Treaty up to the expiry of the term mentioned above.

**Neutrality of the Environmental Provisions of the Energy Charter Treaty and the PEEREA**

Inclusion of environmental aspects into the Energy Charter Treaty has become a reflection of the growing attention to the climate change problem in early 1990s, but from the beginning they were of secondary (to the commercial and investment aspects) and advisory nature. The Energy Charter Treaty promotes a fuller account of environmental considerations throughout the formulation of the energy policy, assistance to market-oriented price formation, development of international cooperation, information sharing, better public awareness etc., with special account of the energy efficiency issues. The PEEREA has become the only Protocol to the Energy Charter Treaty primarily due to the absence of legal commitments and quantitative targets - the purpose of the Protocol is limited to defining policy principles “for the promotion of energy efficiency as a considerable source of energy and for consequently reducing adverse Environmental Impacts of energy systems” (Article 1 of the PEEREA). Moreover, Russia gives significant attention to the energy efficiency policy, which allows saying that the country generally takes into account the recommendations of the Energy Charter Treaty in the fields of environment and energy efficiency.

The advisory nature of the Environmental Aspects of the Energy Charter Treaty (Article 19) and the PEEREA make these areas neutral regarding the ratification of the Energy Charter Treaty by Russia.

43 According to Article 45(3)(c) of the Energy Charter Treaty this requirement shall not apply to any signatory listed in Annex PA (the Czech republic, Germany, Hungary, Lithuania, Poland and Slovakia), although they did not apply the Energy Charter Treaty provisionally.
In conclusion of the discussion one general but key moment may be noted. The purpose of the Energy Charter Treaty is to support open and non-discriminatory energy markets. In this regard the "protectionist" arguments against the Energy Charter Treaty are hardly appropriate. By accessing to the Energy Charter Treaty a state demonstrates its intention to contribute to development of competition in the energy area, providing the freedom of transit and equal opportunities for investors (though with account of understandings, reservations, exceptions etc., which reflect the balance of the participating states' national interests). This should correspond to a state's national strategy and its initiatives in regulating the energy sector. In order to make decisions about interaction with the Charter, Russia should focus on both the vision of the future national energy sector (primarily, on the target models of the gas, oil and electricity markets)\(^{44}\), and on the emerging regional rules (within the EAEU).

**Conclusions and recommendations**

At this stage Russia, being bound by the obligations to protect investments, de facto uses the Charter as a forum for negotiations on the priority areas of activity of the organisation, although the main value of the Energy Charter Treaty is in the legally binding nature of its provisions for the Contracting Parties. It appears that further participation in creating the common “rules of the game” for the energy sector and payment of contributions to the Charter have sense if Russia is planning to follow the rules in future.

The strategic goals of development and interaction in the energy sector announced by Russia testify that the country is interested in a multilateral treaty regulating relations in the energy area (primarily in its geographic region). In this case the options of developing relations between Russia and the Energy Charter come down to the choice between the ratification of the Energy Charter Treaty (on condition of resolving the unsettled issues) and promotion of its own Convention. The latter is linked with significant difficulties. First of all, there are reputation risks (inconsistency, shifting the targets). Secondly, it would be required to show and prove the essential advantages of the provisions of a new initiative for most of the potential participants as compared with the Energy Charter Treaty, as well as the impossibility to take these provisions into account within the Charter. Thirdly, the discussion of a new initiative would probably need a long time and at the end a new document would have to be approved and signed, with success not assured. Fourthly, new negotiations would not solve the disagreements between the positions of different states in themselves - so it would be necessary to return to all the controversial issues and probably address new ones, concerning a broader geographical scope. It is more favourable to be based on the understandings

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\(^{44}\) For example, a possibility to move from regulating the gas wholesale prices to regulating the tariffs on transportation through gas transmission pipelines is being considered for the gas sector, which requires solving the issue of interim and transit tariffs in respect of the Energy Charter Treaty.
achieved and to use the accumulated experience, which means developing interaction with the Energy Charter.

With Russia’s accession to the WTO, transit of Energy Products and Materials and, to a greater degree, investments, have become the most interesting areas of activity of the Charter for Russia of those where exist legal commitments (Table 1), because the transit of Energy Products and Materials is to a certain extent related to the WTO rules as well.

In light of the latest most serious transit conflicts between Russia and Ukraine, the provisions of the Energy Charter Treaty on the possibility of providing flawless transit and transit dispute settlement are of key importance to Russia but, at the same time, they need clarification/improvement (regarding the time for application and the role of a conciliator).

For the Russian side, the provisions of the Energy Charter Treaty on promoting the transit look the most ambiguous. Some statements about the Energy Charter Treaty, namely about the obligatory access of third parties, are inappropriate; others (regarding the freedom of transit and unhampered creation of new infrastructure) can potentially increase pressure on Russia but will not deprive it of the opportunity to defend its interests (which, however, will require more effort in justification of refusals) or develop bilateral cooperation. The firm position to limit the transit of Central Asian gas to Europe through the territory of Russia, which has remained throughout 2000s, may need correction: it is a short-term solution that will, in the long term, promote creation of infrastructure around Russia, which has already led to stronger competition in the Eastern direction; Russia is not receiving income from the transit, which could amount to about 350-400 million dollars with the current transportation volumes; the prices for the Central Asian gas have significantly increased over the last five years, so heavy price competition is hardly possible; according to forecasts, Europe’s gas import needs will grow. If Russia decides to allocate free capacities for transit, the provisions of the Energy Charter Treaty could contribute to harmonising the conditions of implementation of the decision. The issues related to the Energy Charter Treaty (including a special set of questions on the non-agreed Transit Protocol) and the issues related to the Third Energy Package have to be considered separately. In order to take the decision to ratify the Treaty, it would be reasonable for Russia to formalise arrangements on the transit provisions of the Energy Charter Treaty/Transit Protocol or move the unsettled issues to the bilateral level (Russia-EU).

The Energy Charter Treaty contains a constructive idea of optimising use and construction of transport infrastructure, but at the current level of their politicisation, duplication of efforts (around the unstable regions) and the intention to increase the flexibility of supplies (development of the LNG market) remain, which could potentially decrease the intensity of transit disputes.

On the contrary, the role of the investment provisions of the Energy Charter Treaty will probably increase further. If at the initial stages of discussing the Energy Charter Treaty Russia's priority was to attract investments to the national energy sector, then at the moment
(against the backdrop of the growing presence of Russian companies in foreign projects and the Third Energy Package adaptation of the EU) opportunities to protect Russian investments (in the Energy Charter Treaty states) are coming to the forefront. The Energy Charter Treaty, which covers investments over the whole supply chain of the energy sector, has a lot of common features with the Model Agreement of the Russian Federation on Promotion and Protection of Investments and can provide a common and predictable investment protection treatment with all the Contracting Parties (without denying the conditions of the active Bilateral Investment Treaties). In this regard it would be preferable to clarify a stand of the largest energy companies of Russia, which are active in the international markets, about their knowledge of and interest in the investment protection mechanisms within the Energy Charter Treaty.

The process of expanding the geographical scope of the Energy Charter towards a more balanced representation of energy importing countries, energy transiting countries and energy exporting countries could also raise the attractiveness of the Energy Charter Treaty for Russia.
# Summary and Assessment of Risks and Advantages of Russia’s Participation in the Energy Charter on the Priority Areas of Activity

<table>
<thead>
<tr>
<th>Argument</th>
<th>Correctness</th>
<th>Relevance</th>
<th>Significance</th>
<th>Alternatives/Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Commerce</strong></td>
<td>Development of trade in Energy Materials and Products and acceleration of Russia’s accession to the WTO</td>
<td>Yes</td>
<td>No (in relation with the accession to the WTO)</td>
<td>Average</td>
</tr>
<tr>
<td>Development of trade in Energy Materials and Products with states outside the WTO</td>
<td>Yes</td>
<td>Yes</td>
<td>Low (small scope)</td>
<td>Bilateral agreements, free trade area</td>
</tr>
<tr>
<td>Development of trade in Energy Materials and Products with states outside the WTO</td>
<td>No (initially excluded from the Energy Charter Treaty regime)</td>
<td>Yes</td>
<td>High</td>
<td>Bilateral agreements, WTO</td>
</tr>
<tr>
<td>Outstanding problem of trade in nuclear fuel between Russia and the EU</td>
<td>Protectionist argument</td>
<td>No (contradicts the WTO)</td>
<td>Average</td>
<td>-</td>
</tr>
<tr>
<td>Limitation of investment support of national producers</td>
<td>No (initially excluded from the Energy Charter Treaty regime)</td>
<td>Yes</td>
<td>Yes</td>
<td>High</td>
</tr>
<tr>
<td><strong>Transit</strong></td>
<td>Minimisation of breakdowns in transit supplies</td>
<td>Yes (potentially)</td>
<td>Yes</td>
<td>High</td>
</tr>
<tr>
<td>The Energy Charter Treaty did not contribute to resolution of transit disputes between Russia and Ukraine</td>
<td>No (there were no applications)</td>
<td>Yes</td>
<td>High</td>
<td>Updating and improvement of the mechanism are required</td>
</tr>
<tr>
<td>Extremely broad mandate of a conciliator</td>
<td>Yes</td>
<td>Yes</td>
<td>High</td>
<td>Update needed (towards increase of objectivity)</td>
</tr>
<tr>
<td>Mandatory third party access</td>
<td>No</td>
<td>Yes</td>
<td>High</td>
<td>As in the case of creating new infrastructure, Russia will have an opportunity to protect its transit interests in the Charter, but the pressure on our country can increase Consolidation of this position needed</td>
</tr>
<tr>
<td>Equality of interim export/import tariffs</td>
<td>No (potentially)</td>
<td>Yes</td>
<td>High</td>
<td>A decision to resume negotiations on the Transit Protocol or move the issues to the bilateral level of EU-Russia is needed before Russia’s accession to the Charter</td>
</tr>
<tr>
<td>Tariff setting on the basis of auctions</td>
<td>No (related to the non-agreed Transit Protocol and not directly to the Energy Charter Treaty)</td>
<td>Yes</td>
<td>High</td>
<td></td>
</tr>
<tr>
<td>Exclusion of the EU from most of the transit provisions as a Regional Economic Integration Organisation</td>
<td>No (related to the Third Energy Package)</td>
<td>Yes</td>
<td>High</td>
<td></td>
</tr>
<tr>
<td>Objections against the right of first denial</td>
<td>No (there is a reference to the existing regulation)</td>
<td>Yes</td>
<td>Average</td>
<td>-</td>
</tr>
<tr>
<td>Investments</td>
<td>Improvement of investment attractiveness of Russian energy sector</td>
<td>Yes</td>
<td>Yes</td>
<td>High</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>-----------------------------------------------------------------</td>
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</tr>
<tr>
<td></td>
<td>Increasing protection of investments of Russian companies in the Energy Charter Treaty participating states</td>
<td>Yes</td>
<td>Yes</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>Expansion of access to foreign capital</td>
<td>Yes</td>
<td>Yes</td>
<td>Average</td>
</tr>
<tr>
<td></td>
<td>The Energy Charter Treaty opens long term and free access to the natural resources of Russia</td>
<td>No (confirms state sovereignty)</td>
<td>Yes</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>The Energy Charter Treaty contributes to the inflow of capital to extractive industries</td>
<td>No (covers all the supply chain of the energy sector)</td>
<td>Yes</td>
<td>Average</td>
</tr>
<tr>
<td>Environment</td>
<td>The Energy Charter Treaty contributes to higher energy efficiency</td>
<td>Yes</td>
<td>Yes</td>
<td>Low (recommendations)</td>
</tr>
</tbody>
</table>