
TABLE OF CONTENTS

FOREWORD	1
INTRODUCTION	5
SECTION I: POLITICAL ENERGY RELATIONS BETWEEN EU AND RUSSIA	
Chapter I: The EU-Russia Energy Dialogue at the Origin of the European Foreign Energy Policy	9
1. Introduction	9
2. Objectives and Functioning of the EU – Russia Energy Dialogue	10
A. Objectives	10
B. Other energy dialogues	11
C. Functioning	13
1. The Permanent Partnership Council (PPC)	13
2. The coordinators	14
3. Working groups	14
3. Progress Achieved Under the Energy Dialogue	16
4. Main Elements of the Energy Dialogue	16
A. Investment	17
B. Markets	18
C. Infrastructure	19
D. Energy efficiency	20
E. Early Warning Mechanism	23
5. Future of the Dialogue	24
6. Conclusion	24
Chapter II: The Politics of EU – Russia Energy Relations	25
1. Introduction	25
2. Russian Energy Policy	28
3. Ukraine	31
4. EU Energy Policy	32
5. Conclusion	33

SECTION II: LEGAL ASPECTS OF EU – RUSSIA ENERGY RELATIONS

Chapter I: A Common Russia – EU Energy Space (The New EU – Russia Partnership Agreement, Acquis Communautaire, the Energy Charter and the New Russian Initiative)	45
1. Introduction	45
2. First Option: Export of the Acquis Communautaire (the EU’s Preferred Approach But a “no go” For Russia)	49
A. “Direct” expansion of the ‘acquis’ area	50
B. “Indirect” expansion of the ‘acquis’ area	54
3. Second Option: A New Bilateral Treaty	57
4. Third Option: a New PA Energy Chapter Based on the 1994 ECT	63
A. Russia and the ECT	65
B. The EU and the ECT	71
5. The Energy Charter and Consequences of the Recent Russia-Ukraine Gas Dispute (Role of the Energy Charter Secretariat)	78
6. New Russian Energy Initiative and the Energy Charter	83
A. Russia is bound by the ECT	83
B. Consequences of withdrawal from the ECT	85
C. Transit: common fallacy	87
D. Destroy or renew	90
7. Practical Actions for Moving Forward	91
8. Russia Between Two Margins: to Lead Energy Charter Process “Plus” – or to Withdraw From ECT Provisional Application?	93
A. Disadvantages resulting from withdrawal	94
B. Energy Charter process “plus”	96
C. Road map within Energy Charter “plus” scenario	97
D. Package solution	97
9. Unfortunate Development - and its Consequences	99
Chapter II: EU- Russia Relations in the Energy Field: The Continuing Role of International Law	103
1. Context	104
2. Energy and Sovereignty	105
3. The EU’s House-Keeping Matters	107
4. Avenues in International Law	109
A. Contractual provisions	109

B.	Treaties and public international law	110
C.	Russia's provisional application	111
D.	Opting Out	112
E.	The 'domestic exception' clause in Article 45	113
F.	Scope of provisional application: time and relationship to substantive ECT provisions	114
G.	Treaties and Russian law	115
H.	The rule of law in the ECT	116
I.	The way forward	117
5.	Conclusion	118

Chapter III: Arbitrating Disputes Under the Energy Charter Treaty **119**

1.	Introduction	119
2.	Overview of the Energy Charter Treaty	120
	A. Background	120
	B. Investment promotion and protection	121
	C. Dispute settlement	122
3.	Investment Protection	122
	A. Introduction	122
	B. Scope of protection	123
	C. Minimum standard of investment protection – Article 10(1)	124
	1. Fair and equitable treatment	124
	2. Most constant protection and security	125
	3. Discrimination	126
	4. Umbrella clause	126
	D. Most favoured nation treatment	127
	E. Article 13 – Expropriation	129
	F. Article 17 – Non-application of Part III in certain circumstances	130
4.	Settlement of Disputes Between an Investor and a Contracting Party	130
	A. Introduction	130
	B. Amicable settlement	131
	C. The investor's choice of forum for dispute resolution	131
	D. Applicable law	132
	E. Local companies controlled by foreign investors	133
5.	Provisional Application of the ECT	133
	A. Provisional application of Treaty obligations	133

B.	The relationship between international law and municipal law	136
C.	Termination and opting out of provisional application of the ECT	138
6.	Awards Rendered	139
A.	Brief introduction to the cases	140
1.	Nykomb Synergetics Technology Holding AB v. the Republic of Latvia	140
2.	Petrobart Limited v. the Kyrgyz Republic	141
3.	Plama Consortium Limited v. Republic of Bulgaria (ICSID case no. ARB/03/24)	142
4.	Amto v. Ukraine	144
5.	Ioannis Kardassopoulos v. Georgia (ICSID Case No. ARB/05/18) - Decision on jurisdiction	146
B.	Jurisdictional issues	147
1.	Nykomb	147
(a)	Investment	147
(b)	Retroactive application	148
2.	Petrobart	148
(a)	Investment	148
(b)	Applicability of the ECT with regard to Gibraltar	149
(c)	Article 17 ECT	151
(d)	Res Judicata	152
3.	Plama	152
(a)	Burden of proof	152
(b)	Investment	153
(c)	Article 17 ECT	154
4.	Amto	156
(a)	Investment	156
(b)	Article 17 ECT	156
5.	Kardassopoulos	157
(a)	Jurisdiction Ratione Materiae	157
(b)	Provisional application	159
6.	Concluding remarks on jurisdiction	160
(a)	Article 17 ECT	160
(b)	Provisional application	161
(c)	Investment	161
C.	Compensation standards	161
1.	Nykomb	162
2.	Petrobart	164

3. Concluding remarks regarding compensation	165
7. Concluding Remarks	166
Chapter IV: Enforcement of Foreign Arbitral Awards in Russia: Improving, But Still Uncertain	167
1. Introduction	167
2. The Russian Legal System has Generally Demonstrated a “Two Steps Forward, One Step Back” Approach to Enforcement of Foreign Arbitral Awards Under the New York Convention	168
3. Examining Russia’s Nascent Pro-Enforcement Trend Through the Application of Three Oft-Cited Grounds for Refusal Highlights the Domestic Courts’ Internal Struggle	170
A. Non-arbitrability of the underlying dispute	171
B. Lack of sufficient notice	173
C. Arbitration awards as contrary to Russian public policy	176
4. Conclusion	180
Chapter V: The Effect of the EC – Russia Partnership Agreement in Community Law: Lessons Learned From the Soccer World	181
1. Introduction	181
A. The EC-Russia Partnership Agreement	181
B. Partnership Agreements as an instrument of EC external policy	183
2. The Effect of International Agreements in the Community Legal Order	184
3. Direct Effect of the EC-Russia Partnership Agreement	187
4. From Professional Football to Energy Relations	190
5. Relevance for a New EC-Russia Bilateral Agreement	192
A. Lessons learned from Simutenkov	192
B. Implications for an energy chapter in the future agreement	195
1. Rules modelled on EC law	195
2. Rules not modelled on EC law	197
6. Conclusion	198

SECTION III: CHANGING THE RULES FOR THE EU NATURAL GAS MARKETS – FROM STATE TO MARKET AND PLAN TO CONTRACT

Chapter I: The New EU Energy Policy and Implications for Former Soviet Union Natural Gas Suppliers 205

- 1. Introduction 205
- 2. Changes in the Regulation of the EU Internal Market in Natural Gas 206
- 3. Natural Gas Pipeline Projects from the Caspian Region 215
 - A. Inconsistent rule of law 218
 - B. Resource base 220
- 4. New Energy Strategy - Second Strategic Energy Review 222
- 5. Conclusion 226

Chapter II: Unbundling as a Defence Mechanism Against Russia: Is the EU Missing the Point? 227

- 1. Introduction 227
- 2. Challenging Unbundling and the Third Country Clause Under the EC Treaty 229
 - A. Is the EU competent to require unbundling? 229
 - 1. Article 95 cannot be used to address potential behaviour 230
 - 2. Unbundling requirements are inconsistent with the principle of subsidiarity and proportionality 231
 - B. Can the EU restrict the free movement of capital and the freedom of establishment? 233
 - 1. Unbundling and the third country clause violate the free movement of capital and the freedom of establishment 234
 - 2. These violations cannot be covered by any exceptions 235
- 3. Challenging Unbundling and the Third Country Clause Under BITs and the ECT 237
 - A. Claiming compensation under a BIT 238
 - B. Claiming compensation under the ECT 240
- 4. Concluding Remarks – Enforceability and Bilateral Relations 241
 - A. Enforceability 242
 - B. EU-Russia bilateral energy relations 243

Chapter III: Long-Term Capacity Agreements, Third Party Access and EU-Russia Relations	245
1. Introduction	245
2. Access to Import and Transit Pipelines Under EU Law	248
3. Secondary EC Law and Third Party Access in the Gas Sector	251
A. The gas market Directive	251
B. The access Regulation	253
1. Tariffs	255
2. Third party access services	256
3. Exemptions from TPA – new infrastructure	257
4. TPA and EC Competition Law	259
A. Article 82 and TPA	260
1. Refusal to deal	262
2. The essential facility doctrine	265
3. Refusal to deal – access to pipelines	269
(a) There must be a refusal to deal	269
(b) There are two distinct markets and the requested company has a dominant position in the upstream market	272
(c) The input is essential and indispensable for competition in the downstream market	273
(d) Refusal leads to total elimination of competition	276
(e) In case of IP rights, there is a requirement of “new product”	276
(f) There is no objective justification for the refusal	277
B. Some reflections	279
5. Relationship Between General Competition Laws And Sector-Specific Energy Regulation	282
A. The relationship – possible approaches	283
B. The European Court of Justice	287
C. Application of the two regimes	289
6. TPA and EU-Russia Relations – The Right of First Refusal	290
7. Conclusion	292

Chapter IV: Russian Energy Strategy and Transit Routes in Eastern Europe – A View From Warsaw	295
1. Introduction	295
2. Poland's Energy Policy	296
A. Poland's energy security	296
B. Tensions on the Yamal-Europe gas pipeline	300
C. Russian Polish transit disputes in Europogaz	302
3. Poland's Perceptions of the Russian Energy Policy	305
A. Perceptions of the Russian-Ukrainian gas disputes	305
B. Perceptions of the Russian-German energy cooperation	310
4. New Energy Alliances in Eastern Europe	315
A. Amber Stream	316
B. Baltic pipe	316
C. Developments on the Druzhba pipeline	317
D. Odessa-Brody oil pipeline	319
E. Mazeikiu refinery	321
F. Ignalin nuclear plant	323
5. Conclusions	325
Chapter V: Can Nordstream and Southstream Survive in a Changing European Gas Market?	327
1. Introduction	327
2. Nordstream	328
3. Southstream	335
4. A Changing European Gas Market	338
A. Market liberalization	338
B. Unconventional gas and LNG	342
C. Gazprom and the economic crisis	345
5. Conclusion	347

Chapter VI: The 2009 Gas Conflict and its Consequences for European Energy Security	351
1. Introduction	351
2. Russia: Energy and Financial Background Prior to the Crisis	352
A. The need to “sweep under the carpet” an external business conflict caused by a corporate problem of a current gas deficit	352
B. Gazprom’s shortage of energy and financial resources	353
1. Estimate of the current deficit of Gazprom’s resources during the consumption peak in the period of January 1-20, 2009	354
2. The critical financial standing of Gazprom caused by debts and the price downturn on the main market in the EU	356
3. Russia: Political and Economic Considerations Behind Unleashing the Crisis	357
A. Articulated political and economic considerations	357
B. Russia was also pursuing non-articulated goals	358
4. Ukraine: Allegations vs Reality	359
5. Prospects of Gas Transit via Ukraine	361
6. The Gas Crisis as a “Mirror” of Energy Vulnerability of the EU	364
7. Resolution of the Crisis and its Consequences	370
8. Proposals for Enhancement of European Energy Security	372
9. Conclusive Remarks	376