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ARTICLE

The EU's Missed Role in International Transit Governance

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ABSTRACT The debates surrounding the European Union (EU) energy dependency on Russia should take into account the issue of non-acceptance of governance norms, defined hereafter by logic of appropriateness. The logic of appropriateness demonstrates the importance of values and norms in the setting of energy governance. The EU is the world's largest gas importer, which has not been able to influence effective governance in gas trade with the former Soviet Union (FSU), in spite of its initial strategic interest in the region. Three dimensions of EU-driven policies have failed to pass a test of the logic of appropriateness: international norms promotion, regional and bilateral relations; and the export of its domestic market model. Each of the three components demonstrates that the EU has, until now, missed achievement of its earlier stated objectives of setting an international energy regime in its relations with the FSU.

KEY WORDS: European Union, international governance, energy, geopolitics, Russia

Introduction

The Russia-Ukraine gas transit dispute in January 2009 has indisputably spurred on the energy security debate in Europe (Pirani, Stern, and Yafimava 2009). It cannot be argued that both Russia and Ukraine were aiming to damage EU Member States' interests. Rather, former Soviet Union (FSU) transit governance failed and this, in turn, demonstrated the vulnerability of the European Union (EU) energy security. It would also be misleading to consider that the EU is only an external actor in the region without considerable influence. Energy cooperation has been an important part of the agenda of European policy towards the FSU since the early 1990s. Indeed, the development of new pipeline projects as well as the promotion of Liquefied Natural Gas (hereinafter, LNG) partly stem from

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the weakness of transit governance in the FSU area and the EU's inability to influence the curse of transit conflicts.

Based on these premises, this article attempts to outline the causes of the EU's limited impact in the policy agenda, which has been a crucial aspect of its external energy policy for approximately two decades. At the same time, scholars cannot consider EU external energy policy without taking into consideration the complex nature of the EU system itself. Being a combination of an economic block and an international organisation (Young 2004, 394), EU energy governance has been characterised by a co-existence between the European Community, represented by the European Commission, and EU Member States, represented by the EU Presidency. The EU is a combination of economic interests and competences of the European Community and the geopolitical views of its Member States. It would be incorrect to state that this complex energy governance is strictly limited to the EU's borders as the European Internal Market plays a pivotal role in the whole Eastern Europe and FSU region (Prange-Gstohl 2009, 5297–5298).

Embedded in the logic of international organisation and economic block, the EU has three interdependent levels of political leverage on international energy relations (Belyi 2007, 191–220): (1) the promotion of multilateral trade norms, which include transit, (2) regional and bilateral soft-power mechanisms, such as the European Neighbourhood Policy (ENP) and the EU-Russia Energy Dialogue among others (3) EU domestic market integration, which constitutes a basis for becoming a Regional Economic Integration Organisation (REIO), a so-called uniform cross-border economic block that also expands beyond its own borders.

What is needed is a detailed assessment of the EU policy dimensions on FSU in terms of treating stable and predictable relations in the energy sphere. Moreover, the EU started forming new structures of governance, which are focused on the European integration itself.

Defining International Energy Governance

The term 'governance' is considered to be an alternative to that of 'government' and aims to distinguish between indirect and direct regulation of a market (Mueller-Kraenner 2008, 154). A cross-border market would always be defined by governance rather than by a government regulation due to the fact that states usually avoid the establishment of a single cross-border regulatory body. Successful governance is associated with a higher level of predictability for economic and political agents. By contrast, difficulties in governance may result in unpredictability for agents, which is translated into higher costs for economic activity related to information asymmetries, more complex bargaining and other non-economic risks. In other words, lack of governance may lead to a transaction costs increase (North 1990, 355–357).

In contrast to the definition of 'government', 'governance' involves the adaptability of various actors (states, market actors, public opinion etc) to the norms, rules and values of an economic (in our case, energy transit)

activity. Therefore, international governance analysis should take into account the adaptability of agents (states, market actors etc) to institutions of governance. Adaptability assumes a logic of appropriateness to be one of the important aspects of governance. The concept of appropriateness helps to demonstrate the limits of economic interdependence as a precondition for governance. We could, for example, also refer to other historical events, such as WWI, which demonstrate how economic interdependency can be hindered by a general lack of governance (Keohane 2001, 12). Likewise, the failure of transit governance draws our attention to an important theoretical assumption: the economic interdependency between energy-producing, energy-transit and energy-importing states does not constitute, per se, a basis for stability of the gas supply chain. At the same time, logic of norm-acceptance might also presuppose an institutional learning, the actors' adaptation to the new norms and realities.

At the same time, logic of norms acceptance can also assume an institutional learning, the actors' adaptation to the new norms and realities. An international legally binding and politically effective regime can be an outcome of governance. By contrast, a failure of governance may lead to weakening an international regime. Effective governance is hence associated with the acceptance of its norms and practices by the actors involved (Peters 1999, 154).

This leads to the thought that the three afore-mentioned components of EU external energy policy have been trapped by conflicts around the logic of appropriateness in energy governance. The EU-driven approach in the region has not been fully canvassed in either Russia or Ukraine. The reason for this lies in the inherent difficulty of international gas markets, which combines a need for higher competition to support innovation on the one hand, and a requirement for long-term stability to ensure capital-intensive pay back stability. To generalise, this constitutes a conflict of appropriateness in institutional learning between the actors involved. Consequently, non-successful international energy governance resulted in unbalanced information about risks and perceived risks. Hence, additional transaction costs have been reflected in higher expenditure in infrastructural development and for market transformation in Europe.

Transit Regime: From Innovative Initiative to Controversies

A normative dimension of the EU energy policy has been largely related to the promotion of international institutions, such as the global trade and climate regimes (Bretheron and Volger 1999, 15–45). The importance attributed to these institutions consists of creating a legitimate international arena to promote the EU-integrated interest, which bypasses the national interests of any single Member State (Belyi 2003, 362). The Energy Charter Treaty (ECT) (2004) is one of those multilateral institutions, promoted by the EU. However, a high level of politicisation of energy trade and transit in the EU-FSU relations has hindered the international energy regime. For the main part, the EU has met with a non-acceptance of the Energy Charter governance system by Russia.

The Energy Charter was initiated by the Dutch Presidency of the European Community about two decades ago, in 1990. The geographical scope of the Charter covered the post-Cold War area in the aftermath of the signature of the Charter for New Europe the same year in Paris. The political context of these events has been marked by a so-called 'seminar diplomacy', which substitutes Cold War discourse by cooperative semantics (Adler 1991, 58–75). Unlike the Charter of Paris, the Energy Charter moved towards a new Treaty, which represents a major attempt to create an international energy governance structure.

In 1994 a Treaty was signed by 52 countries representing major energy producers on the Eurasian continent (Azerbaijan, Kazakhstan, Norway and Russia), the European Community as well as EU Member States, Japan, and Australia. Clearly, the EU imposed itself as a leader of the process in terms of the preparation of the legal documents and in terms of financing the Energy Charter Secretariat in Brussels (Waelde 2007, 149). Other actors have not shown much sign of activity. The US withdrew from the process due to contradictions with Europeans on a number of issues (Dore 1996, 143–145). Unlike Washington, Moscow signed the agreement, but being in a state of economic depression and political instability at that time, it did not actively participate in the negotiations. Russia's adaptability to the process has thus been largely conditioned by its attitude *vis-a-vis* the EU.

The multilateral framework also shaped energy transit provisions, which was the subject of particular interest after the break-up of the Soviet Union. Indeed, the emergence of a number of new states casts a sharp light on the need to secure energy flows, which crossed more than one state. With the disintegration of the Soviet State, the Soviet Unified Gas System was substituted by a number of companies owned by the newly emerged states. Each of them owned pipelines, underground storages and gas equipment (Mitrova 2009, 15). In the aftermath of the breakdown of the USSR, Russia inherited most of the pipeline network, which also connects the Central Asian gas production network to the FSU exports to Europe. Ukraine possesses the largest transit pipeline network with the widest European gas storage facility, which today represents an important factor for the security of gas supply.

As for any other multilateral structure of governance, dispute settlement mechanism is the key factor for effective governance. In the ECT text, the transit dispute settlement relates to non-discrimination and national treatment with regard to transit and construction of new transport capacities. The text of the Treaty puts forward a mediation mechanism, which provides a certain flexibility for actors in dispute. The specificity of this mechanism consists of a prohibition of transit interruption in the event of a dispute. Instead, a mediator is foreseen to set temporary conditions for volumes and supplies. This provision remained the most controversial in the whole ECT text: already after the conclusion of the Treaty, Russia asked for clarifications regarding the ECT Article's 7(7) norm that a mediator sets tariffs and volumes during the 90-day mediation period. For instance, in the context of securing the long-term gas chain, setting

volumes and supplies can be regarded as a highly strategic issue. Therefore, institutional practice of conciliation could become effective only in a situation of norm acceptance.

Moreover, apart from the legal scope of the provisions, there has also been a discrepancy in political perspectives of the transit regime. Moscow sees a multilateral framework as the one that ensures long-term supply stability, which is best ensured by vertically integrated suppliers. In European capitals, the ECT has a competition-supportive role in the energy sectors.

Indeed, for Russia, the main problem consisted in ensuring the long-term uninterrupted transit of gas through Ukraine. In the late 1990s and early 2000s, Moscow accused Kiev of unlawfully taking Russian gas from Ukrainian underground storages (Stern 2004, 87; Pirani 2009, 123–125). The stability of the gas chain was also related to a link between transit and supply. Indeed, the Russian gas exporter, Gazprom, considered that competition for access to infrastructure should not create a mismatch between a contract for supply and a contract for infrastructure usage. Accordingly, Gazprom consistently insisted on the 'right of first refusal' to be applied to transit governance. Currently, the 'right of first refusal' allows a supplier to protect its access to infrastructures if it has a long-term supply agreement (Finon and Locatelli 2008, 426–434; Talus and Hunt 2010, 245–247).

For the EU, the ECT transit provisions integrate an element of competition into the international gas chain. State monopoly and ownership over a pipeline network may not guarantee a predictable market structure with a non-discriminatory practice. This would allow non-Gazprom companies as well as Central Asian gas producers to access the post-Soviet gas infrastructure. Moreover, the 'right of first refusal' has often been considered to be illegitimate by European Community representatives because it contradicts the very logic of competition (Konoplyanik 2006, 9–12).

This opposition of views was reflected during negotiations of an additional Transit Protocol, proposed in 2000. The Transit Protocol aims to reinforce and clarify aspects related to the definition of major terms used in energy transit (Article 1); to the prohibition of the unlawful taking of energy by a transit country (Article 6); to the usage of available capacity and an explanation by the transit state in the case of denial of access (Article 8); to situations where the transit agreement does not match a supply agreement (Article 8.4) as well as non-discrimination in tariffs (Article 10). The strategic importance of the Transit Protocol remained the key factor for the success of the ECT itself. In addition, in 2001 Russia made the successful adoption of the Transit Protocol a condition of its agreement to the ratification of the Treaty (Konoplyanik 2009, 273).

For the Russians, the Protocol represented an opportunity to renegotiate the Treaty, which was negotiated while Russia held a weaker negotiating position. After the economic recovery of 2000, being the largest player of the gas trade, Russia attempted to reformulate the ECT norms to be broader and wider, hence weaker. For the Europeans, the role of the Protocol consisted of a clarification of norms rather than a revising of the Treaty. The EU Member States consistently opposed Russian attempts to revise the Treaty.

The Treaty-based governance was not, from a European perspective, the final objective of governance. Instead, the promotion of energy competition was. Thus, in 2003, the European Community claimed to be a regime on its own, by introducing the proposed clause of Regional Economic Integration Organisation (REIO) applied within the Transit Protocol. In practice, the REIO aims to exempt the European Community from the transit provisions of the ECT because once energy is traded within the EU, it is subject to the Internal Energy Market and hence there is no transit involved. It could be argued that the ECT-based governance cannot ignore the EU approach of competition-driven governance, and could, therefore, enter into even deeper contradiction with the Russian approach. Indeed, for Russia, which considered the transit regime ensured stability of the gas chain, the REIO clause was viewed as a willingness on the part of the EU to exempt itself from the multilateral process.

Curiously enough, although the Transit Protocol has never been concluded, the EU Member States often requested Russia to ratify both the ECT and the Protocol. From the Russian viewpoint, this position aimed at pressing Russia to accept rules, which are still under elaboration and are not applied for the EU (Konoplyanik 2009, 277). Moreover, Russian concern regarding the afore-mentioned supply-capacity mismatch remained quite significant. And for these reasons, Russia considered the need for the Transit Protocol for the gas chain stability also within the EU territory.

Discrepancies of views on the essence of the ECT, Transit Protocol and dispute settlement mechanism led to a marginalisation of energy transit governance during the disputes between Russia and Ukraine in 2006 and 2009. A historical overview of the conflicts and their resolution demonstrates that the countries involved made every attempt to ensure that both FSU did not become the first example of the ECT Article 7 dispute settlement mechanism. Russia-Ukraine gas trade and transit governance has been based on a number of agreements between the two states and also on commercial contracts between their national gas companies, Gazprom from Russia and Naftagas from Ukraine. These contracts included barter deals: part of the Russian gas was supplied at a lower price as a premium for the transit. In 2001, Kiev and Moscow signed a framework agreement opening the way to annual Protocols concluded by the two companies, who set the volumes of supplies, transit and supply tariffs (Pirani 2009, 101–103). Since 2005, a supply-transit dispute emerged between Moscow and Kiev: the former attempted to increase the supply price, whereas the latter attempted to change the transit fees. In 2006 a dispute led to the reduction of gas transit in the Ukrainian territory. In 2009, a similar dispute provoked a large-scale interruption of gas supply and transit through Ukraine. In the aftermath of both conflicts, there was a potential debate about the possibility of Russia using ECT transit dispute mechanisms to resolve its dispute with Ukraine and if this could be used in similar transit crises. However, since the ECT dispute resolution mechanism in Article 7 (7) only applies to conflicts arising over transit, and not to disputes over supply, in this case it would have included only the transit tariff and

conditions dispute between Gazprom and Naftagas. The price hike for gas supplies to Ukraine would not have been subject to an Article 7 ECT-based dispute settlement process. Russia seemed, therefore, to be well placed within the ECT-based transit provisions (Belyi and Klaus 2007, 219–222).

The logic of appropriateness is certainly a solid analytical explanation for the rejection of the dispute settlement mechanisms. Indeed, a dispute settlement addresses a specific disagreement relating to a question of rights or interests of the parties involved (Collier and Lowe 1999, 1). In the case of the ECT and Transit Protocol negotiations, a structural conflict of logics of appropriateness emerged, which cannot be defined as a 'specific' disagreement.

The application of the conciliatory mechanisms of the Charter was hindered by a structural conflict of understanding of the gas sector in general and Transit Protocol in particular.

As a consequence of its non-acceptance of the ECT norms, in the aftermath of the January 2009 crisis, Russia tabled an 'alternative' to the ECT: the 'Conceptual Approach to the New Legal Framework for Energy Cooperation'. Broadly worded and in the form of a statement of principles at this stage, the Treaty includes many principles and practices that have previously been debated and adopted. These include: sovereignty over natural resources, ensuring non-discriminatory access to markets, transparency, access to technologies and exchange of information. Russia supported the idea of extending the ECT to other countries (including the US and producing countries) and covering a broader scope of energy sources (e.g., nuclear). Transit conflicts are also given a more global dimension. Russia proposed that transit conflicts be resolved within a United Nations Commission on International Trade Law (UNICTRAL) (Collier and Lowe 1999, 50–53; Medvedev 2009). This would create a governance of energy markets that is broader than the ECT. (Belyi and S. Nappert. 2009). The Russian proposal was furthermore embodied in a Draft Convention on Energy Security (Draft Convention) issued in September 2010. The new Russian document reiterates that long term gas contracts should avoid unnecessary mismatch with contracts on capacity. Noteworthy, by contrast to the ECT text, the Draft Convention uses statist and unilateralist wording (Belyi, Nappert, and Pogoretsky 2011). In the context of a conflict of values related to gas trade and transit (competitive model vs stability of the long-term supply chain), the EU has consistently ignored the Russian proposal. At the same time, the Russian proposal may be considered as a marginalisation of the ECT instead of creating a new form of cooperation within the already existing framework. Subsequently, the international transit regime evolved into two competing views of energy governance.

EU Soft-Power Mechanisms and Transit Governance

Soft-power mechanisms have been an important tool for EU external policy, which aims at securing Europe's position in the international arena.

Regional and bilateral agreements constitute an important soft-power tool for EU-coordinated policy. Regional ties allow for the implementation of long-term energy relations and the institutionalisation of market practices at the intergovernmental level.

In the case of transit governance, the EU has lacked instruments to deal with transit governance beyond its borders. Instead, both the European Community and a number of its Member States have attempted to promote alternative pipeline projects, which until now, have not enjoyed a successful result. It could be argued that the appropriateness of the transit regime was questioned without an alternative being elaborated.

The reason for this lies in an apparent inconsistency of EU policy towards the FSU region. The EU developed two separated strategies towards the FSU region: one towards non-Russian FSU and the other towards Russia itself. The policy logic was mainly based on the disproportional size of Russia compared to all other FSU republics. At the same time, no attempt was made to form an EU-FSU-Russia framework of cooperation and therefore a perception of a new geopolitical divide emerged rather than one of a multilateral cooperation. A two-strategy policy contributed to a weakening of the initial 'seminar diplomacy', and this also shaped the Energy Charter process. In the case of soft power, conflict of appropriateness between stability and competition driven approaches is less evident. Instead, an institutional design of the policy framework weakened the EU-driven governance in the region.

As far as EU policy towards non-Russian FSU energy is concerned, this emerged as early as the mid-1990s and consisted of backing new oil and gas transit routes that bypass Russian territory. For instance, the EU-fundedprojects, INOGATE and TRACECA, aimed at financing new pipeline infrastructures from the Caspian Sea and Central Asia (Belyi 2003, 358). This type of intra-regional cooperation would enable the growth of a new impetus for cross-border integration in the region, but with the EU replacing Russia as the core-integrating pole. This policy has subsequently created competition between European and Russian interests in the region.

The Baku–Tblisi–Ceyhan oil pipeline running from Azerbaijan through Georgia (Tbilisi) to Turkey (Ceyhan) can be considered as a major success in the pipeline diversification policy. Its geopolitical impact has nevertheless been less significant than expected. Interest in Caspian oil is quite low and not vital for Western Europe, whereas Eastern European states remain linked by an oil pipeline system inherited from the Soviet era. Pipeline infrastructure is, moreover, far less important in the oil trade than in the gas sector, where sea trade remains minor. A gas pipeline infrastructure from the Caspian Sea and from Central Asia would, therefore, create the basis for a diversification of supplies for European states.

However, a gas pipeline project under the Caspian Sea, connecting Turkmenistan with Azerbaijan and then Turkey (thus bypassing Russia) has not yet emerged. One of the reasons for the difficulties in gas diversification consists in the Russian influence in the Central Asian region. Central Asian gas-producing states, namely Kazakhstan, Turkmenistan and Uzbekistan, still prefer to use the old ties with Russian Gazprom to

export their gas. In most cases, the Central Asian gas producers have never attempted or wished to export their gas directly to Europe in order to avoid transit responsibility (Mitrova *et al*. 2009, 406). Since 2006, Gazprom has had a long-term gas purchase agreement with the largest Central Asian exporter Turkmenistan, which has practically annihilated any gas diversification strategies on the part of the EU. Russian-Central Asian gas export competition has not evolved into transit diversification, mainly due to the political and economic links inherited from the USSR.

Since 2003, EU policy towards the western part of the FSU has been partially integrated within the European Neighbourhood Policy (ENP), which is designed to be a 'force for good', allowing the EU's influence to expand beyond its own borders (Barbé and Johansson 2008, 81–82). In 2009, the EU countries, Poland and Sweden, advanced a proposal on Eastern Partnership, involving Belarus, Moldova, Ukraine and the three Transcaucasian countries. The main soft-power instrument used in this region is project finance. The EU has, moreover, rejected the possibility of their integration into full Membership. For their part, the countries have successfully managed to position themselves as a playground for competition between the political influences of the EU and Russia, although competition between the two bigger poles of the region is less evident because the EU never aimed to irritate Russian interests (Wilson 2009, 61), whereas non-Russian FSU seek to consider the EU as a counterbalance to Russia.

Subsequently, despite increased competition in the non-Russian FSU, the EU has attempted to develop a stable and predictable energy partnership with Russia and, institutionally, EU-Russia energy relations have evolved within two political frameworks:

- in 1994 the EU and Russia concluded a Partnership and Cooperation Agreement (PCA), which expired in 2007. Negotiations for a new PCA agreement have been ongoing since June 2008. Energy-related aspects could become part of the new PCA agreement. However, two main problems arise: firstly, transit through Ukraine cannot be addressed within the bilateral Treaty; secondly, considering the difficulties met during the Energy Charter negotiations, the chances of achieving a new legally-binding energy agreement ratified by Russia, all EU Members and the EC are slim (Konoplyanik 2009, 272).
- in 2000, the EU and Russia initiated an Energy Dialogue. Unlike the PCA, this does not create a legally binding structure of governance. Instead, it lays down the basis for a policy dialogue, which aims at improving an understanding between the countries (Romanova 2009). The Energy Dialogue was not aimed at becoming a conciliation mechanism between Russia and Ukraine, and the scope of EU-Russia bilateral energy relations remained limited and they have never, in turn, replaced the multilateral framework of the Energy Charter (Konoplyanik 2009, 276). However, after the crisis of 2009, an 'early warning mechanism' was set within the EU-Russia Energy Dialogue. But again, the Energy Dialogue does not involve Ukraine into the system of governance, although it represents a clear political attempt to improve a mutual understanding between energy exporters and importers.

It could be argued that the differentiation between non-Russian FSU and Russia with regards to European policy stems from the very internal EU divide on perspectives of energy transit and supply from the region. This is reflected in a number of competing gas pipeline projects that have emerged with a view to reducing EU dependency either on Russia or on transit through Ukraine (Benavides Salas 2009, 221–223):

- Nord Stream: an offshore pipeline project, which started to be built under the Baltic Sea, connecting Russia directly to Germany and then going on to north-western Europe. The project received enthusiastic support from Germany, whereas the Baltic States and Poland initially opposed it.
- Nabucco: an onshore pipeline from Central Asia and Iran going to Central Europe, thereby bypassing both Russia and Ukraine.
- South Stream: a project sponsored by Russian Gazprom and Italian Eni, which would open an export route from Russia to the Mediterranean. South Stream, in its geographical scope, competes with Nabucco, whereas Nord Stream can coexist with both. Interestingly, Central and East European countries often negotiate their participation in both projects.

None of the projects have so far been completed, and the further implementation of Nabucco and South Stream might be further delayed, mainly for commercial reasons. The institutional setting of the gas pipeline game may represent a failure of the energy governance in the area. As a consequence, high transaction costs which stemmed from the transit conflicts have influenced favourable decisions towards capital intensive projects (Chyong, Noël, and Reiner 2010; Riley 2010, 327–337).

At the same time, the EU faces two major risks related to the stability of Russia-Ukraine gas transit governance:

First, is the mid- and long-term risk of technical disruptions, as the number of small accidents has dramatically increased since the year 2000. Up to 80% of pipelines connecting Russia and Ukraine are older than 25 years and hence require continuous maintenance work.

Secondly, during the gas transit disputes between Russia and Ukraine, the EU missed an opportunity to impose itself as a mediator. For instance, the Energy Dialogue could not create a conciliation procedure. Instead, during the January 2009 crisis, the Czech Republic, holding the EU Presidency, attempted to mediate during the crisis. It could be then argued that mediation on the part of the EU Presidency was a starting point for a new role of the EU in the FSU area. For instance, a few months previously, the French Presidency had played the role of mediator in the Russia-Georgia crisis in August 2008. This demonstrated that Russia needs the EU's involvement in order to stabilise relations with its direct neighbours.

Nevertheless, the EU internal divide on the energy issue weakened its mediation capability. In turn, capital-intensive investments substituted cross-border gas trade governance.

Export of the EU Market Model and its Limitations

As was emphasised earlier, EU external energy policy involves the development of intra-EU cross-border governance. The EU's influence in the energy transit regime can thus not be separated from an intra-EU cross-border trade and transit model. However, it can be demonstrated that the EU energy market model has only limited influence in the FSU area, which in turn contributed to the failure of the EU to influence transit governance.

The intra-EU transit regime emerged in 1991: the Gas Transit Directive 91/296/EEC sets norms for non-discriminatory access to the networks across the Union. Transit Directives aimed at a harmonisation of the energy trade by network norms in the EU. Internal EU Transit Directives also became a basis for ECT Article 7 in 1994. Non-discrimination in access to networks as well as in licensing new capacity building has been largely borrowed from the EU Transit Directives.

Since 1998, EU gas legislation has evolved into a new model, which consists of a separation of gas transport companies from supply companies in order to enhance competition between suppliers. Since then, a number of policies and regulatory practices have been developed at three different levels:

- Level of the Directives, which have set legally binding *acquis communautaires* for gas liberalisation, the internal gas market, which has revoked an intra-EU transit as such (Directive 2003/55/EC); and, finally, measures for competitive cross-border market (Directive 2009/73/EC).
- Level of the supranational authorities, being both the European Commission and the European Court of Justice. Both have been monitoring the implementation process by disallowing mergers and monopolies to abuse their market power.
- Level of national regulators, which have been coordinating their policies between national gas market regimes. For instance, the new regulatory model includes market-based mechanisms for gas transport capacity.

Within the framework of the afore-mentioned ENP, the new regulatory model also started to be exported to other countries. The most integrated regulatory commitment is the south-eastern Europe Energy Community Treaty. (2005), where non-EU European countries accept the *acquis communautaire* in energy markets. Here, the EU is in the process of creating a wide-ranging energy community, extending beyond the borders of the Union and based on common rules and practices.

The Athens Memorandum was signed in 2002, the Energy Community Treaty was signed on 25 October 2005 between the European Community on the one hand and the non-EU countries of south-eastern Europe: Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Romania and Serbia on the other. The Energy Community has established its own institutions: (1) Ministerial Council representing each contracting party by one representative, with the exception of the European Community, which is attributed two representatives; (2) rotating presidency; (3) Energy Community Secretariat, which, alongside the

European Commission, is responsible for the energy markets' monitoring. In the aftermath of the accession to the EU, Bulgaria and Romania have changed their status within the Energy Community from the contracting party and now are represented in the Ministerial Council of the Energy Community through the European Community.

The Treaty introduces a qualitatively new relationship between the EU and the above-mentioned non-EU countries of Europe on energy trade (Hunt and Karova 2010, 51–86). One of the main objectives is declared as follows:

'Considering that in order to reduce stress on the state level gas and electricity systems and contribute to resolving local gas and electricity shortages, specific rules should be put in place to facilitate gas and electricity trade; and that such rules are needed to create a single regulatory space for the geographic extent of the concerned product markets'.

The Energy Community will follow the *acquis communautaires* (Article 5) related to the EU internal energy market as well as the European Community's competition norms (Article 18). The impact of EU harmonisation should also spread to the contracting parties of the Energy Community Treaty.

The Community Treaty involves actual integration to the EU market rather than a new framework of cooperation (Prange-Gstohl 2009, 5299). Therefore, the Energy Community governance represents a coherent cross-border regime, which may marginalise other international energy forums.

The political role of the Treaty consists of exporting the EU liberalisation model to other non-EU European countries. A contrast with the initial stages of liberalisation (between 1998 and 2003) can be observed, when the EU responded to the challenges of international energy markets. At a later stage of liberalisation, both deepening of the competition-driven approach and its international expansion demonstrate the EU attempts to forge international energy (particularly gas) markets both inside and outside the EU. A paradoxical situation emerges due to the unfinished nature of the EU regulatory regime and its expanding influence. It seems important to note that in the vast majority of EU Member States the regulatory regimes remain different and the level of the liberalisation varies from one country to another. Moreover, between 2007 and 2009 the European Commission embarked on legal proceedings against 17 EU Member States for non-implementation of the gas market *acquis*. Thus, the EU succeeds in promoting its own unfinished regulatory framework as the model for the neighbouring countries. The success of the Treaty's implementation is consequently largely linked to the success of the EU regulatory regime and of the liberalisation of gas markets. The logic of appropriateness would then explain the expansion of the Energy Community Treaty: states accept the general framework of the EU regulation despite the EU national incumbent's opposition to the liberalisation.

At the same time, the competition-driven approach had only little impact on the FSU, where commercial actors preferred long-term and monopolistic interrelations in the gas sector. If the EU internal market model is based on a gradual de-nationalisation of the gas trade, both

Russia and Ukraine have preferred to maintain stability in the gas chain. Last but not least, the transition process of the EU internal market represents a major concern for long-term investments in both production and transit of energy. So, an unfinished EU model did not receive a full acceptance on the part of the EU's eastern neighbours.

However, a year after the major gas transit conflict of 2009, Ukraine became a contracting party of the Energy Community Treaty. Such membership implies the unbundling of the Ukrainian Naftagas, which was designed by recent legislation on natural gas in Ukraine for January 2012 (Gas Law 2010, Article 16).

In spite of the Energy Community Treaty accession, Ukraine preferred to play a middle game between Brussels and Moscow and considered Russian interests before accepting the EU offer. Moreover, in March 2010 Ukraine changed its Presidential administration, which, unlike the previous 'Orange' administration, aims to seek a more consistent dialogue with Russia. It would be premature to consider that Russia-Ukraine trade and transit governance will bypass the earlier contradictions. For instance, tariffs for gas supplies as well as the Russian monopoly of exports to Ukraine remain major concerns for the new administration. A balance between long-term supplies from Russia and the Energy Community Treaty might become a source of new conflict of interests in the future.

The integration and expansion of the EU gas market also posed a concern to Russian gas exports to Europe. For instance, older bilateral practices involved 100% transport capacity booking, which allowed Gazprom to apply the right of first refusal in its relations with each gas company of either Europe or Ukraine. However, new EU legislation requires anti-hoarding mechanisms for non-used capacity. These measures imply that a supplier (such as Gazprom) cannot book 100% of the capacity without using it. Instead, unused capacity can go to the so-called capacity market. It would mean that once Russian natural gas is located at the EU borders, it would be subject to these anti-hoarding mechanisms. A hypothetical issue will be about the implementation of those mechanisms in Russia-Ukraine gas trade under hypothesis of the new Ukrainian law implementation.

In parallel, the EU market model gradually puts into question the long-term "take or pay" mechanisms that cover demand fluctuation risks by importers. Instead, the new market model is moving towards new price risk allocation between producers and consumers (Talus and Hunt 2010, 245–294). For instance, price and demand forecasts remain unclear, which constitutes an uncertainty for long-term upstream investments. So, the transition to the new market model hampers the long-term investment commitments of Gazprom (Locatelli 2008, 13–15). Being an importing state, Ukraine might be interested in introducing more flexibility in the take-or-pay principle. However, similarly to Russia, Ukraine has a concern regarding the unpredictability of the EU gas demand, which provides important revenues to the Ukrainian gas sector.

It can be misleading to consider that Russia and Ukraine base their gas market logic solely on political relations between them, unlike the EU

where market logic prevails. For instance, the supply tariff increase within the FSU area was a consensus between all the actors involved despite conflicts on the practical applicability of the new system. Likewise the Russian gas supply tariff increase to Ukraine was related to prices hiked in trade relations for Central Asian gas supplies to Russia. In turn, Ukraine insisted that modifications be made to transit charges, which for a long time had been lower than the international average. Interestingly, the actors involved never suggested a return to the previous system in spite of the conflicts about the transition towards new trade and transit governance. However, the EU market model has been excluded from FSU considerations in spite of the European Community's attempt to export its own model beyond its borders. A deep-rooted difference consists in the different institutional learning regarding gas markets on the part of the EU on one hand and the FSU on the other. As a result, the development of the EU gas market might further deepen discrepancies in the understanding of norms of the gas markets in the mid-term future. Moreover, the EU's energy governance is now focused on the Energy Community Treaty rather than on the international framework of the Energy Charter.

Conclusions

The afore-mentioned observation demonstrates that the EU has gradually moved towards a self-centred and competition-driven approach of the energy governance. The Energy Charter has thus been a reflection of an initial transit governance that existed before EU internal gas market Directives. Since 2003, the EU has reshaped its position towards energy governance at both domestic and international levels. At the domestic level, a faster move towards a competitive market model has been observed. At the international level, the EU defended the position of an REIO, which meant for other actors, mainly for Russia, an unwillingness to stick to the Energy Charter process as such. However, if the EU initiated the process and was able to impose its leading role in the process at the beginning, it experienced difficulties in making the ECT process acceptable as part of the competition-driven approach. In turn, Russia regarded the ECT as a basis for stability of gas chain relations between East and West. This conflict of appropriateness has been reflected by Transit Protocol negotiations and the subsequent implementation of transit conciliatory mechanisms between Russia and Ukraine.

In the meantime, the EU moved further in terms of deepening and expanding its regulatory model. Moreover, the EU attempts to play a pivotal role in the cross-border market transformation also beyond the Union's borders. But the export of the EU gas market model through an Energy Community Treaty did not affect the FSU region, which has remained the weak spot of the EU's external energy policy. Moreover, intra-EU difficulties in market setting highlighted the difficulties of a competition-driven approach. Therefore, the EU-based competition-based governance does not find appropriateness in the eyes of eastern neighbours, despite their own attempts to integrate elements of market approach.

Moreover, the FSU region has been the major subject of an intra-EU political divide. This led to the emergence of an approach of geopolitical appropriateness as opposed to multilateral appropriateness based on 'seminar diplomacy' and EU-initiated transit governance thus found no grounds for acceptance. Subsequently, the EU had only limited capabilities in exporting its own market model and in imposing a multilateral EU-based governance.

The EU's missed role in the creation of a wide international energy transit regime demonstrates that a governance structure cannot be explained purely by an approach of finding common interests between actors. Instead, the success of governance depends largely on the acceptance of common values and norms, the so-called logic of appropriateness. The logic of appropriateness creates a necessary analytical framework within which to consider discrepancies in demands for transit governance between various actors. Based on a similar logic of appropriateness, agents' demand for governance becomes similar and an international regime can thereby be effective. The opposite would be also true: in a situation of conflict of appropriateness, agents' demands of regimes differ and governance is thus hindered by a non-acceptance of common norms and values. Investments into security projects stem then from the transaction costs associated with a failure of governance.

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