

Energy Security and the Southern Energy Corridor: Implications under the Energy Charter Treaty

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Energy supply security has recently been drawing enormous and growing attention in the Eurasian context, especially after the repeated and anticipated dispute between the Russian Federation and Ukraine in the early days of this year. Negotiations between the two countries have not produced any positive result and led to termination of gas flows from Russia transiting through Ukraine toward EU countries, and thus creating gas supply interruptions in many EU countries mainly in the Eastern Europe and the Balkans as well as in Turkey. Certain parts in the EU have been heavily affected by the crisis, leading to central heating systems in some cities not functioning for a number of days and people shivering from the cold at harsh winter times.² This development has seemingly added further steam onto the discussions of energy security of Europe, both in terms of route and source diversification of its energy supplies.

Gas is arguably more vulnerable than oil to unforeseen supply interruptions.³ Bulk of the EU gas supply comes from Russia through Ukraine and Belarussia acting as transit countries. Therefore, reliability of the gas transit has been a serious concern in the recent years. Although alternative routes and/or sources have been on the EU agenda for a long period of time, discussions in the EU circles in favour of diversification in both terms have recently been voiced more vigorously than before. One alternative is the southern energy corridor, linking the Caspian and Central Asian energy resources to the EU via possible routes that bypass Russia, and thus creating a complementary source of energy to the already existing ones that stem from Russia and go through certain East European countries like Ukraine and Belarussia.

There are many routes suggested theoretically by various stakeholders. One of them is the South Stream which is envisaged to deliver Russian gas flowing through a prospective pipeline under the Black Sea, extending from the Russian end and reaching the EU at its shore along the Balkans. Yet the recent news reveals that the estimated cost for this pipeline has recently jumped enormously, from 11 billion dollars to around 20 billion or so⁴, and thus allegedly creating difficulties for this option in the foreseeable future. Another suggested route came as the so-called Nabucco project, which assumes the delivery of natural gas from the Caspian region (and from other additional sources in the region-at-large) to the EU by transiting Turkey. The EU now seems to have more focus on this project, as partly evidenced by the recent EU declaration in support of the project, in the form of a 250 million € funding made available to allure further private finance. Nonetheless, there seems no unique voice of

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² Nitzov, Boyko; "A Tale of Two (Empty) Pipelines", The Atlantic Council, 14 January 2009 (<http://www.acus.org/highlights/tale-two-empty-pipelines>).

³ Saryusz-Wolski, Jacek / Tannock, Charles; "Energy Disarmament", February 15, 2009 (<http://www.project-syndicate.org/commentary/saryuzswolski2>).

⁴ Comments by Mr. Vladimir Socor at the European Policy Center meeting in Brussels on 4 March 2009.

support in the EU toward this project, given the recent declarations made by the German Chancellor.⁵

Nevertheless, regardless of whatever project(s) to come at the forefront of discussions, the issue at stake is rather the availability of adequate gas to fill in all these prospective pipelines. According to some sources, the Azeri gas would not be enough to support any of such pipelines, and additional gas from other countries around the Caspian Sea would be required. This inevitably may lead to a discussion focusing on the likelihood of a pipeline crossing under the Caspian Sea. Here again, the legal nature of the Caspian Sea comes to the fore, although there are also allegations that such a concern is not indeed a real burden and that the main issue here is more about the willingness of the countries along the Caspian shore while deciding on a route through which they would like to export their gas. A view has been voiced recently that, why Turkmenistan, for example, would consider a Caspian pipeline westwards instead of the existing Russian pipeline network, so long as the country receives the netted-back European market prices from Russia.⁶

On the other hand, the issue of laying trans-boundary pipes is a highly complicated business which requires dedication and consistent policies by relevant political stakeholders, and needs to be pursued over a relatively long duration. In fact, this feature should have been well-versed in the course of the Baku-Tbilisi-Ceyhan petroleum pipeline project. Even the active negotiation phase of its respective agreements took place practically through more than a few years. Furthermore, a comprehensive legal framework needs to be in place to ensure securing finance for projects of this nature. Besides, a multilateral legal framework is generally also an essential instrument in realizing such projects, and this requires utmost attention and careful drafting of all the related project agreements and structuring of the proper legal basis on which the project would be established.

Although there is the possibility of interstate agreements between relevant countries, it is obvious that an already existing multilateral legal framework such as the Energy Charter Treaty could provide a much easier and more convenient legal instrument in enabling the success of any such project. There are several reasons that one could possibly cite in this respect, like the extensive coverage of the ECT in all energy sector activities, the breadth of the scope of its definitions and provisions, legal protection made available for investors especially through binding international arbitration for any investment-related disputes, etc. It should be remembered here that the BTC Project, despite the existence in this project of international agreements between the three respective countries, had to refer explicitly to the ECT as one of its legal basis for the particular set of project agreements, and this was mostly due to the extensive coverage of the ECT provisions affording a generous comfort to investors. Also, it is noteworthy to mention that the Charter Process also offers an invaluable help through its model agreements that can be used freely by interested parties relating to any specific project.

Under the Treaty, investors of established investments have the adequate level of protection through having recourse to binding international arbitration (like ICSID arbitration, which is

⁵ UPI, “Germany opposes EU funding for Nabucco”, 3 March 2009 (http://www.upi.com/Energy_Resources/2009/03/03/Germany_opposes_EU_funding_for_Nabucco/UPI-40651236092778/); Euractive, “No EU funding for Nabucco, says Merkel” (<http://www.euractiv.com/en/energy/eu-funding-nabucco-merkel/article-179883>).

⁶ Cf. Centre for Global Energy Studies, “FSU Oil & Gas Advisory” (Ed. Julian Lee), No. 7, 2 March 2009.

directly applicable as if awarded by domestic courts, or UNCITRAL arbitration) against all political risks such as expropriation, or discriminatory or discretionary treatment by the host governments.

One thing which should be emphasised here is that, the Energy Charter does not make any distinction on the energy mode, sector or project; thus, it covers whatever energy project that would be promoted by relevant stakeholders. It should boldly be emphasised in this respect that it is totally blind in terms of any specific project and therefore provides its facilities to each and all pipeline projects throughout its constituency.

To this end, it should also be born in mind that the ECT requires its member states to “endeavor to apply” certain principles for the established investments such as the National Treatment (NT) to all foreign investors in the energy sector, as well as those other principles like the Most Favoured Nation (MFN) and the Fair and Equitable Treatment (FET). Especially this last principle, due to its “overall catch-up” nature, is viewed by legal scholars to be of crucial importance toward ensuring an extensive legal coverage or protection for investors, which is further supported by the binding investor-to-state arbitration offered under the Treaty.

The ECT is clearly designed to take out political/legal risks associated with energy investments in the its constituency, which covers all the Caspian and Central Asian countries around the Caspian Sea and the possible transit countries like Georgia and Turkey, and thus encompasses all the states considered to be of relevance in the context of the southern energy corridor. It envisages a transit regime covering grid-bound energy transport based on the principle of freedom of transit and non-discrimination, and a transit dispute conciliation mechanism.

Therefore, it may be argued that the ECT, as being the only multilateral legal instrument in fostering investment especially in respect of trans-boundary energy pipeline projects, still remains to be an important legal framework to be considered in all discussions on energy security issues that relate to the southern energy corridor options in the Caspian region.