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## The Natural Gas Trade Between the Russian Federation and the European Union: Power Dynamics, Legal Challenges, and a Country Caught in the Middle

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## The Natural Gas Trade Between the Russian Federation and the European Union: Power Dynamics, Legal Challenges, and a Country Caught in the Middle

*By Justin Clune\**

*Abstract: The European energy sector is a fragile framework that requires foreign imports to support domestic production. Natural gas and petroleum imports from Russia are crucial to the vitality of the European Union's economy. This Note addresses both the attempts made to secure the future of these imports as well as the mitigating factors that have occurred recently that have threatened the flow of trade. Assessing the legal challenges brought against Russian energy companies, expansion of the Russian natural gas trade to China, and the upheaval in Ukraine, this Note looks at the strategic interests in play and how the European Union and Russia have come to such a dramatic standoff. With the end result of many of these issues still uncertain as of this writing, this Note assesses possible tactics that Russia and the EU may employ moving forward and the consequences such tactics may have on the energy trade.*

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## I. INTRODUCTION

In the summer of 2013, an assessment of the natural gas trade between the Russian Federation (Russia) and the European Union (the EU) would have been straightforward. The resource imbalance, unchecked nature of Russia's gas giant, Gazprom, and political capital of Russia created a landscape in which the EU had little room to negotiate for its market or nonmarket interests. Since then, the EU's growing worry over Russia's inefficient management of its resources, a probe launched by the European Commissioner for Competition (the Commission), judgments in European courts regarding Russia's handling of the Yukos Oil Company, and political upheaval in Eastern Europe have radically reshaped the landscape for the natural gas trade, thereby threatening Russia's bargaining advantage when dealing with its western neighbors. In the wake of such changes, the pieces of which are shifting daily, this Comment will examine (1) the situation as it existed in the summer of 2013; (2) the major developments in the shifting political, economic, and trade patterns of the last year; and (3) Russia and the EU's future prospects with regard to this trade.

## II. THE EUROPEAN ENERGY LANDSCAPE AS IT EXISTED

### A. The Natural Gas Landscape

The energy landscape involves finding natural resources and transforming them into usable energy.<sup>1</sup> Energy is used in the following four primary sectors: electricity generation, industrial, transportation, and residential/commercial.<sup>2</sup> Current EU member states used 3,094 terawatt hours of electricity in 2011.<sup>3</sup> In the industrial sector, EU Member States consumed, in megatonnes of oil equivalent (Mtoe), 291.59 Mtoe in 2010.<sup>4</sup> In the transportation sector, the EU member states used 365.22 Mtoe.<sup>5</sup> In the residential/commercial sector, Europe as a continent used 23 million British thermal units (BTUs) per person, a figure that is expected to slowly

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<sup>1</sup> FRED BOSSELMAN ET AL., *ENERGY, ECONOMICS AND THE ENVIRONMENT* 4 (Univ. Casebook Series, 3d ed. 2010).

<sup>2</sup> EXXONMOBIL, *THE OUTLOOK FOR ENERGY: A VIEW TO 2040* 9 (2013), <http://www.globaloilwatch.com/reports/exxonmobil-energy-outlook-2013.pdf> (last visited Nov. 25, 2014).

<sup>3</sup> *Electric Power Consumption (kWh)*, WORLD BANK, <http://data.worldbank.org/indicator/EG.USE.ELEC.KH> (last visited Oct. 6, 2014) (compiled from 2011 data; "Electric Power Consumption measures the production of power plants and combined heat and power plants less transmission, distribution, and transformation losses and own use by heat and power plants").

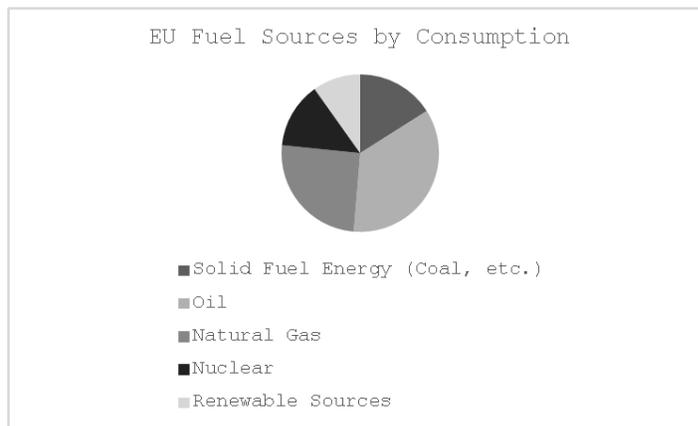
<sup>4</sup> EUROPEAN COMM'N, *EU TRANSPORT IN FIGURES* 115 (2012), <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2012/pocketbook2012.pdf>.

<sup>5</sup> *Id.*

decrease as energy efficiency increases in the future.<sup>6</sup> (See table below for comparative values.)

Energy Consumption in Joules by Sector <sup>7</sup>	
Electricity	1.114E+19
Industrial	1.221E+19
Transportation	1.529E+19
Residential/Commercial (includes electrical consumption for such industries)	1.232E+19

Energy in the EU comes from solid fuels, particularly coal, oil, gas, electricity, and renewable energy.<sup>8</sup> In 2010, EU member states used 279.97 terawatt hours of solid fuel energy, 617.09 terawatt hours of oil energy, 441.80 terawatt hours of gas energy, 236.53 terawatt hours of nuclear energy, and 172.14 terawatt hours of renewable energy as computed by total Gross Inland Consumption.<sup>9</sup> (See graph below for comparison).



Given the current emphasis on reducing energy consumption due to environmental concerns, Europe has oriented its energy policy to cut consumption in many sectors.<sup>10</sup> Reductions in fuel usage can be achieved

<sup>6</sup> BOSSELMAN ET AL., *supra* note 1, at 13.

<sup>7</sup> EUROPEAN COMM'N, EU TRANSPORT, *supra* note 4, at 115; U.S. Dep't of Energy, *Unit Conversion Factors*, SOCIETY OF PETROLEUM ENGINEERS (2001), <http://www.spe.org/industry/unit-conversion-factors.php>.

<sup>8</sup> EUROPEAN COMM'N, EU TRANSPORT, *supra* note 4, at 111, 115.

<sup>9</sup> *Id.* at 115. Consumption by percentage equates to 16% solid fuel energy, 35.3% oil energy, 25.3% gas energy, 13.5% nuclear energy, and 10% renewable energy consumption. *Id.*

<sup>10</sup> See *Energy Efficient Europe*, EUROPEAN COMM'N (June 22, 2011), <http://ec.europa.eu/>

through greater efficiency,<sup>11</sup> reduction in waste, and decreased consumer demand.

Russia is the natural source of fuel production for the EU because it has the largest proven supply of natural gas reserves.<sup>12</sup> In contrast, the EU member states have much lower natural gas production, and such production has been steadily declining due to exhaustion of natural resources and uneconomical potential for production.<sup>13</sup> The EU imports approximately 64% of its natural gas, a percentage that is expected to grow in the foreseeable future.<sup>14</sup> In 2012, Russia accounted for 34% of the EU's natural gas imports and about one quarter of its total supply.<sup>15</sup>

Russia's success in natural gas export depends, in large part, on the security of its pipeline transmission system. With notable exceptions, almost all existing operational pipelines run through either Ukraine or Belarus, two former republics of the Soviet Union that became independent in 1991.<sup>16</sup> Currently, pipelines flowing from Russia through Ukraine have a capacity of 142 billion cubic metres (bcm) while pipelines from Russia through Belarus have a capacity of 38 bcm.<sup>17</sup> Russia's main export competitors for the EU market are Norway, Algeria, Qatar, and Central Asia, although the United States is poised to potentially become a player in the market as transmission technology is developed to facilitate transportation.<sup>18</sup> Ultimately, non-European competitors must first secure transmission access to the EU to increase their energy exports to the EU.

In 2012, Gazprom, the largest exporter of Russian natural gas and the subject of imminent legal action by the Commission, produced 74.4% of Russia's natural gas supply and 13.6% of worldwide natural gas supply.<sup>19</sup> Gazprom exports about half of its 7.1 trillion cubic feet of natural gas to EU member states, with the remaining exports going to former Soviet states,

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news/energy/110622\_en.htm.

<sup>11</sup> See Lorna A. Greening et al., *Energy Efficiency and Consumption – The Rebound Effect – A Survey*, 28 ENERGY POL'Y 389 (2000).

<sup>12</sup> Keith Kohl, *OPEC and Russia's Greatest Fear: Losing Their Energy Weapon*, ENERGY & CAPITAL (Mar. 4, 2011), <http://www.energyandcapital.com/articles/opec-russia-fear/1450>.

<sup>13</sup> Eurostat, *Energy Production and Imports*, EUROPEAN COMM'N, [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Energy\\_production\\_and\\_imports](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Energy_production_and_imports) (last modified Sept. 5, 2014).

<sup>14</sup> MICHAEL RATNER ET AL., CONG. RESEARCH SERV., R42405, EUROPE'S ENERGY SECURITY: OPTIONS AND CHALLENGES TO NATURAL GAS SUPPLY DIVERSIFICATION 5 (2013), available at <http://www.fas.org/sgp/crs/row/R42405.pdf>. The EU Commission forecasts 80% of natural gas consumption in Europe will be imported in 2030. *Id.*

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Major Gas Pipelines of the Former Soviet Union and Capacity of Export Pipelines*, E. EUROPEAN GAS ANALYSIS, <http://www.eegas.com/fsu.htm#Tab> (last visited Apr. 8, 2014).

<sup>17</sup> *Id.*

<sup>18</sup> RATNER, *supra* note 14, at 2–4, 6.

<sup>19</sup> GAZPROM, GAZPROM IN FIGURES 2008-2012 FACTBOOK 3 (2013), available at <http://www.gazprom.com/f/posts/55/477129/gazprom-reference-figures-2008-2012-eng.pdf>.

Turkey, and other small import markets.<sup>20</sup> While Russia hopes to eventually diversify its exports to include burgeoning markets in Asia,<sup>21</sup> it is currently very dependent on natural gas revenues from the EU; similarly, the EU is very dependent on Russia's natural gas supply.

The positions of Belarus and Ukraine towards Russian natural gas pipelines have posed political and economic advantages and risks to the Russian natural gas export industry. Belarus is a former Soviet state with strong ties to Russia.<sup>22</sup> Russia and Belarus codified their united interests in the 1999 signing of the Agreement on Establishment of a Union State of Belarus and Russia, which established a supranational entity consisting of only Russia and Belarus.<sup>23</sup> Ukraine, also a former Soviet state, has a population that is divided between its western half—pro-European, Ukrainian speaking, tourism and agrarian driven—and its eastern half—pro-Russian, Russian speaking, and industrial.<sup>24</sup> This tension has birthed a transformative political discussion that includes radical statements by Russian President Vladimir Putin (e.g., Ukrainian accession to the World Trade Organization could provide a platform for Russian annexation of eastern Ukraine).<sup>25</sup> Ultimately, the stability of Belarus and Ukraine and the susceptibility of those nations to Russian influence are of critical importance to Russian export dominance in the EU energy market, as these nations control the transmission of energy to the EU.

In relation to the natural gas trade, Russia has categorized former Soviet states on its borders, including Belarus and Ukraine, as part of Russia's "sphere of privileged interest."<sup>26</sup> Russia has used its dominant energy position and existing transmission infrastructure to its political and economic gain with regard to this sphere. For instance, Russia provided Ukraine a two-thirds discount on natural gas prices for ten years in exchange for a renegotiation of the withdrawal of Russian Black Sea fleet

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<sup>20</sup> RATNER, *supra* note 14, at 9.

<sup>21</sup> *Id.* at 11; see Elena Mazneva, *Gazprom Says China Natural Gas Deal Delayed to Putin's May Visit*, BLOOMBERG (Jan. 22, 2014), <http://www.bloomberg.com/news/2014-01-22/gazprom-says-china-natural-gas-deal-delayed-to-putin-s-may-visit.html> (discussing Gazprom's failure to close a 30-year natural gas contract with China, but optimistically predicting that the deal will be closed in 2014).

<sup>22</sup> See Helena Yakovlev Golani, *Two Decades of the Russian Federation's Foreign Policy in the Commonwealth of Independent States: The Cases of Belarus and Ukraine* (European Forum at the Hebrew Univ. of Jerusalem, Working Paper, 2011), available at <http://www.ef.huji.ac.il/publications/Yakovlev%20Golani.pdf>.

<sup>23</sup> *Russia and Union State*, MINISTRY OF FOREIGN AFFAIRS OF THE REPUBLIC OF BELARUS, <http://www.mfa.gov.by/en/courtiers/russia/> (last visited Nov. 19, 2013).

<sup>24</sup> See Stephen Mulvey, *Analysis: Divided Ukraine*, BBC NEWS (Nov. 25, 2004), <http://news.bbc.co.uk/2/hi/europe/4043315.stm>.

<sup>25</sup> Юрий Стець, *Impyerskiye Komplyeksy Brat'yev Rossiyan ili Nye Mechitye Bisyeve pyeryed Svin'yami* [*The Imperial Complexes of Our Russian Brothers or Don't Throw Pearls Before Pigs*], UKRAINSKAYA PRAVDA (July 3, 2008), <http://www.pravda.com.ua/articles/2008/07/3/3482506/> (Ukr.).

<sup>26</sup> RATNER, *supra* note 14, at 11.

in formerly Ukrainian Crimea from the original withdrawal date of 2017 to one in 2042.<sup>27</sup>

However, despite Russia's strong ties to and economic codependence on its eastern Slavic-speaking neighbors, the transmission of natural gas from Russia to the EU has undergone notable periods of crisis when relations were frayed between Russia, Belarus and Ukraine. In 2005, for example, Russia accused Ukraine of domestically using gas that was intended for the EU without actually paying for it.<sup>28</sup> In response, Gazprom froze exports of natural gas through the Ukrainian pipelines, which caused shortages in the EU member states that depend on the gas, until Ukraine and Russia could agree on a new deal.<sup>29</sup> Similar reductions occurred in 2009 over alleged debts owed by Ukraine to Gazprom.<sup>30</sup> While tensions have continued to simmer intermittently between Russia and Ukraine, the replacement of pro-Ukrainian President Viktor Yushchenko, born in Ukrainian-speaking Sumy Oblast,<sup>31</sup> with pro-Russian President Viktor Yanukovich, born in the Russian-speaking industrial center Donetsk Oblast,<sup>32</sup> reoriented Ukrainian policy with regard to Russia. In 2007, Belarus also underwent problems relating to the oil pipeline, Druzhba, when Russia accused Belarus of siphoning oil marked for EU consumption.<sup>33</sup>

## B. The Petroleum Landscape

While only Russia's state-controlled natural gas supplier, Gazprom, is implicated in the current antitrust investigation by the EU, Russia and the EU have a similarly codependent relationship with regard to petroleum imports. The EU has extremely limited oil reserves, which comprise less than 9% of its total crude oil supply.<sup>34</sup> Therefore, the EU must import a

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<sup>27</sup> *Id.* at 11–12.

<sup>28</sup> *Ukraine 'Stealing Europe's Gas,'* BBC NEWS (Jan. 2, 2006), <http://news.bbc.co.uk/2/hi/europe/4574630.stm>.

<sup>29</sup> Miriam Elder, *Behind the Russia-Ukraine Gas Conflict*, BLOOMBERG (Jan. 3, 2009), [http://www.businessweek.com/globalbiz/content/jan2009/gb2009013\\_045451.htm](http://www.businessweek.com/globalbiz/content/jan2009/gb2009013_045451.htm).

<sup>30</sup> *Id.*

<sup>31</sup> *Profile: Viktor Yushchenko*, BBC NEWS (Jan. 13, 2010), <http://news.bbc.co.uk/2/hi/europe/4035789.stm>.

<sup>32</sup> Stuart Williams, *Ukraine's 'Orange Villain' Seeks Last Laugh*, TELEGRAPH (Jan. 12, 2010), <http://www.telegraph.co.uk/expat/expatnews/6973451/Ukraines-Orange-villain-seeks-last-laugh.html>.

<sup>33</sup> *Russia Oil Row Hits Europe Supply*, BBC NEWS (Jan. 8, 2007), <http://news.bbc.co.uk/2/hi/business/6240473.stm>.

<sup>34</sup> *Registration of Crude Oil Imports and Deliveries in the European Union*, EUROPEAN COMM'N (2012), [http://ec.europa.eu/energy/observatory/oil/import\\_export\\_en.htm](http://ec.europa.eu/energy/observatory/oil/import_export_en.htm) (accessed by downloading "Monthly and Cumulated Crude Oil Imports (Volumes and Prices) by EU and Non EU Country" and opening file "eu-coi-2011-01-12").

large majority of its crude oil supply.<sup>35</sup> The EU imports about 27.95% of its crude oil supply from Russia, the majority of which comes from the Urals.<sup>36</sup> Like the natural gas market, the oil market in Russia is dominated by a single state-controlled company, Transneft, which transports 90% of the oil produced in Russia.<sup>37</sup> Transneft is even less privatized than Gazprom; the Russian government holds 78.1% of Transneft shares<sup>38</sup> as opposed to over 50% of Gazprom's shares.<sup>39</sup> Russia's oil pipelines to the EU also traverse Ukraine and Belarus in the same way that its natural gas pipelines do; therefore, these pipelines present similar risks to the oil export industry.

### C. EU Domestic Supplies

In 2007, the Commission published an "Energy Policy for Europe" that proposed the radical integration and regulatory control of EU member states' energy-production industries to increase efficiency and stymie the growing dependence on energy imports.<sup>40</sup> In 2010, renewable energy accounted for about 12.4% of EU member states' final energy consumption<sup>41</sup> despite repeated efforts to promote immediate and significant growth in energy production using renewables.<sup>42</sup> Renewable sources of energy include biomass, hydro, wind, solar, and geothermal power.<sup>43</sup>

Domestically produced nuclear power accounts for approximately 30% of all electricity generated in the EU.<sup>44</sup> Nuclear power in the EU is governed by the Euratom Treaty, which sets high standards to ensure

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<sup>35</sup> *EU Crude Oil Imports*, EUROPEAN COMM'N (2012), [http://ec.europa.eu/energy/observatory/oil/import\\_export\\_en.htm](http://ec.europa.eu/energy/observatory/oil/import_export_en.htm).

<sup>36</sup> EUROPEAN COMM'N, *Registration of Crude Oil Imports*, *supra* note 34.

<sup>37</sup> *Company*, TRANSNEFT, <http://en.transneft.ru/company/> (last visited Nov. 19, 2013).

<sup>38</sup> *Update 2-Russia to Reduce Transneft Stake in 2014*, REUTERS (Apr. 18, 2013), <http://www.reuters.com/article/2013/04/18/russia-transneft-results-idUSL5N0D515B20130418> (stating that Russia intends to reduce its ownership share to as low as 75% in the near future).

<sup>39</sup> *Shares*, GAZPROM, <http://www.gazprom.com/investors/stock/> (last updated May 8, 2014).

<sup>40</sup> *Communication from the Commission to the European Council and the European Parliament: An Energy Policy for Europe*, EUROPEAN COMM'N (Jan. 10, 2007), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0001&from=EN>.

<sup>41</sup> *The Contribution of Renewable Energy Up to 12.4% of Energy Consumption in the EU27 in 2010*, COMM'N OF THE EUROPEAN CMTYS. (June 18, 2012), [http://europa.eu/rapid/press-release\\_STAT-12-94\\_en.htm](http://europa.eu/rapid/press-release_STAT-12-94_en.htm).

<sup>42</sup> See *EU Renewable Energy Policy*, EURACTIV (Aug. 2, 2007), <http://www.euractiv.com/energy/eu-renewable-energy-policy/article-117536> (setting a goal of 20% of energy production based on renewables).

<sup>43</sup> See Dawn Stover, *The Myth of Renewable Energy*, BULLETIN OF THE ATOMIC SCIENTISTS (Nov. 22, 2011), <http://thebulletin.org/myth-renewable-energy>.

<sup>44</sup> *Nuclear Energy*, EUROPEAN COMM'N, <https://ec.europa.eu/energy/en/topics/nuclear-energy> (last visited Jan. 27, 2015).

nuclear power remains a safe, clean source of power for EU member states.<sup>45</sup> However, budget problems have stemmed a rapid shift towards nuclear power in the EU as the mammoth overhead costs of reactor construction have cut the legs out from under even the best planned projects.<sup>46</sup> Moreover, in reaction to the Fukushima Daiichi nuclear disaster<sup>47</sup> that has caused immense political, economic, and environmental problems for Japan since 2011, Germany has implemented a policy that involves immediate shutdown of several reactors and a planned exit from the nuclear energy sector by 2022.<sup>48</sup> France, one of the world leaders in nuclear power production, elected Francois Hollande as its President in 2012 on a campaign promise to reduce nuclear energy production in France by up to a third by 2025.<sup>49</sup> Finally, some EU economic powerhouses, such as Spain and Italy, are committed to permanent avoidance of nuclear power.<sup>50</sup>

Overall, as February 2013 drew to a close, the energy relationship between Russia and the EU was, in a word, stable. Russian state energy providers Gazprom and Transneft had dominant market positions that seemed unlikely to be challenged by competitors in any significant way. While the business practices of these companies remained troublesome to EU market regulators, the EU did not possess any leverage to challenge Russia in an appreciable manner. The EU also did not possess a forum to address its concerns in a binding manner, and it appeared unlikely that the EU would be able to exert sufficient pressure to influence anything more than superficial change to Russian business practices.

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<sup>45</sup> *Consolidated Version of the Treaty Establishing the European Atomic Energy Community*, OFFICIAL J. EUR. UNION (Mar. 30, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:084:0001:0112:EN:PDF>.

<sup>46</sup> James Kanter, *In Finland, Nuclear Renaissance Runs into Trouble*, N.Y. TIMES (May 28, 2009), [http://www.nytimes.com/2009/05/29/business/energy-environment/29nuke.html?ref=global-home&\\_r=0](http://www.nytimes.com/2009/05/29/business/energy-environment/29nuke.html?ref=global-home&_r=0).

<sup>47</sup> *Fukushima Accident*, WORLD NUCLEAR ASS'N (Sept. 2014), <http://www.world-nuclear.org/info/safety-and-security/safety-of-plants/fukushima-accident/>. On March 11, 2011, a major earthquake struck near Japan and triggered a tsunami, which disabled the power supply and cooling for three reactors at Japan's Fukushima Daiichi power plant, thereby resulting in the meltdown of those three cores. The efforts to contain radiation in the area and the resulting evacuations were largely covered in the news for the next few years.

<sup>48</sup> Annika Bredthardt, *German Government Wants Nuclear Exit by 2022 at Latest*, REUTERS (May 30, 2011), <http://uk.reuters.com/article/2011/05/30/us-germany-nuclear-idUKTRE74Q2P120110530>.

<sup>49</sup> Henry Sokolski, *Nuclear Power Goes Rogue*, NEWSWEEK (Nov. 28, 2011), <http://mag.newsweek.com/2011/11/27/post-fukushima-nuclear-power-changes-latitudes.html>.

<sup>50</sup> *Id.*

### III. CHANGING MARKETS

#### A. The Roadmap EU–Russia Energy Cooperation until 2050

In March 2013, Russia and the Commission signed the most comprehensive energy-roadmap agreement ever coordinated between the parties: the Roadmap EU–Russia Energy Cooperation until 2050 (Roadmap Agreement).<sup>51</sup> The Roadmap Agreement memorialized the parties' intent to work towards a pan-European energy space by 2050,<sup>52</sup> which would provide Russia with market security within European energy markets while simultaneously addressing the EU's goal of bringing Russian companies in line with the EU's business standards.<sup>53</sup> The structure of the Roadmap Agreement speaks to the following areas in which the EU focused its pressure to influence reform of the Russian energy providers: (1) building a functioning, integrated network infrastructure; (2) establishing open, transparent, efficient, and competitive markets; (3) ensuring energy security; and (4) conforming to the goals of sustainable development.<sup>54</sup>

##### *1. Functioning, Integrated Network Infrastructure*

The development of a functioning, integrated network infrastructure as the first tenet of EU–Russian energy relations reflects the EU's concern with the reliability and security of energy trade.<sup>55</sup> An integrated EU energy network is one that allows for maximum utilization of domestic energy sources, including renewables, sufficient interconnections to reach new EU member states, a smart grid to ensure maximum energy efficiency, and sufficient storage or reverse flow options to get energy where it needs to go.<sup>56</sup> With regard to all aspects of energy trade between Russia and the EU, particularly with respect to natural gas transmission by Gazprom, the Roadmap Agreement pushes for greater integration of energy grids and an increase in the channels of transmission from Russia to the EU.<sup>57</sup> The Roadmap Agreement identifies several risks to be mitigated involving supply and demand, including (1) anticipating the peaks and troughs of the

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<sup>51</sup> *Roadmap EU–Russia Energy Cooperation until 2050*, EUROPEAN COMM'N (Mar. 2013), available at [https://ec.europa.eu/energy/sites/ener/files/documents/2013\\_03\\_eu\\_russia\\_roadmap\\_2050\\_signed.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2013_03_eu_russia_roadmap_2050_signed.pdf).

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.* at 10–11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Priorities for 2020 and Beyond — A Blueprint for an Integrated European Energy Network*, EUROPEAN COMM'N 2–3 (Nov. 17, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0677:FIN:EN:PDF>.

<sup>57</sup> *Roadmap EU–Russia Energy Cooperation until 2050*, *supra* note 51, at 10.

EU's gas demand, (2) ensuring stable, secure, and consistent transmission through existing and proposed pipeline connections, and (3) coordinating the energy infrastructures of member states to be compatible with Russian gas export infrastructure.<sup>58</sup>

The EU, however, hedges its promises in the Roadmap Agreement by leaving itself room to grow its energy markets away from dependence on Russian gas and oil if the energy market and technological developments make it possible. For instance, the EU explicitly contemplates reduced gas demand consistent with its promotion of domestic energy production, including renewables and nuclear power.<sup>59</sup> Moreover, the Roadmap Agreement highlights political problems that may not have been foreseen or contemplated, such as the differing market frameworks and policy considerations with regard to EU member states.<sup>60</sup> Under the Roadmap Agreement, such considerations would be resolved by preexisting and contemplated supranational organizations and forums.<sup>61</sup>

However, such strategies have historically been insufficient to resolve disputes. In 1994, several former Soviet states and current and future EU member states negotiated the Energy Charter Treaty (the Treaty), which provided strict standards on energy trade between eastern and Western Europe, including Article 27, which outlined a dispute arbitration mechanism to deal with conflicts between states or energy companies within different states.<sup>62</sup> While Russia was instrumental in negotiating the Treaty, it failed to ratify the Treaty, and in 2009 Russia ceased to be bound by it.<sup>63</sup> Following this withdrawal, it became increasingly difficult for EU member states to initiate legal action against Gazprom or Transneft for activities after 2009.<sup>64</sup> Just as the enforcement and dispute resolution mechanisms are soft on Russia, the promises of the EU provide only superficial assurances to Russian natural gas producers. For instance, the EU's main commitment with regard to guaranteed demand for Russia's natural gas supply is a promise by the EU to provide Russia with access to all official forward-looking natural gas demand assessments.<sup>65</sup> Overall, neither side is willing to make the strong assurances necessary to institute a functioning, integrated network that would solve the long-term issues in the

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<sup>58</sup> *Id.* at 13–14.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 15.

<sup>62</sup> Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents*, ENERGY CHARTER (Sept. 2004), available at [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf).

<sup>63</sup> *FAQ*, ENERGY CHARTER, <http://www.encharter.org/index.php?id=18> (last visited Nov. 19, 2013) (accessed by clicking the link, “What is Russia’s status with the Energy Charter?”).

<sup>64</sup> Keith C. Smith, *Bringing Energy Security to East Central Europe: Regional Cooperation is the Key 4*, CTR. FOR STRATEGIC & INT’L STUDIES (Apr. 2010), available at [http://csis.org/files/publication/100402\\_Smith\\_BringingEnergySecurity\\_Web.pdf](http://csis.org/files/publication/100402_Smith_BringingEnergySecurity_Web.pdf).

<sup>65</sup> *Roadmap EU–Russia Energy Cooperation until 2050*, *supra* note 51, at 15.

gas trade.

## 2. *Open, Transparent, Efficient, and Competitive Markets*

The Roadmap Agreement's commitment to open, transparent, efficient, and competitive markets presents the most significant challenge to the status quo energy relationship between the EU and Russia. Russia's natural gas and oil markets are dominated by single, state-controlled entities, and while upstart private Russian competitors have begun to increase their market shares,<sup>66</sup> they do not possess sufficient market power to displace Gazprom and Transneft from their dominant market positions.

With regard to open markets, as articulated in the "2050 goal" of full integration of Russian and EU energy networks, potential challenges loom based on the historical animosity between Eastern and Western Europe. For instance, Kosovo is widely regarded as a potential candidate for eventual EU membership.<sup>67</sup> But Kosovo, which in 2008 unilaterally declared its independence<sup>68</sup> from Serbia, an official EU candidate for membership,<sup>69</sup> is not currently recognized as a sovereign state by Russia.<sup>70</sup> Kosovo is not currently linked to any oil or gas pipelines and must rely on imports by rail or truck, primarily from Macedonia, for its supply.<sup>71</sup> If Kosovo accedes to the EU as part of the Roadmap Agreement, Gazprom in support of Serbian interests may be hesitant to link Kosovo to the EU energy network. As exemplified in the situations involving Belarus and Ukraine, Russia is not afraid to use its position as a dominant supplier to exercise political influence.

Transparency has long been an issue in EU–Russian energy trade.<sup>72</sup> The Russian energy industry exhibits significant problems with cartel management whereby governmental leaders, intelligence officials, and favored business oligarchs craft corporate energy policy alongside Russian government policymakers to maximize wealth and buy support from

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<sup>66</sup> *Id.* at 13.

<sup>67</sup> *Kosovo*, EUROPEAN COMM'N, <http://ec.europa.eu/enlargement/countries/detailed-country-information/kosovo/> (last updated June 27, 2013).

<sup>68</sup> *Kosovo Declaration of Independence*, REPUB. OF KOS. ASSEMB. (Feb. 17, 2008), <http://www.assembly-kosova.org/?cid=2,128,1635>.

<sup>69</sup> *Serbia*, EUROPEAN COMM'N, <http://ec.europa.eu/enlargement/countries/detailed-country-information/serbia/> (last updated June 27, 2013).

<sup>70</sup> Giorgio Comai, *Moscow's Approach Towards De Facto States After Kosovo's Recognition*, OSSERVATORIO BALCANI E CAUCASO (Aug. 8, 2013), <http://www.balcanicaucaso.org/eng/Regions-and-countries/Russia/Moscow-s-approach-towards-de-facto-states-after-Kosovo-s-recognition-140382>.

<sup>71</sup> Energy Regulatory Office, *Statement of Security of Supply for Kosovo*, ELEC. NATURAL GAS & OIL 28, 33 (July 2011), available at <http://www.energy-community.org/pls/portal/docs/1218181.PDF>.

<sup>72</sup> See *Corruption Perceptions Index 2012*, TRANSPARENCY INT'L (2012), <http://cpi.transparency.org/cpi2012/results/> (showing that Russia is ranked number 133 in the world in corruption, while Belarus and Ukraine, the main transmission intermediaries, are ranked 123 and 144 respectively).

western leaders.<sup>73</sup> The lack of legal reporting or impartial court systems to enforce contractual obligations presents further risks to EU policymakers considering opening energy relationships with Russia.<sup>74</sup> While many newly acceded EU member states are struggling to end corrupt business practices, Russia's energy markets have become more corrupt over time.<sup>75</sup>

Russia's economy has a longstanding practice of bribery, which can be an intolerable danger to western companies predicated on a transparent and ethically regulated market.<sup>76</sup> This norm in Russian business practice can cause problems for international companies that might face domestic liability for corrupt business practices abroad.<sup>77</sup> With energy cartels amassing influence at every strata of the Russian political system,<sup>78</sup> building an energy market that conforms to western standards of transparency may prove insurmountable in the Russian energy sector. While such corrupt business practices have long been linked to companies like Gazprom,<sup>79</sup> the EU expresses its resolve with regard to enforcing anticorruption measures for overt corrupt business practices as well as bribery and other more clandestine forms of corruption.<sup>80</sup> As the EU moves closer to acceptance of principles of corporate social responsibility such as the ten principles of the UN Global Compact,<sup>81</sup> Gazprom and Transneft

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<sup>73</sup> Keith C. Smith, *Lack of Transparency in Russian Energy Trade: The Risks to Europe 1-2*, CTR. FOR STRATEGIC & INT'L STUDIES (July 2010), available at [http://csis.org/files/publication/100702\\_Smith\\_LackOfTransparency\\_Web.pdf](http://csis.org/files/publication/100702_Smith_LackOfTransparency_Web.pdf).

<sup>74</sup> *Id.*

<sup>75</sup> See Margarita M. Balmaceda, *Filling a Gap, Filling a Pocket: Absent Institutions, Intermediary Companies, and Energy Dependency in the Post-Soviet World* (May 2008) (unpublished paper), available at <http://www.i.umich.edu/UMICH/ceseuc/Home/ACADEMICS/Research%20Projects/Energy%20Security%20in%20Europe%20and%20Eurasia/Balmaceda.pdf>.

<sup>76</sup> Michael Scott, *Russia Corruption "May Force Western Firms to Quit,"* REUTERS (Mar. 15, 2010), <http://www.reuters.com/article/2010/03/15/us-russia-corruption-idUSTRE62E1SU20100315>.

<sup>77</sup> Smith, *supra* note 73, at 2–3; see also Organisation for Economic Co-Operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* art. 4, Dec. 17, 1997, 37 I.L.M. 1 (imposing a duty on signatory states to criminalize the bribery of public officials both for offenses that occur within that state and for offenses committed by their citizens abroad).

<sup>78</sup> See, e.g., Cynthia A. Roberts, *Russia and the European Union: The Sources and Limits of "Special Relationships,"* STRATEGIC STUDIES INST. (Feb. 2007), <http://www.strategicstudiesinstitute.army.mil/pubs/summary.cfm?q=761>. "Russia's autocrats and dominant elites who gain phenomenal wealth from their positions of power have a stake in a nontransparent, illiberal Russian state and eschew international agreements requiring strict conditionality and accountability."

<sup>79</sup> Smith, *supra* note 73, at 2–5. "[T]hroughout the eight years of Vladimir Putin's presidency, Russia's state-owned natural gas monopoly Gazprom and its subsidiaries Gazpromexport and Gazprombank systematically created an elaborate web of opaque companies throughout Europe and Russia acting in league with various European partners. . . . The companies are also believed to be linked to Russian and other organized crime groups."

<sup>80</sup> See *id.* at 10–11.

<sup>81</sup> *Corporate Social Responsibility (CSR)*, EUROPEAN COMM'N, [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm) (last visited Feb. 14, 2014).

clearly lag behind in the area of anticorruption and environmental responsibility.<sup>82</sup>

Energy efficiency is crucial to maintaining a supply of natural gas that can serve both Russia's increasing domestic needs as well as the increasing export demand to the EU and potential new markets in Asia.<sup>83</sup> In this way, a strong cooperative partnership between Russia and the EU benefits both parties. The EU desires Russian energy efficiency to ensure an adequate supply that meets its energy consumption needs without driving up prices, and Russia will profit in the long term if it can reduce natural gas waste due to flaring<sup>84</sup> and grow its energy revenues by maximizing energy production from its current rate of harvesting.

### 3. Energy Security

Energy security for the EU means uninterrupted access to energy sources at an affordable price.<sup>85</sup> Since the EU is a major net importer of fuel sources, energy security depends in large part on the dependability of the EU's imports.<sup>86</sup> For natural gas, energy security involves having import channels from multiple nations, increased storage capacity, and sufficient pipeline capacity.<sup>87</sup> With a history of conflicts affecting the gas supply running through Belarus and Ukraine, energy security has been historically low. However, looking forward, both Russia and the EU have a mutual interest in increasing pipeline transmission, including through countries other than Belarus and Ukraine. Meanwhile, the EU has an interest in diversifying the countries from which it imports gas by building pipeline transmission to Europe or encouraging Liquefied Natural Gas (LNG) imports.<sup>88</sup>

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<sup>82</sup> See *The Ten Principles*, UN GLOBAL COMPACT, <http://www.unglobalcompact.org/abouttheGC/TheTenPrinciples/index.html> (last visited Feb. 14, 2014). "Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies. Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery." *Id.*

<sup>83</sup> GEVORG SARGSYAN ET AL., INT'L FIN. CORP. & WORLD BANK, ENERGY EFFICIENCY IN RUSSIA: UNTAPPED RESERVES 17 (Dec. 2008), available at <http://www.ifc.org/wps/wcm/connect/de1e58804aababd79797d79e0dc67fc6/IFC+EE+in+Russia+Untapped+Potential.pdf?MOD=AJPERES> (noting that even under the current framework of supply and demand for Russian natural gas, the excess of demand will still create increasing shortfalls).

<sup>84</sup> *Id.* at 19.

<sup>85</sup> *In-Depth Study of European Energy Security*, at 3, COM (2014) 330 final (July 2, 2014), available at [https://ec.europa.eu/energy/sites/ener/files/documents/20140528\\_energy\\_security\\_study\\_0.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/20140528_energy_security_study_0.pdf).

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 8–9.

<sup>88</sup> *Id.* at 9.

#### 4. Sustainable Development

The Commission defines sustainable development as “meeting the needs of the present generation without jeopardizing the ability of future[] generations to meet their own needs – in other words a better quality of life for everyone, now and for generations to come.”<sup>89</sup> Sustainable development typically entails policies that minimize climate change and promote low carbon emissions.<sup>90</sup> The EU has recently been a prime destination for exports of coal from the United States, a fuel source that poses among the most severe climate effects<sup>91</sup> as well as immediate health hazards to human life.<sup>92</sup> However, the EU’s push towards renewables is intended to stimulate a decrease in demand for coal in the EU starting immediately.<sup>93</sup>

The EU has sought to reduce the greenhouse gas emissions created by coal as an alternative fuel source to gas and in March 2013 issued an official communication signaling the EU’s support for Carbon Capture and Storage (CCS) technology.<sup>94</sup> Implementing CCS on existing and future coal-fired power plants would greatly increase the monetary cost of coal as a fuel source.<sup>95</sup>

Natural gas, while not as environmentally friendly as renewable fuel sources, has 60% fewer greenhouse gas emissions than coal in electricity generation.<sup>96</sup> Gazprom has responded to the EU’s demands for more sustainable energy growth by positioning natural gas as the most suitable fuel source to be used in conjunction with a shift to a greater use of renewables.<sup>97</sup> The report, *Making the Green Journey Work*, specifically

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<sup>89</sup> *Sustainable Development*, EUROPEAN COMM’N, <http://ec.europa.eu/environment/eussd/> (last updated July 5, 2013).

<sup>90</sup> *Id.*

<sup>91</sup> *Coal*, GREENPEACE, <http://www.greenpeace.org/international/en/campaigns/climate-change/coal/> (last visited Nov. 21, 2013).

<sup>92</sup> Justin Guay, *U.S. Coal Exports Causing Deaths in Europe*, SIERRA CLUB (June 14, 2013), <http://sierraclub.typepad.com/compass/2013/06/us-coal-exports-causing-deaths-in-europe.html>.

<sup>93</sup> John McGarrity, *Analysis: EU Coal Demand Starting Decades-Long Slide*, REUTERS (Aug. 30, 2013), <http://www.reuters.com/article/2013/08/30/us-coal-demand-europe-analysis-idUSBRE97T0K120130830>.

<sup>94</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Future of Carbon Capture and Storage in Europe*, COM (2013) 180 final (Mar. 27, 2013), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0180:FIN:EN:PDF>.

<sup>95</sup> *Carbon Capture and Geological Storage*, EUROPEAN COMM’N, <http://ec.europa.eu/clima/policies/lowcarbon/ccs/> (last visited Nov. 4, 2014).

<sup>96</sup> *Flipbook*, GASNATURALLY, <http://www.gasnaturally.eu/ebook/gasnaturallybrochureupdate/index.html> (last updated Oct. 2012).

<sup>97</sup> *Our Perspectives*, GAZPROM, <http://www.gazprom-mt.com/WhatWeSay/OurPerspectives/Pages/Making-the-Green-Journey-Work.aspx> (last visited Nov. 22, 2013); see also EUROPEAN GAS ADVOCACY FORUM, *THE FUTURE ROLE OF NATURAL GAS* (2011); EUROPEAN GAS ADVOCACY FORUM,

assesses how the use of natural gas alongside renewable development would allow Europe to reach each of its sustainable development goals through 2050.<sup>98</sup>

While the Roadmap Agreement offers plans, suggestions, and a convenient forum for discussion of the Russian–EU energy trade, its overall effect is similar to soft law. Without an enforcement mechanism to protect EU from Gazprom and Transneft’s corporate practices, the EU remains powerless to effect real change on Russia’s energy companies. Seven months after this Roadmap Agreement was signed, the Commission found that enforcement mechanism to hold Gazprom legally accountable for its noncompliance with EU business regulations.

### B. The Commission Probe into Gazprom

On October 3, 2013 in Vilnius, Lithuania, European Commissioner for Competition Joaquin Almunia announced that the EU was prepared to formally charge the Russian state-controlled<sup>99</sup> natural gas company, Gazprom, with abusing its dominant position in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Slovakia.<sup>100</sup> The antitrust charges, which are expected to be resolved by the spring of 2014,<sup>101</sup> stem from investigations begun in 2012<sup>102</sup> and could result in fines of up to 10% of Gazprom’s annual revenue,<sup>103</sup> or \$15 billion dollars.<sup>104</sup>

The EU is built on a capitalist market system whereby competing suppliers drive down prices for consumer benefit, and government involvement is relegated to regulatory policy for the protection of consumers.<sup>105</sup> This market structure is incompatible with Gazprom and

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MAKING THE GREEN JOURNEY WORK (2011).

<sup>98</sup> EUROPEAN GAS ADVOCACY FORUM, MAKING THE GREEN JOURNEY WORK 1 (2011).

<sup>99</sup> *Shares*, GAZPROM, <http://www.gazprom.com/investors/stock/> (information current as of Dec. 31, 2011).

<sup>100</sup> *EU to Charge Gazprom in Antitrust Probe*, RADIO FREE EUROPE RADIO LIBERTY (Oct. 3, 2013), <http://www.rferl.org/content/gazprom-eu-probe/25125736.html>.

<sup>101</sup> Nerijus Adomaitis, *EU Aims to Complete Gazprom Antitrust Probe by Spring*, REUTERS (Nov. 4, 2013), <http://www.reuters.com/article/2013/11/04/us-eu-gazprom-probe-idUSBRE9A30AQ20131104>.

<sup>102</sup> Press Release, European Comm’n, Antitrust: Commission Opens Proceedings Against Gazprom (Sept. 4, 2012) (on file with the European Comm’n).

<sup>103</sup> RADIO FREE EUROPE RADIO LIBERTY, *supra* note 100.

<sup>104</sup> *Gazprom Faces \$15Bln Antitrust Charges from EU*, MOSCOW TIMES (Oct. 4, 2013), <http://www.themoscowtimes.com/business/article/gazprom-faces-15bln-antitrust-charges-from-eu/487057.html>.

<sup>105</sup> *See generally Communication to the Spring European Council: Working Together for Growth and Jobs – A New Start for the Lisbon Treaty*, at 8, COM (2005) 24 final (Feb. 2, 2005), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0024:FIN:en:PDF> (noting the need to screen regulatory barriers to competition in the European Union energy market to promote more healthy competition).

Transneft's government-controlled and government-sanctioned monopolies. Russia actively discourages competitors by directing western businesses towards Gazprom and Transneft, which are connected to the most elite of cartels.<sup>106</sup> Moreover, Russia's policy of pricing gas exports on an index of oil exports allows Gazprom and Transneft to work together to maximize their market shares.<sup>107</sup> This practice is at the center of the ongoing EU investigation into Gazprom's anticompetitive actions.<sup>108</sup>

Anticompetitive practices in the EU's internal markets are governed by Title VII, Chapter 1 of the Treaty on the Functioning of the EU (TFEU).<sup>109</sup> While Article 101 of the TFEU more or less mirrors the restrictions of the Sherman Act in U.S. law,<sup>110</sup> Article 102, on which this action is predicated, declares that "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the Member States."<sup>111</sup>

The European Commission will prepare a statement of objections that note the anticompetitive practices to which the Commission objects, but it is already clear that two of the primary objections are Gazprom's prohibition on resale of natural gas by European buyers and its unfair inflation of costs by linking gas prices to oil prices.<sup>112</sup>

Ideally, Gazprom would prefer to resolve this matter with a commitment decision—an expedited and flexible tool of EU competition law that allows a legal action to be concluded through a target's

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<sup>106</sup> Smith, *supra* note 73, at 4.

<sup>107</sup> Foo Yun Chee, *EU Preparing to Charge Gazprom in Antitrust Case*, REUTERS (Oct. 3, 2012), <http://www.reuters.com/article/2013/10/03/us-eu-gazprom-idUSBRE9920DV20131003>.

<sup>108</sup> *Id.*

<sup>109</sup> Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–109, Oct. 26, 2012, 2012 O.J. (C 326) 47, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

<sup>110</sup> See *Antitrust Overview*, EUROPEAN COMM'N, [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html) (last updated Nov. 21, 2014); 15 U.S.C. § 1 (2006) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby is declared to be illegal shall be deemed guilty of a felony . . .").

<sup>111</sup> *Antitrust Overview*, *supra* note 110 (noting that such abuse may consist of "(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; (d) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.").

<sup>112</sup> James Kanter & Andrew E. Kramer, *Europe Threatens Gazprom with Antitrust Action*, N.Y. TIMES (Oct. 3, 2013), <http://www.nytimes.com/2013/10/04/business/international/europe-threatens-gazprom-with-antitrust-action.html>.

acquiescence to demands of the Commission.<sup>113</sup> Gazprom would likely be amenable to the terms of a commitment decision with regard to the prohibitions on resale.<sup>114</sup> The Commission alleges that Gazprom included “destination clauses,” which are contractual prohibitions on resale of gas to other countries.<sup>115</sup> Destination clauses are prohibited when the net effect of their use creates national submarkets for gas instead of a single EU market.<sup>116</sup> Gazprom has been investigated for market abuses before and has shown willingness to cancel these clauses, which would be the likely effect of a commitment letter with regard to this issue.<sup>117</sup>

The more divisive issue covered in the action against Gazprom will be the linking of natural gas prices to oil prices in long-term gas contracts. On June 27, 2013, Gazprom lost an action in an arbitral tribunal against RWE, a German electric utilities company, regarding whether this long-practiced method of pricing was allowed.<sup>118</sup> Gazprom has extra incentive to avoid an adverse ruling on this issue because a clear ruling against oil indexation by a Commission tribunal could have strong persuasive authority not only throughout Europe, but also in other countries seeking to do business with Gazprom.<sup>119</sup>

Besides Gazprom’s natural incentive to avoid significant fines in this antitrust action, it would be put in a perilous position in the case of an adverse ruling. Gazprom relies on long-term contracts using “take and pay” provisions to guarantee enough supply to ensure strong revenues and leverage pricing power.<sup>120</sup> Having such practices deemed illegal may destabilize Gazprom’s European gas sales model with drastic effects for the company. Gazprom has explicitly favored a settlement to conclude this matter throughout this probe.<sup>121</sup> As of this time, Gazprom has offered the

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<sup>113</sup> See Heike Schweitzer, *Commitment Decisions in the EU and in the Member States: Functions and Risks of a New Instrument of Competition Law Enforcement Within a Federal Enforcement Regime*, E-COMPETITIONS BULLETIN (Aug. 2, 2012), available at <http://ssrn.com/abstract=2101630> (discussing the growing tendency to end all but the most extreme of cartel cases in a commitment decision).

<sup>114</sup> Nicolò Sartori, *The European Commission vs. Gazprom: An Issue of Fair Competition or a Foreign Policy Quarrel?* (5 Istituto Affari Internazionali, Working Paper No. 13, 2013).

<sup>115</sup> ALAN RILEY, CEPS POLICY BRIEF No. 285, COMMISSION V. GAZPROM: THE ANTITRUST CLASH OF THE DECADE? 8 (2012).

<sup>116</sup> Sartori, *supra* note 114.

<sup>117</sup> See *id.*

<sup>118</sup> Richard Power, *RWE v Gazprom Export: Is It Open Season on Contract Price Clauses in Gas Supply Contracts?*, BERWIN LEIGHTON PAISNER (July 16, 2013) <http://www.blplaw.com/expert-legal-insights/articles/rwe-v-gazprom-export-is-it-open-season-on-contract-price-clauses-in-gas-supply-contracts/>.

<sup>119</sup> RILEY, *supra* note 115, at 9.

<sup>120</sup> *Id.*

<sup>121</sup> *EU Says Gazprom Not Yet Satisfied Pricing Concerns*, MOSCOW TIMES (Feb. 10, 2014), <http://www.themoscowtimes.com/business/article/eu-says-gazprom-not-yet-satisfied-pricing-concerns/494153.html>.

EU price concessions, but they have not yet been accepted by the Commission.<sup>122</sup>

Looking forward, such legal instruments could provide the EU with the necessary leverage to effect tangible reform on the Russian energy providers. Many of the allegations against Gazprom also apply to Transneft. Since each member state of the EU could file its own complaint to the Commission based on a multitude of practices, the Commission could create a real economic incentive for Russian energy companies to avoid the worst of its business practices to avoid sanctions by the Commission.

### C. Yukos Oil Legal Proceedings and Arbitration

The Gazprom antitrust investigation was not the only legal action initiated against Russia's energy interests in the last year. In 2003, Mikhail Khodorkovsky, the owner of Yukos Oil Company (Yukos), a dominant player in gas and oil, was arrested on charges of fraud and tax evasion.<sup>123</sup> Seen as a move to seize power, Putin's arrest of one of the wealthiest oligarchs in the country quieted challenges to Putin's power from other wealthy players, most of whom could be charged similarly.<sup>124</sup> Following Khodorkovsky's arrest, Russia sought to collect on billions of dollars in allegedly unpaid taxes, thereby ultimately freezing Yukos's assets and resulting in Yukos's sale of its most lucrative assets in an auction.<sup>125</sup>

Former majority shareholders in Yukos who were led by Leonid Nevzlin, owner of just over 70% of GML Ltd. (the former majority owner of Yukos),<sup>126</sup> filed a claim based on the Treaty at the Permanent Court of Arbitration.<sup>127</sup> On July 28, 2014, the Permanent Court of Arbitration ruled for the claimant shareholders for \$50 billion, which was twenty times larger than any arbitration ruling ever rendered against a government.<sup>128</sup> The

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<sup>122</sup> *Id.*

<sup>123</sup> Leonid Bershidsky, *A \$50 Billion Bill for Putin's Aggression*, BLOOMBERG (July 28, 2014), <http://www.bloombergview.com/articles/2014-07-28/a-50-billion-bill-for-putin-s-aggression>.

<sup>124</sup> *Id.*

<sup>125</sup> Kavaljit Singh, *Khodorovsky and the Yukos Oil Saga: The Investor-to-State Arbitration Is Rigged. Why Russia Should Not Honor Tribunal Award of \$51 Billion*, GLOBAL RESEARCH (July 29, 2014), <http://www.globalresearch.ca/khodorkovsky-and-the-yukos-oil-saga-the-investor-to-state-arbitration-is-rigged-why-russia-should-not-honour-tribunal-award-of-51-billion/5393883>.

<sup>126</sup> Courtney Weaver, *Leonid Nevzlin Is Biggest Winner from Yukos Ruling at The Hague*, FINANCIAL TIMES (July 28, 2014), <http://www.ft.com/cms/s/0/bba18346-1669-11e4-a5c7-00144feabdc0.html#axzz3C9Q4eSPN>.

<sup>127</sup> Tim Worstall, *Hague Court; Russia Did Steal Yukos and Must Pay \$50 Billion Damages*, FORBES (July 28, 2014), <http://www.forbes.com/sites/timworstall/2014/07/28/hague-court-russia-did-steal-yukos-and-must-pay-50-billion-damages/>.

<sup>128</sup> Jennifer Rankin, *Russia Ordered to Pay \$50bn in Damages to Yukos Shareholders*, GUARDIAN (July 28, 2014), <http://www.theguardian.com/business/2014/jul/28/russia-order-pay-50bn-yukos-shareholders-khodorkovsky-court>.

arbiters ruled that Russia had violated Article 13(1) of the Treaty, thereby essentially expropriating an industry without providing due compensation.<sup>129</sup> Russia's Ministry of Finance announced that it would appeal the decision, which it claimed was politically motivated.<sup>130</sup> If Russia refuses to pay the award, the claimants may pursue Russian sovereign commercial assets, including those of Gazprom and Rosneft, through court-ordered seizures.<sup>131</sup> Additionally, the former management of Yukos won an award of \$2.5 billion from the European Court of Human Rights just three days later.<sup>132</sup>

While these decisions are a result of a series of legal proceedings dating back almost a decade, the timing of the judgments is certainly conspicuous. The arbitration award rendered on July 18, 2014 came just one day after the downing of Malaysia Airlines Flight 17 in eastern Ukraine.<sup>133</sup> The attack, which Russia has been accused of being involved in,<sup>134</sup> had been the latest escalation in the Ukrainian conflict discussed in Part E.

#### D. Proposals for a More Integrated Pipeline Network

Pipeline security poses the most imminent challenge to the Russia–EU energy trade. Energy shortages caused by pipeline shutdowns in Belarus and Ukraine not only present a looming threat to the EU's ability to feel secure in their energy supply, but also result in substantial lost profits for

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<sup>129</sup> *Final Awards Issued in 3 Arbitrations Between Former Shareholders of Yukos and the Russian Federation*, PERM. CT. OF ARB., [http://www.pca-cpa.org/shownews.asp?nws\\_id=440&pag\\_id=1261&ac=view](http://www.pca-cpa.org/shownews.asp?nws_id=440&pag_id=1261&ac=view) (last visited Aug. 31, 2014). Article 13(1) of the Energy Charter Treaty provides, "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation . . . except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate, and effective compensation." ENERGY CHARTER SECRETARIAT, THE ENERGY CHARTER TREATY AND RELATED DOCUMENTS art. 13, § 1 (2004), available at [http://www.encharter.org/fileadmin/user\\_upload/document/EN.pdf](http://www.encharter.org/fileadmin/user_upload/document/EN.pdf).

<sup>130</sup> *Russia to Appeal Against \$50bn Yukos Shareholder Payout*, BBC NEWS (July 28, 2014), <http://www.bbc.com/news/business-28520892>.

<sup>131</sup> Henry Meyer & Stephen Bierman, *Yukos Hunting Rosneft Assets from Venezuela to Vietnam*, BLOOMBERG (July 31, 2014), <http://www.bloomberg.com/news/2014-07-30/yukos-hunting-rosneft-gazprom-assets-from-venezuela-to-vietnam.html>.

<sup>132</sup> Gabrielle Steinhauser & Gregory L. White, *Russia Must Compensate Yukos Shareholders, Says European Court*, WALL ST. J. (July 31, 2014), <http://online.wsj.com/articles/russia-must-compensate-yukos-shareholders-says-european-court-1406797417>.

<sup>133</sup> *Malaysian Airliner Crashes in E. Ukraine near Russian Border, 298 People on Board*, RT (July 17, 2014), <http://rt.com/news/173616-malaysian-crash-ukraine-border/>.

<sup>134</sup> Greg Miller, *U.S. Discloses Intelligence on Downing of Malaysian Jet*, WASH. POST (July 22, 2014), [http://www.washingtonpost.com/world/national-security/us-discloses-intelligence-on-downing-of-malaysian-jet/2014/07/22/b178fe58-11e1-11e4-98ee-daea85133bc9\\_story.html](http://www.washingtonpost.com/world/national-security/us-discloses-intelligence-on-downing-of-malaysian-jet/2014/07/22/b178fe58-11e1-11e4-98ee-daea85133bc9_story.html).

Russia. Both parties have a strong interest to mutually plan for pipeline construction that avoids these volatile and economically depressed countries.<sup>135</sup>

The first major pipeline project inaugurated in response to this problem was the Nord Stream pipeline.<sup>136</sup> This pipeline runs underneath the Baltic Sea and connects Russian suppliers directly with the EU via Germany.<sup>137</sup> The pipeline completed its final planned stage of construction in August 2012<sup>138</sup> although feasibility studies are in the works for a third or fourth stage of the pipeline in the coming years.<sup>139</sup>

Access to southern EU member states through new pipelines has presented a more daunting challenge. Announced in June 2007, the South Stream connects Russian pipelines directly to southeastern EU member states through the Black Sea.<sup>140</sup> Unlike the Nord Stream, which passes through only Russian and EU territorial waters, the South Stream pipeline passes through Turkish territorial waters to avoid further conflicts with Ukraine, which borders the Black Sea to the north.<sup>141</sup> However, the South Stream pipeline originally competed directly with alternative pipeline projects through Turkey that bypassed Russia.<sup>142</sup> The Trans Anatolian Gas Pipeline (TANAP) is a planned pipeline project that would transport gas from Azerbaijan through Turkey to the EU.<sup>143</sup> Likewise, the Nabucco pipeline was proposed to connect gas sources from Azerbaijan, Iraq, Egypt, and Turkmenistan to the EU through Turkey, thereby delivering gas supply through the Nabucco-West Pipeline to Bulgaria, Romania, Hungary, and

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<sup>135</sup> RATNER ET AL., *supra* note 14, at 2.

<sup>136</sup> *Controversial Project Launched: Merkel and Medvedev Open Baltic Gas Pipeline*, SPIEGEL ONLINE INT'L (Nov. 11, 2008), <http://www.spiegel.de/international/europe/controversial-project-launched-merkel-and-medvedev-open-baltic-gas-pipeline-a-796611.html>.

<sup>137</sup> *Id.*

<sup>138</sup> *Gazprom Completes Nord Stream's 2<sup>nd</sup> Pipeline*, RIA NOVOSTI (Aug. 2012), <http://en.ria.ru/business/20120829/175503578.html>.

<sup>139</sup> *Nord Stream Seeks to Study Estonian Economic Zone in Baltic until 2015*, KYIVPOST (Aug. 27, 2012), <http://www.kyivpost.com/content/russia-and-former-soviet-union/nord-stream-seeks-to-study-estonian-economic-zone-in-baltic-until-2015-312086.html>.

<sup>140</sup> Nadia Rodova, *Russia, Bulgaria Sign Final Investment Decision on South Stream Gas Pipeline*, PLATTS MCGRAW HILL FIN. (Nov. 15, 2012), <http://www.platts.com/latest-news/natural-gas/moscow/russia-bulgaria-sign-final-investment-decision-8916177>.

<sup>141</sup> Lyubov Pronina & Ali Berat Meric, *Turkey Offers Route for Gazprom's South Stream Gas Pipeline*, BLOOMBERG (Aug. 6, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.TM4QijmIMk>.

<sup>142</sup> Deutsche Presse-Agentur, *Gazprom Agrees to Boost Pipeline Capacity*, DOWNSTREAM TODAY (May 15, 2009), [http://downstreamtoday.com/news/article.aspx?a\\_id=16386&AspxAutoDetectCookieSupport=1](http://downstreamtoday.com/news/article.aspx?a_id=16386&AspxAutoDetectCookieSupport=1).

<sup>143</sup> Emre Peker, *Turkey to Sign Agreement for Azerbaijan Gas Pipeline Tomorrow*, BLOOMBERG (Dec. 25, 2011), <http://www.bloomberg.com/news/2011-12-25/turkey-to-sign-agreement-for-azerbaijan-gas-pipeline-tomorrow.html>.

Austria where it could be further branched out to Western Europe.<sup>144</sup> Although Russia's main export competitors for the EU market are Norway, Algeria, and Qatar, the United States is poised to potentially become a player in the market as transmission technology is developed to facilitate transportation.<sup>145</sup> Russia therefore has a strong interest in limiting other gas exporters from entering the EU market and further diluting its market share.

However, both TANAP and the Nabucco pipeline have faced significant problems in the last year. On June 28, 2013, the Shah Deniz Consortium, comprised of the major stakeholders of Azeri gas fields, announced that it would be supplying Europe with gas through the Trans Adriatic Pipeline project—connecting Turkey with Greece, Albania, and Italy—rather than the more expansive Nabucco-West pipeline.<sup>146</sup> This artery will be connected through the TANAP pipeline, but transmission is not expected to begin until 2018 at the earliest.<sup>147</sup>

With an obvious need to secure delivery through countries other than Ukraine or Belarus, Russia and the EU have become even more closely intertwined through investment in recent pipeline projects. The downscaling and failure of pipeline proposals that link the EU with Russia's competitors make diversification of energy suppliers even more difficult. Since the Southern Stream is still in construction and further pipeline branches to connect the rest of the EU to the Nord Stream and South Stream are still in their planning stages, if the EU is to move away from Russian energy dependence, it must do so now. The trigger for the EU to consider pulling the plug on cementing its dependence on Russian energy supplies came in the form of unrest in Ukraine.

#### E. The Ukrainian Revolution

In November 2013, the EU gas supply was projected to be threatened over the winter by Ukrainian failure to store sufficient gas in its underground storage facilities.<sup>148</sup> Positioning over Ukrainian gas prices was again at the forefront of this crisis as Russia continued to use gas pricing as a way to control Ukraine's political alignment; Gazprom had

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<sup>144</sup> Bloomberg, *Nabucco Venture Sees Iraq as Top Supplier*, HURRIYET DAILY NEWS (Sept. 30, 2010), <http://www.hurriyetaidailynews.com/default.aspx?pageid=438&n=nabucco-venture-sees-iraq-as-top-supplier-2010-09-30>.

<sup>145</sup> RATNER ET AL., *supra* note 14, at 2–4, 6.

<sup>146</sup> *Shah Deniz Consortium Selects the Trans Adriatic Pipeline (TAP) as European Export Pipeline*, TAP (June 28, 2013), available at <http://www.tap-ag.com/news-and-events/2013/06/28/shah-deniz-consortium-selects-the-trans-adriatic-pipeline-tap-as-european-export-pipeline>.

<sup>147</sup> Maria Snytkova, *South Stream Adding Gas to the Fire*, PRAVDA.RU (Mar. 16, 2014), [http://english.pravda.ru/business/companies/16-03-2014/127112-south\\_stream-0/](http://english.pravda.ru/business/companies/16-03-2014/127112-south_stream-0/).

<sup>148</sup> Andrew Rettman, *Gazprom Warns EU of Winter 'Catastrophe'*, EUOBSERVER (Nov. 15, 2013), <http://euobserver.com/economic/122122>.

indicated its willingness to drop gas prices only if Ukraine abandoned plans to sign the Ukraine–European Union Association Agreement (the Association Agreement) and instead signed with the Eurasian Economic Community customs union.<sup>149</sup> This customs union created an EU-style market between Russia, Belarus and Kazakhstan and had sought Ukrainian membership since its inception.<sup>150</sup> By contrast, the Association Agreement would have allowed Ukraine access to many EU resources such as the European Investment Bank, EU regulations, and a pathway to visa-free movement from Ukraine to the EU.<sup>151</sup> While European gas delivery was not affected, Ukraine stopped all of its import of Russian gas for several days due to an ongoing debate about payments Gazprom claimed were due from Ukraine.<sup>152</sup>

Ukraine suspended negotiations on the Association Agreement with the EU on November 21, 2013.<sup>153</sup> On December 17, the President of Ukraine, Viktor Yanukovich, and the President of Russia, Vladimir Putin, signed a Ukrainian–Russian action plan that provided for Russian investment in Ukrainian Eurobonds and a subsequent lowering of natural gas prices to Ukraine.<sup>154</sup> Unlike previous exercises of Russian political influence over Ukraine, this action sparked massive spontaneous protests in Kiev.<sup>155</sup> Such protests were exacerbated and brought to the attention of the international media when the protestors were violently dispersed by Ukrainian police forces.<sup>156</sup> With the protestors gaining momentum, Prime Minister Mykola Azarov, one of the strongest pro-Russian voices in the cabinet, resigned on January 28, 2014.<sup>157</sup> Following days of violence and

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<sup>149</sup> *Id.*

<sup>150</sup> *Soviet Union to be Restored in the Form of New Customs Union*, KYIVPOST (Dec. 18, 2009), <http://www.kyivpost.com/content/russia-and-former-soviet-union/soviet-union-to-be-restored-in-the-form-of-new-cus-55474.html>.

<sup>151</sup> *Association Agreement Between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part*, COM (2013) 290 final (May 15, 2013), available at [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2013/0290/COM\\_COM\(2013\)0290\(PAR2\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2013/0290/COM_COM(2013)0290(PAR2)_EN.pdf).

<sup>152</sup> *Ukraine Resumes Gas Purchases from Russia – Gazprom*, RIA NOVOSTI (Nov. 15, 2013), available at <http://sputniknews.com/russia/20131115/184735301/Ukraine-Resumes-Gas-Purchases-From-Russia--Gazprom.html>.

<sup>153</sup> *Ukraine Drops EU Plans and Looks to Russia*, AL JAZEERA, <http://www.aljazeera.com/news/europe/2013/11/ukraine-drops-eu-plans-looks-russia-20131121145417227621.html> (last updated Nov. 21, 2013).

<sup>154</sup> *Russia Offers Ukraine Major Economic Assistance*, BBC NEWS (Dec. 17, 2013), <http://www.bbc.com/news/world-europe-25411118>.

<sup>155</sup> *Students in Ukraine Threaten Indefinite National Strike*, EURONEWS (Nov. 26, 2013), <http://www.euronews.com/2013/11/26/students-in-ukraine-threaten-indefinite-national-strike/>.

<sup>156</sup> Brian Whitmore, *Ukraine's Threat to Putin*, ATLANTIC (Dec. 6, 2013), <http://www.theatlantic.com/international/archive/2013/12/ukraines-threat-to-putin/282103/>.

<sup>157</sup> *Ukraine's PM Azarov and Government Resign*, BBC NEWS (Jan. 28, 2014), <http://www.bbc.co.uk/news/world-europe-25932352>.

talks, protestors finally took control of Kiev, the capital of Ukraine, as President Yanukovich fled to Russia.<sup>158</sup> Protestors appointed a new interim President, immediately released from jail Yulia Tymoshenko, a staunch political opponent of President Yanukovich, and reverted the Ukrainian constitution back to the 2004–2010 version (eliminating subsequent amendments that had allowed Russian to be used in some regions as a second national language).<sup>159</sup>

While Ukraine's interim government has reversed course and is actively pursuing a pro-EU stance, the relationship between Russia and the EU has notably soured. In response to the change of government in Kiev, the Crimean Oblast and Sevastopol (a city with special status under the Ukrainian constitution), both predominantly Russian-speaking areas, voted to secede from Ukraine and subsequently held a referendum to join Russia.<sup>160</sup> Meanwhile, the EU joined the United States and Canada in issuing broad sanctions for officials from Russia, Crimea, and the Commonwealth of Independent States who were accused of orchestrating Crimean separatism.<sup>161</sup>

In response to the Ukrainian Revolution, Russian-speaking and pro-Russian elements in the eastern Ukrainian cities of Donetsk and Lugansk declared independence from Ukraine.<sup>162</sup> The subsequent conflict between pro-Russian separatists, allegedly supported by Russian military elements,<sup>163</sup> has been declared a civil war by the Red Cross<sup>164</sup> and has exponentially agitated tensions between Russia and the EU over handling of the crisis.

Gas interests have remained an important factor in the Ukrainian crisis. To date, delivery of gas from Russia to the EU through Ukraine has been unaffected by the crisis.<sup>165</sup> However, with tension between Ukraine

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<sup>158</sup> Yuras Karmanou & Angela Charlton, *Ukrainian Protesters Claim Control over Capital*, YAHOO! NEWS (Feb. 22, 2014), <http://news.yahoo.com/ukrainian-protesters-claim-control-over-capital-055501879.html>.

<sup>159</sup> *Id.*

<sup>160</sup> *Crimea Referendum: Voters 'Back Russia Union,'* BBC NEWS (Mar. 16, 2014), <http://www.bbc.com/news/world-europe-26606097>.

<sup>161</sup> *EU Sanctions List Includes Russian Commanders, Crimean PM*, REUTERS (Mar. 17, 2014), <http://www.reuters.com/article/2014/03/17/eu-russia-sanctions-idUSB5N0LP01720140317>.

<sup>162</sup> *East Ukrainian Separatists Seek Union with Russia*, BBC NEWS (May 12, 2014), <http://www.bbc.com/news/world-europe-27369980>.

<sup>163</sup> Gabriela Baczynska & Aleksandar Vasovic, *Pushing Locals Aside, Russians Take Top Rebel Posts in East Ukraine*, REUTERS (July 27, 2014), <http://www.reuters.com/article/2014/07/27/us-ukraine-crisis-rebels-insight-idUSKBN0FW07020140727>.

<sup>164</sup> Tom Miles, *Ukraine War Crimes Trials a Step Closer after Red Cross Assessment*, REUTERS (July 22, 2014), <http://www.reuters.com/article/2014/07/22/us-ukraine-crisis-warcrimes-idUSKBN0FR0V920140722>.

<sup>165</sup> Elena Mazneva & Stephan Bierman, *Russia Gas Threat Shows Putin Using Pipes to Press Ukraine*, BLOOMBERG (Mar. 3, 2014), <http://www.bloomberg.com/news/2014-03-02/russia-gas-threat-shows-putin-using-pipelines-to-press-ukraine.html>.

and Russia unlikely to disperse quickly, Russia is looking to expedite construction on the South Stream pipeline to ensure its transmission capacity to the EU.<sup>166</sup> But the EU has repeatedly threatened to end cooperation with Russia on the South Stream pipeline,<sup>167</sup> adding further uncertainty to a flailing Russian energy market that was hit hard by EU sanctions.<sup>168</sup>

Meanwhile, domestic gas suppliers like Norway have seen a spiked increase in gas demand resulting from the EU–Russia standoff.<sup>169</sup> Without the pipeline capacity to turn immediately away from Russian energy dependence in response to these political concerns, the EU and Russia must independently consider whether the ramifications of continuing such a political standoff outweigh the economic consequences. For Russia, the economic consequences are the loss of a stable market for its gas exports. For the EU, those consequences could include energy shortages.

#### F. The Chinese Markets

Russia's export strategy has shifted in response to political conflicts with the West, leading to a stronger focus on eastern markets like China.<sup>170</sup> On May 21, 2014, China signed a deal with Gazprom for an estimated \$400 billion to construct a pipeline and deliver about 4 trillion cubic meters per year of gas to China over the next thirty years.<sup>171</sup> On the one hand, connecting China to Russia's pipeline system will integrate the eastern and western gas markets.<sup>172</sup> The pipeline, which broke ground on September 1, 2014, is expected to be operational in 2019, providing a direct outlet for Siberian and Far East gas into China.<sup>173</sup> On the other hand, the availability of China as a large-scale consumer makes Russian gas a more competitive commodity, breaking the monopsony power of Europe over Russia's export market.<sup>174</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *South Stream Adding Gas to the Fire*, PRAVDA.RU (Mar. 6, 2014), [http://english.pravda.ru/business/companies/16-03-2014/127112-south\\_stream-0/](http://english.pravda.ru/business/companies/16-03-2014/127112-south_stream-0/).

<sup>168</sup> *Ruble, Stocks Slide over Growing Ukraine Tension*, RT (Mar. 3, 2014), <http://www.webcitation.org/6Nq7BJ5FC>.

<sup>169</sup> *Ukraine Crisis 'Awesome' for Norway Gas: Analyst*, LOCAL (Mar. 3, 2014), <http://www.the.local.no/20140303/ukraine-situation-awesome-for-norway-gas>.

<sup>170</sup> Rakteem Katakey, *Crimea Crisis Pushes Russian Energy to China from Europe*, BLOOMBERG (Mar. 25, 2014), <http://www.bloomberg.com/news/2014-03-25/russian-oil-seen-heading-east-not-west-in-crimea-spat.html>.

<sup>171</sup> Everett Rosenfeld, *Why the Russia-China Gas Deal Matters*, CNBC (May 22, 2014), <http://www.cnbc.com/id/101693525#>.

<sup>172</sup> *Id.*

<sup>173</sup> *Putin Breaks Ground on Russia-China Gas Pipeline, World's Biggest*, RT (Sept. 1, 2014), <http://rt.com/business/184176-russia-china-gas-siberian-power/>.

<sup>174</sup> Rosenfeld, *supra* note 171.

#### IV. DISCUSSION

##### A. Analysis

The Roadmap Agreement envisions the continuation and building of the current dependence of Europe on Russian natural gas until at least 2050.<sup>175</sup> However, there is an inherent disconnect between the EU's clearly articulated standards for the EU energy market and the practices and ideals on which the Gazprom energy market is based upon.

The EU is committed to building a functioning, integrated network infrastructure and open, transparent, efficient, and competitive markets; ensuring energy security; and conforming to the goals of sustainable development.<sup>176</sup> To the EU, a functioning, integrated network infrastructure means working towards the development of a smart grid that can immediately and sufficiently meet the energy needs of every citizen in each member state. Open, transparent, efficient, and competitive markets means the development of a single EU energy market that offers consistent electricity pricing due to transparent companies engaged in actual competition for consumers. Energy security means finding a way to ensure that the EU can avoid the stoppage crises that have occurred when relations between Russia and Ukraine or Belarus have gone sour, leaving the EU to suffer the consequences of complete Russian energy dependence. Finally, sustainable development involves developing an energy policy that will promote lower carbon emissions and decrease Europe's contribution to climate change.

Gazprom, and by virtue of its majority ownership, Russia, are clearly not in accord with many of these goals. The accusations levied against Gazprom cite Gazprom's policy of using "destination clauses" to create national energy sub-markets for the purpose of discriminatory pricing that flies directly in the face of the EU goal of a single energy market. Moreover, the corruption and lack of transparency in Russian energy cartels has been a consistent problem, and Gazprom fervently resists EU measures to end such corrupt practices. Russia has never shied away from using gas prices to incentivize Ukraine and Belarus to act in accordance with Russia's wishes, and conversely, Russia has been accused of punishing countries that act against Russian interests.<sup>177</sup>

With Russia and the EU demonstrating such diametrically opposed interests, the EU's move to sign the Roadmap Agreement before initiating the recent legal action against Gazprom shows the power of the EU's

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<sup>175</sup> *Roadmap EU–Russia Energy Cooperation until 2050*, *supra* note 51.

<sup>176</sup> *Id.* at 5.

<sup>177</sup> See Valentina Pop, *Taking on Gazprom: Lithuania's Battle for Energy Independence*, EUOBSERVER.COM (June 6, 2013), <http://euobserver.com/lithuania/120406>.

competing goals. Establishing a long-term energy relationship with Russia through the Roadmap Agreement is an attempt to lock down much needed energy security. Meanwhile, the legal action shows that the EU is equally motivated to enforce the standards to which it holds its energy policy. Both interests have become increasingly acute given the political standoff over Ukraine. The timely handing down of the Yukos Oil arbitration and European Court of Human Rights decisions, coupled with the sanctions on Russian officials over the Crimean and eastern Ukrainian unrest, have shown that the EU is unwilling to compromise its political interests for its economic needs. Likewise, Russia's investment in China and continued support of pro-Russian separatists in Ukraine has shown Russia's growing insecurity over Europe's consumer power. With these interests in mind, there are three possible eventualities for the Russian–EU natural gas trade.

#### B. Potential Outcomes

First, the status quo may prevail. The EU will continue to challenge the most egregious of Gazprom's anticompetitive business practices while Gazprom will continue to innovate new ways of extorting enough profits from the EU to keep Gazprom profitable. This situation would likely result in neither party feeling that their goals were met. The EU would not feel that it achieved energy security because it would constantly fear that any legal action taken against Gazprom could result in stoppages of gas deliveries, or that Russia may find a way to utilize the Asian market more lucratively and abandon the EU's energy demands. With the outcome of the Ukrainian unrest still uncertain and alternative pipelines still years from completion, returning to the status quo seems both unlikely and increasingly fraught with political conflict.

Second, the EU may prevail and force changes to Gazprom's business practices. This possibility also presents severe risks. With Gazprom avoiding its profit-generating anticompetitive practices, it would have reduced revenues to make the much-needed increases to production efficiency to meet the EU demand.<sup>178</sup> The EU shares Gazprom's incentive to keep the latter profitable and supply the Central and Eastern European member states with natural gas. The Energy Charter Treaty and the Roadmap Agreement have attempted to put in place communication mechanisms to allow for greater cooperation between Russia and EU consumers, but dispute resolution still too often comes in the form of legal arbitration or legal action.<sup>179</sup> The EU's hardline stance on legal matters like

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<sup>178</sup> See generally *Tensions Threaten Long Standing Natural Gas Partnership Between EU and Russia*, OILPRICE.COM (Oct. 7, 2013), <http://oilprice.com/Energy/Natural-Gas/Tensions-Threaten-Long-Standing-Natural-Gas-Partnership-between-EU-and-Russia.html>; SARGSYAN ET AL., *supra* note 83.

<sup>179</sup> See *Tensions Threaten Long Standing Natural Gas Partnership Between EU and Russia*,

the Yukos Oil dispute combined with economic sanctions over the Ukrainian crisis suggest that the EU still perceives this option as a potential outcome. However, given the resource imbalance favoring Russia and the new availability of Chinese markets, the EU's ability to force this outcome seems more remote by the day.

Finally, the EU could find another fuel supplier that would meet its standards and offer fuel in a competitive market. One option for this would be Middle Eastern and Central Asian countries which require pipeline construction to begin large scale trade. The Middle East currently has a marginal share in Europe's import market, especially for petroleum, while Central Asia has proposed and lost bids for pipeline access throughout Europe. If the EU chooses to abandon Russia as its primary import source for energy, it could look to either of these regions to increase their share. Alternatively, Europe could increase its use of American coal exports; however, coal presents its own environmental risks that threaten EU sustainable development goals. Some have suggested that a future solution may be United States entry into the LNG export industry.<sup>180</sup> LNG is natural gas that has been supercooled into a liquid state for transportation through pipelines or shipping.<sup>181</sup> Currently, the leading exporters of LNG are Qatar, Malaysia, Australia, Nigeria, and Indonesia.<sup>182</sup> The United States has become largely self sufficient when it comes to fuel sources for electricity and is poised to become a net exporter of natural gas within the next four to five years.<sup>183</sup> The United States currently maintains an export ban on natural gas, but the U.S. Department of Energy is considering some export licenses which would allow the United States to begin participation in the LNG export industry.<sup>184</sup> For Russia, this would place greater importance on the new Chinese import market for natural gas. With integration of eastern and western pipeline systems scheduled for 2019, Russia would be forced to balance its economic interests in export to both Europe and China with its disinterest in reforming its internal politics and corporate governance.

In the meantime, the EU must find a way to stabilize its relationship with Gazprom and Russia to provide energy security, which the soft commitments of the Roadmap Agreement fail to provide, while bringing

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OILPRICE.COM (Oct. 7, 2013), <http://oilprice.com/Energy/Natural-Gas/Tensions-Threaten-Long-Standing-Natural-Gas-Partnership-between-EU-and-Russia.html>.

<sup>180</sup> RILEY, *supra* note 115, at 4.

<sup>181</sup> *Liquefied Natural Gas*, CHEVRON, <http://www.chevron.com/deliveringenergy/naturalgas/liquefiednaturalgas/> (last updated Apr. 2012).

<sup>182</sup> *World LNG Report – 2013 Edition* 9, INT'L GAS UNION (2013), available at [http://www.igu.org/sites/default/files/node-page-field\\_file/IGU%20-%20World%20LNG%20Report%20-%202013%20Edition.pdf](http://www.igu.org/sites/default/files/node-page-field_file/IGU%20-%20World%20LNG%20Report%20-%202013%20Edition.pdf).

<sup>183</sup> Andrew Callus, *Interview – U.S. Brings Forward Gas Self-Sufficiency Forecast*, REUTERS (Nov. 13, 2012), <http://uk.reuters.com/article/2012/11/13/us-energy-sieminski-idUKL5E8MDCL720121113>.

<sup>184</sup> RILEY, *supra* note 115, at 4.

Gazprom in line with the energy policy the EU has set for the foreseeable future, which the current action against Gazprom is very unlikely to achieve. It is still difficult at this juncture to predict the course of the Russia–EU natural gas trade. What had previously been a stable relationship of necessity owing to resource imbalance and the captivity of both buyer and seller has been thrown into flux. The Ukrainian conflict and the recent legal actions are not the causes of this flux, but rather the result of shifting markets and economic interests. Even without immediately available alternatives to Russian gas, the EU has shown its unwillingness to be completely vulnerable to Russia’s monopoly supplier power, and Russia has countered with alternatives to the EU’s monopsony consumer power. Only time will tell who wins this game of chicken.