The speech of the Secretary General Amb. André Mernier

Brainstorming roundtable on energy

Berlin, 19-20 February 2007

Mr Chairman, It is a great pleasure to be back here in Berlin, and to participate in such a discussion.

In this brief intervention, I would like to focus on the set of questions outlined in the programme for this session:

- How could future interests of both the EU and Russia be defined? And secondly,
- Is there a need for a revised Energy Charter regime?

But before doing so, I would just like to refer to a couple of misunderstandings that have plagued the debate on the Charter over the last year; I firmly believe that, without these misunderstandings, it would be clear that the positions of Russia and EU in relation to the Energy Charter are actually not so distant from one other.

Firstly, on the issue of access to resources. It is often said, and reported, that the Charter would force Russia to open up access to resources to foreign investors. The Energy Charter is based on the idea that international flows of investments and technologies in the energy sector are mutually beneficial, and it does protect investments once they are made. However, each member country is free to decide whether and how its national energy resources are developed, and also the extent to which its energy sector is open to foreign investors. It is simply not the case that the Treaty would force Russia, or any other member country, to provide foreign investors with access to its national energy resources. On the contrary, the Treaty is the only multilateral legal instrument which explicitly affirms national sovereignty over energy resources.

Secondly, on the issue of access to infrastructure. The Treaty does include an obligation on member countries to facilitate international energy transit across their territory, and to ensure the reliability of existing transit flows. This does not imply an absolute ‘freedom of transit', but rather sets out, for the first time, the specific context in which transit should be understood for the energy sector. Moreover, an understanding included as part of the Treaty makes it clear that the Treaty provisions "do not oblige any Contracting Party to introduce mandatory third party access".

As we have seen in the cases of Ukraine last year and Belarus this year, where there are strong disagreements over the conditions for energy supply, it has been the transit of energy to European markets that takes the strain. This has produced temporary disruptions to supply in early 2006 for gas through Ukraine and in early 2007 for oil through Belarus, and also stimulated a broad debate on European security of supply.

These disputes highlighted the importance of Energy Charter principles and the availability of the Treaty's mechanisms for dispute settlement. However, I think that we need to keep a sense of perspective; in my view, these temporary disruptions were a product of the difficult adjustment in Russia's neighbours to higher energy prices for imports from Russia, and should not be seen as indications of any larger systemic crisis. While there is still a need for greater transparency and early information in the handling of such disputes, I do not consider that they give grounds to call into question Russia's reliability as a supplier to European markets.

I should also underline that one of the principles of the Energy Charter is 'market-oriented price formation', and so the changes in pricing policy that Russia and Gazprom are introducing, both for the domestic market and for export markets such as Ukraine and Belarus, are a step in a positive direction.

At the same time, all sides should be interested in an orderly transition to the new price environment, and an open question is the speed at which Russia's neighbours are required to make the adjustment. This is a matter for negotiation between the parties, and it will be helpful in this context to have strong, open dialogue, and - as much as possible - greater transparency on the commercial arrangements.

And so, back to the questions for this session: how could future interests of the EU and Russia be defined, and is there a need for a revised Energy Charter regime? Well, first of all, I think it is important to recognise that the interests of net energy exporters and net energy importers are always likely to diverge: to take an obvious example, the EU is clearly more interested than Russia in lower prices for natural gas. So, in defining future interests, we should not set unrealistic expectations about the degree of convergence that is possible.

At the same time, this does not mean that there is no interest in a common framework for energy relations. Indeed, this is a necessity, but it has to be balanced, based on those principles that are shared by both sides, and based also on the recognition that all parties stand to gain from a reduction of risks along the energy value chain from producer to consumer.

This is the contribution of the Energy Charter. It is a good starting point that the principles of the Charter are recognised by both the EU and Russia, and that both Russia and the EU (and its member states) participate actively in our work. Nonetheless, the distinctive contribution of the Treaty is that these principles are given binding legal form.

It is also important to recognise the difficulties to reproduce this binding legal framework in any other setting:

- In relation to the WTO, Russian membership would of course be welcome, but it would not be a replacement for the Energy Charter. The Charter Treaty addresses specific challenges for the energy sector that are not covered by the WTO, in particular the issue of investment protection and the specific characteristics of energy transit through electricity grids and pipelines.
- Likewise, while a new bilateral legal arrangement between the EU and Russia can reinforce the principles of the Energy Charter, it will be difficult to include -

and impossible to substitute - the most important substantive provisions of the Treaty. There are legal and political problems to reproduce, let alone re-negotiate, the provisions on investment protection and investor-state arbitration; there are logical and conceptual problems in including detailed provisions on transit in a bilateral agreement.

We should also remember that the Energy Charter Treaty has an important degree of inbuilt flexibility. For example, the provisions on investment protection are not uniquely applicable to the upstream sector; they are neutral and apply all along the energy value chain, and are equally capable of protecting Russian investments downstream.

Moreover, the possibility for additional Protocols, Declarations and other non-binding instruments is specifically foreseen in order to deal with new challenges and developments on energy markets. The first and highest priority in this respect should be the finalisation of the draft Energy Charter Protocol on Transit.

But what I think needs to be addressed more urgently are some of the political and policy assumptions around EU-Russia energy cooperation, and I would like to highlight a few of the points that, in my view, are worth considering:

In my view, the EU needs to recognise that ‘regulatory convergence' towards the EU model is not the right starting point for the EU-Russia energy relationship. Relations have to be balanced, and this means occasionally accepting that there are legitimate producer interests that need to be accommodated in the construction of the EU's internal market. It is on this point, where Russia is demandeur, that the negotiations on a Transit Protocol are stuck.

Secondly, both parties need to understand that diversification, whether of export routes or of imports, is not a threat to the EU-Russia energy partnership, but a legitimate policy aim that can enhance international energy security.

Thirdly, I would argue that Russia needs to recognise that there are benefits not only in supporting the common principles of the Energy Charter, but also accepting their binding application and implementation in practice. Russia has much to gain from a binding multilateral framework for energy cooperation.

Fourthly, and although this has been mentioned already, there has to be a greater emphasis on communication and transparency. For example, much of the tension around the dispute with Belarus earlier this year and with Ukraine last year could have been mitigated with better and earlier information.

Finally, Mr Chairman, a historical perspective. The original European Community was built on energy, with the creation of the European Coal and Steel Community as an expression of the shared interest in overcoming previous divisions in Western Europe.

The Energy Charter was created in the 1990s, was also built on energy, and also designed as a means to overcome previous antagonisms on the basis of shared values and interests. I believe that the original vision of the Energy Charter is more valid than ever today, and that it has an important role to play in providing a common

foundation for the future. The representatives around this table must help to ensure that the Charter has the political momentum to play this role in full.