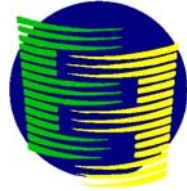


**ATLANTIC COUNCIL OF THE UNITED STATES, WASHINGTON,
D.C**

1ST NOVEMBER 2001



**PRESENTATION BY DR RIA KEMPER, SECRETARY GENERAL,
ENERGY CHARTER SECRETARIAT**

**“PROMOTING AN EAST-WEST ENERGY DIALOGUE –
INTRODUCING THE ENERGY CHARTER”**

Ladies and gentlemen, it is a great honour for me to be invited to address this prestigious forum today. And I should like to begin by expressing my gratitude to our hosts here at the Atlantic Council for their initiative in organizing today’s meeting.

In my presentation, I should like to describe briefly the origins, aims and current activities of the Energy Charter, a process of inter-governmental cooperation on energy issues in which 51 states from Europe and the Asia-Pacific region participate. I shall in particular focus on the contribution being made by the Energy Charter to strengthening security of energy supplies for its member states through the creation of new rules under international law on energy transit flows. Finally, I should like to touch on the question of the Energy Charter’s relevance for the United States, which, as some of you will no doubt be aware, is not a member of our organisation.

I believe that now is a timely moment to discuss these issues with a US audience. As is well known, the report on the US’s national energy policy issued earlier this year by the National Energy Policy Development Group places major emphasis on the importance of the United States’s engagement in international energy cooperation, in order to further its

national energy interests. Consequently, one of my main aims during this visit to Washington is to explore with the US administration whether there are prospects for the US to take a fresh look at the possibility of closer involvement in the work of the Energy Charter – a development which, as I hope to demonstrate, would in my view be fully consistent with the policy objectives set out in the recent US National Energy Policy report.

But firstly, for the benefit of those unfamiliar with our organization, let me explain what the Energy Charter is and what it does:

Ours is an inter-governmental organization, which was set up in the early 1990s following the end of the Cold War. The collapse of communism in eastern Europe presented an unprecedented opportunity to overcome the divisions of the past, by offering the newly independent states of Eastern Europe and the CIS participation in a system of equal and transparent cooperation. And nowhere were the prospects for this cooperation more clear than in the energy sector. Russia and many of its CIS neighbours were rich in energy resources but needed major investments to ensure their development; whilst the states of western Europe had a strategic interest in diversifying their sources of energy supplies, thus reducing their potential dependence on any single area, such as the Middle East. There was therefore a clear need to ensure that a commonly accepted foundation was established for developing energy cooperation between the states of the new post-Cold War community.

It was on the basis of these considerations that the Energy Charter process was born. In 1990, the then Dutch Prime Minister Ruud Lubbers proposed to his EU colleagues that a Charter should be elaborated, setting out the commonly-accepted principles to which all European governments would subscribe in the area of energy cooperation. This initiative was endorsed by the European Council in 1990, and eventually culminated in the signing of the European Energy Charter by all of the states of western, central and eastern Europe, plus the USA, Canada, Japan and Australia, in The Hague in December 1991, on the eve of the final demise of the Soviet Union.

The European Energy Charter is a political declaration of intent regarding international energy cooperation. However, the Charter's Signatories agreed at the time that this declaration represented only a first step, on the basis of which they needed to build further, by developing a legally-binding foundation for their relations in the energy sector.

Thus arose the idea of developing the Energy Charter Treaty, the document that gives legal "flesh" to the bones of the original European Energy Charter. After several years of intensive negotiations, the Treaty was signed in December 1994, and entered into legal force in April 1998. The word "European" was dropped from the title of the Treaty, in recognition of the fact that the Energy Charter process had already acquired a substantial non-European dimension. 51 states, including all of the member states of the EU, plus Russia and the other CIS countries, Japan, Australia and Mongolia, have signed or acceded to the Energy Charter Treaty and are thus members of the Energy Charter Conference, the independent inter-governmental organisation which constitutes the Treaty's governing body. As of today, ratification of the Energy Charter Treaty has been completed by 45 of its 51 Signatory States.

The Treaty enshrines, in a legally-binding form, the key principles of openness, transparency and non-discrimination as the basis for the relations among the Charter's constituents in the energy sector. Its provisions focus on five broad areas of activity:

- the protection of foreign energy investments, based on the extension of national treatment, or most-favoured nation treatment (whichever is more favourable), to nationals of other Signatory states
- trade in energy materials, products and energy-related equipment, based on WTO rules
- freedom and facilitation of energy transit through pipelines and grids

- dispute resolution, where the Treaty envisages the possibility for binding international arbitration in the case of disputes between governments, or between an investor and a host government, and
- energy efficiency - a separate legal instrument has been adopted under the Energy Charter's auspices, called the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, which requires its participating states to formulate clear policy aims for improving energy efficiency and reducing the energy cycle's negative environmental impact (although without imposing the kind of quantitative targets as are included in the UN Kyoto Protocol, for example).

The Treaty's primary objective from the beginning was to assist countries in transition in eastern Europe and the CIS in bringing their domestic legislation governing energy issues into line with internationally accepted norms. In doing so, the aim was to contribute to reducing the perceived risks associated with investments in energy projects in such countries, to stimulate flows of foreign investments into new energy production regions such as the Caspian Sea area, and to consequently promote the greater integration of the countries of such regions into the global economy. The expectation was – and still is – that this, in turn, would also serve the interests of western countries in ensuring diversified sources of supplies of oil and, to a lesser extent, gas, thus reducing the vulnerability of western Europe in particular to price upheavals resulting from potential supply interruptions from other producers or groups of producing states.

I should underline at this point that the Energy Charter is not a lending institution, nor a project-financing body. Our work is focused exclusively on ensuring that the necessary legal climate for stimulating energy investments in economies in transition is put in place, and also on fostering the policy dialogue between governments that is needed in order to promote such a development.

Seven years on from the signing of the Energy Charter Treaty, there are those who have argued that it has failed to justify the expectations originally associated with it. Hopes that the adoption of this binding international agreement would trigger an immediate transformation in the energy sectors of Europe's transition economies, based on enormous inflows of foreign capital, have faded, as more and more companies have confronted the harsh realities of the present business environment in many ex-Soviet republics. And critics also point to the fact that Russia, which has a pivotal role to play in the future of European and global energy cooperation, has still not ratified the Treaty, seven years after signing it in 1994.

My view is a different one. The Energy Charter Treaty should, I believe, be seen as part of a long-term undertaking by the international community to consolidate the rule of law in the newly emerged democracies of the post-Soviet era. Taking this long-term perspective, one can regard the Treaty as a landmark on the road to the ultimate creation of a genuinely open and non-discriminatory energy market among the Energy Charter's member states. It is true that the pace of transformation in many post-communist societies has not fully justified the optimistic forecasts of the early post-Cold War period. But this, in my view, only makes it more important for governments to maintain their focus on promoting adherence to the rule of law and to commonly accepted international standards of behaviour, as the best means of ensuring that such transformation is eventually accomplished.

In the area of energy policy, it remains the case that the Energy Charter Treaty represents the bench-mark of internationally-accepted legal standards to which CIS states have signed up. It is therefore essential that the international community continues to emphasise the need to strive to fulfill these standards. In the case of Russia, this, of course, means ensuring that the Treaty is ratified by the State Duma as a first essential step.

A constant focus is also required from governments on ensuring that the Energy Charter Treaty's provisions are implemented in practice. Following entry into force of the

Treaty, this task has become the main priority of the Energy Charter process. Our work is conducted mainly through an ongoing process of monitoring and reviews, assessing the extent to which Signatory States, in particular those with economies in transition, are succeeding in practice in bringing their domestic legislation into line with the standard of non-discrimination towards foreign investors established in the Treaty. By reviewing progress made, and formulating recommendations where appropriate to countries concerning possible improvements to their energy legislation, the Energy Charter is contributing in substance to the goal of creating the right investment climate for international energy companies, in particular in the CIS region. Although no-one underestimates the difficulties associated with achieving full implementation of the Treaty's non-discriminatory investment provisions, the very fact that governments use the Energy Charter to work collectively towards this aim is, I believe, important in itself.

But the Energy Charter is not just about the legal protection of foreign investments. One of the other key aspects of the Energy Charter Treaty is its coverage of energy transit issues. Under Article 7 of the Treaty, Signatory states are obliged to facilitate the transit of energy on a non-discriminatory basis; to promote the modernisation, development and operation of inter-regional transport facilities; and to co-operate in order to mitigate the effects of interruptions in energy supply.

The importance of energy transit as a political issue has increased greatly over the last decade, following the division of the previously unified Soviet pipeline system among various national jurisdictions, and the appearance of new producer states in the Caspian region with no direct access to world markets. At the other end of the supply chain, in the consumer states of western Europe which increasingly rely on imports of oil and gas, there has also been a growing realization of the need to ensure that a clearer international legal regime on energy transit is established, in order to bolster Europe's security of supply.

Given these considerations, and taking into account the breadth of the Energy Charter's geographical coverage, stretching across the whole of Europe and the CIS region, our

member countries felt that our organization represented a particularly appropriate forum within which to develop a new set of binding rules on transit. As a result, negotiations were launched in early 2000 on a legally-binding Energy Charter Protocol on Transit, with the aim of elaborating an enhanced set of rules under international law governing energy transit flows, based on the existing provisions of the Energy Charter Treaty.

Negotiations on the Transit Protocol are now entering their final stage. It is our intention to complete the Transit Protocol by the end of this year, following which it will be open for signature by all of the Energy Charter's 51 member states.

As in any set of multilateral negotiations, the picture can change rapidly. It is therefore not possible, as of today, to forecast exactly the Protocol's final content: this will ultimately be determined by our member states through the concluding round of negotiations, and will have to reflect a fair balance between the sometimes very divergent interests of the countries involved – some of whom are purely “transit” states, some of whom are purely producers, whilst others – Russia, for example – have a direct interest in transit issues both as a producer and as a transit state.

Notwithstanding this caveat, I should like briefly to outline the main obligations on states that are currently under discussion as part of the Transit Protocol negotiations, and on which a consensus is emerging. These are:

- to ensure that energy flows passing through their territory in transit are not interrupted - an issue that, as is well known, is of particular interest to certain companies involved in exporting gas from the CIS region to Europe;
- to define in legal terms the concept of “available capacity” for energy transit shipments, to ensure that access to such available capacity is granted on a transparent and non-discriminatory basis, and that negotiations over such access are conducted in good faith - although it should be underlined that this will not

entail an obligation to provide mandatory Third Party Access to pipeline systems, either in the CIS region or elsewhere in the Energy Charter's constituency;

- to ensure that tariffs charged for energy in transit are objective, reasonable and non-discriminatory;
- and to ensure that due consideration is given to the energy supply needs of transit countries themselves.

I believe that this Transit Protocol, once finalized and adopted, will make an important contribution to creating a more stable and predictable legal environment for investments in energy projects involving exports reliant on transit through the CIS region. This will be good for the countries of that region, in terms of increasing their attractiveness for foreign investments; for the international energy companies looking at investment opportunities in such countries, in terms of reducing the perceived level of risks; and for the consumer states of the west that have a clear interest in diversifying their sources of energy supplies.

It is important to stress that the Energy Charter comprises not only an international Treaty, although that is indeed the main foundation for our work, but also a dynamic framework for multilateral energy cooperation. On the basis of the Treaty, an inter-governmental process has been established within which countries review each other's progress in developing appropriate policies on energy investments; develop collectively new rules on energy transit, designed to strengthen the rule of law in this area; and, importantly, conduct an ongoing dialogue with each other on the key challenges facing policy-makers throughout our constituency – how to restructure domestic energy markets, how to promote energy efficiency strategies, how to encourage greater regional trade in electricity, and so on.

It is, perhaps, this aspect of the Energy Charter's role, as a policy forum within which governments of leading OECD states and transition economies can share views and

experiences on energy issues, which is its greatest asset. And it is precisely the prospect of engaging in this multilateral policy dialogue that is attractive for several states who are presently not members of the Energy Charter, but who are considering the possibility of joining our organization. Among these I would mention Morocco, Tunisia, Iran, and in particular the People's Republic of China, which over the last year has shown a growing interest in the potential of the Energy Charter as a forum for energy dialogue with its neighbours in north-east and central Asia.

This leads me, Chairman, to the position of the United States regarding the Energy Charter. I am often asked on my travels to our member states why the US does not participate in our work. And I see this as a perfectly legitimate question. After all, as I have outlined, ours is an organization devoted to promoting the rule of law, non-discrimination and transparency as the basis for cooperation among states on energy issues, and to fostering dialogue and exchanges between governments in key areas of energy policy. As the world's largest consumer of energy, and also as a country whose companies are among the leading global investors in energy projects, it would seem evident that the US should have a strong interest in being involved in the work of such an organization.

This conclusion is strengthened still further when one looks at the section of the recent US National Energy Policy report concerning the US's international relationships. Among the recommendations included in this section are that the US should work towards the creation of a more stable and transparent business climate for energy projects in the Caspian region, and in particular in Russia. The report also recommends that the US make active use of its membership in multilateral organizations such as the OECD, the WTO and APEC, in order to reduce barriers to international energy trade and investments.

The Energy Charter is not mentioned in the list of multilateral organizations given in this section of the report, although, as I have outlined above, the activities of the Energy Charter are directed towards achieving precisely the same policy goals as those outlined

in the report, in terms of improving the business and investment climate in Russia and the CIS region.

So why is the US not more actively involved in the Energy Charter process? Naturally, I cannot answer for the US administration on this question. I can only recall the historical facts, as I am aware of them. These are as follows:

The US signed the original European Energy Charter in 1991, and was actively involved in negotiations on the Energy Charter Treaty right up until the end of 1994. However, the US eventually decided not to sign the Treaty. By virtue of having signed the original Charter in 1991, the US nonetheless enjoys Observer status within the Energy Charter process, which entitles it to participate in all of our organisation's Working Groups and, if it so wishes, in the negotiation of new documents under the Charter's auspices.

The reasons for the US decision not to sign the Energy Charter Treaty, as they have in the past been explained to me, concern primarily three issues: that the Treaty's provisions on protection of investments are not as strong as those contained in the US's bilateral agreements; that there is a potential conflict between the Treaty's unconditional provisions on most-favoured nation treatment and the Jackson-Vanik Amendment to the 1970 US Trade Act; and that there would be difficulties in ensuring that the Treaty's provisions are implemented at sub-federal level.

It is, of course, the prerogative of the US administration to determine its own position in these matters, and I do not therefore propose to debate these considerations here – although I hope to have an opportunity to discuss them more fully with the administration during my visit.

What I would, however, like to underline is the following point: **the US can play a more active role in the Energy Charter, if it so wishes, without acceding to the Energy Charter Treaty.** There are several options available for this, but, first and

foremost, a more active usage of the US's present Observer status in our organization could be a good starting point.

I emphasise this because there is no doubt that the Energy Charter would very much welcome a more active US presence in our work. Greater input from the US would, unquestionably, add considerable political weight to the Energy Charter's efforts to strengthen the rule of law as the basis of international energy cooperation. Equally, I believe that more active US support for the Energy Charter would be entirely consistent with the US's own policy objectives in terms of promoting good governance and investor-friendly practices in the republics of the former USSR. The Energy Charter is the broadest multilateral forum available within which to engage the governments of these countries in a policy dialogue on issues relating to the legal climate for foreign energy investors.

The fundamental "raison d'être" of the Energy Charter is to promote energy security, and therefore economic security more generally, at an international level. As is well known, the US is already fully engaged in other multilateral bodies that seek to strengthen economic security in the Eurasian continent, including the OECD, the Economic dimension of the OSCE, and the relevant institutions of the UN.

I therefore hope that, even though the US position towards the Energy Charter was not addressed in the recent National Energy Policy report, there is nonetheless still a window of opportunity available for the administration to give fuller consideration to closer US participation in our activities. I am pleased to note that this possibility has already been advocated by some analysts as part of the debate over the future of the US's energy policy. In particular, I would mention the report on "Strategic Energy Policy Challenges for the 21st Century", issued in April this year by an Independent Task Force of the Council for Foreign Relations and Rice University, which concluded that "Energy Charter puts in place exactly the genre of rules the United States should want to seek".

2001 marks the tenth anniversary of the foundation of the Energy Charter. It would be highly welcome if we were able to celebrate this occasion with a policy initiative to re-launch an active trans-Atlantic dimension to the work of our organisation.

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