



LE GOUVERNEMENT
DU GRAND-DUCHÉ DE LUXEMBOURG
Ministère de l'Énergie et de
l'Aménagement du territoire

Le Ministre

Luxembourg, the 5th February 2021

To the attention of the Executive Vice-President, Mr Timmermans,
and Commissioner Kadri Simson
European Commission
Le Berlaymont
Rue de la Loi, 200

ENERGY CHARTER TREATY MODERNIZATION PROCESS: DEFINITION OF ECONOMIC ACTIVITIES TO
TERMINATE INVESTMENT PROTECTION IN FOSSIL FUELS

Dear Executive Vice-President Timmermans,
Dear Commissioner Simson,

I would like to draw your attention to the ongoing revision of the Energy Charter Treaty (ECT) and in particular to the definition of “economic activities” covered by this treaty. Ambition on this matter is not only needed for some EU Member States but for all the EU. Any exception or attempt to slow down to the termination of phasing out of fossil fuels investment protection under the ECT will limit EU governments to take decisions in the direction of energy transition and reduction of CO2 emissions (and in the same time, their right to define their own energy mix). Recently, an Australian coal company¹ used the ECT to enter into arbitration against an EU Member State because of a decision of closing coal mines. The same is happening in another EU Member State with a complaint against its decision to phase-out coal.

I acknowledge and respect the different level of ambition of Member States towards renewable energy and energy efficiency related to different starting points, geographical situations,

¹ Australia is a contracting party of the Charter Treaty.



capacities, GDP and national circumstances as I naturally recognize the right for Member States to define their own energy mix as enshrined in the Lisbon Treaty.

However, the lack of ambition in the definition of economic sectors in the ECT will give more time for investors to claims for millions/billions of indemnities for phasing out fossil energies and jeopardize the pace of our common road for climate neutrality by 2050 and to achieve at least 55% greenhouse gas emission reduction in 2030. No EU countries will be out of that danger. All EU Member States are here on the same boat.

I am not convinced by the strategy of the Commission to present a weak proposal with the argument that it would already be hardly acceptable for non-EU contracting parties. Japan has recently committed to 2050 climate neutrality while Caucasus countries are working hard to develop renewables and energy efficiency policy with the support of the EU. Let's also remember that all ECT contracting parties have signed and ratified the Paris Agreement.²

I do not believe that leaving the ECT is the right starting point. The EU is the founder of the ECT (Dutch PM Ruud Lubbers initiative) and represents a major force with 27 EU countries among 54 contracting parties, making 65 % of the ECT Secretariat budget. An EU withdrawal would be seen as: a) a major EU diplomatic failure, b) a step back in the climate ambition just months before the Glasgow COP 26.

I also doubt how a full EU withdrawal would be legally and technically feasible while keeping EU safe and immune of the 20 years sunset clause of the ECT. The ECT is not an intra-EU agreement but an international one. Leaving the ECT (even combined with a so-called *per se* agreement not to apply the sunset clause to intra-EU cases) would nevertheless keep it alive, offering a 100 % fossil fuel investments protection to all 27 non-EU remaining contracting parties. Legal loopholes coming from creative law firms will break what is imagined by some as a legally sound and safe shelter from the 20 years sunset clause. Leaving the ECT may only be a last resort option, not a starting point to enter the modernization negotiation.

² With the exception of Turkey (not yet ratified but on the way to do it soon).



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For all the above mentions reasons, Mr Executive Vice-President, Ms Commissioner, I urgently call you and the Council to support a more ambitious starting point in the negotiations related to the definition of economic activities, in the interest of the EU and beyond, in the interest of humanity and the planet.

Highest considerations,

Cc: EU Energy Ministers

CC : Ms Ditte Juul-Joergensen, DG, DG Energy

CC: Ms Cristina Lobillo, Director, DG Energy

CC: PT Presidency

Claude Turmes
Minister of Energy