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WORKING PAPER

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CONTRIBUTION

From:	General Secretariat of the Council
To:	Working Party on Energy
Subject:	BE comments on the Energy Charter Treaty Modernisation: Draft EU proposal

Delegations will find in annex the BE comments on the Energy Charter Treaty Modernisation: Draft EU proposal.

Comments of the Kingdom of Belgium on the draft EU text proposal on the Energy Charter Treaty (ECT) modernisation
11/03/2020

Belgium thanks the Commission for the draft EU text proposal on the Energy Charter Treaty (ECT) modernisation. Belgium supports the modernisation process of the ECT and would like to make the following comments.

General comments

- Belgium regrets the very short deadline given to the Member States to send their comments on the draft EU text proposal. Belgium hopes this working method will not constitute a precedent for the further process of modernisation.
- Belgium welcomes the foreseen publication of the EU text proposal on the Energy Charter Treaty ECT modernisation, once finalized and agreed at EU level, in line with the current EU practice.
- Belgium takes the view that a particular attention should be given to the communication accompanying this publication. It should be clearly stated that this text proposal is not comprehensive and will be completed along the negotiations process.
- With regard to TSD, Belgium takes the view that the EU and its Member States should finalize their TSD proposal (including both the substantive provisions and the dispute settlement provisions) for the ECT modernisation before submitting (part of) it to the negotiating parties. Belgium believes that the EU text proposal should only contain wording on the topics discussed during the April negotiating round. Therefore we suggest to delete the TSD text proposals for now.

Annex – Draft EU text proposals for the modernisation of the ECT

Preamble

- Belgium welcomes the reference in the preamble to the principle articulated in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.

Definition of investment (article 1 paragraph 6)

- Belgium would suggest using the same definition as the one used in CETA, as Belgium prefers the particular focus on the “certain duration” as a key characteristic of an investment.

Right to regulate

- Belgium welcomes the inclusion of a new article on regulatory measures and the explicit mention of the environment including climate change in the examples of legitimate policy objectives.

Sustainable development and Corporate Social Responsibility ('CSR')

- Belgium is convinced that the Modernised ECT should include provisions on sustainable development, including on climate change and clean energy transition, in line with recently concluded agreements and EU positions in ongoing negotiations.
- Belgium therefore welcomes the introduction of new articles on this topic in the ECT modernisation.

On the process

- While Belgium wishes to share remarks and suggestions with the Commission on the content of these new articles, Belgium believes they should not be included in the first EU text proposal on the Energy Charter Treaty ECT modernisation to be submitted to the ECT contracting parties (and subsequently published on DG Trade Website) by the 24th March. Belgium takes the view that the EU and its Member States should finalize their

TSD proposals (including both the substantive provisions and the dispute settlement provisions) for the ECT modernisation before submitting (part of) it to the negotiating parties. Since the envisaged dispute settlement provisions have not been proposed by the Commission yet and since TSD will not be discussed during the April negotiations round, Belgium would like to postpone the submission by the EU and its Member States of any TSD-related provision and include them in the next EU text proposals that will be submitted ahead of the July negotiations round.

- Belgium is very keen on receiving more information from the Commission on the envisaged dispute settlement provisions as soon as possible. Belgium attaches importance to the effective enforcement of TSD provisions.

On the content of the proposed substantive TSD provisions

- Non regression clause (new article on "right to regulate and levels of protection", paragraph 3): Belgium would suggest using a more ambitious language, similar to the one agreed in the Economic Partnership Agreement with Japan, by replacing "recognise that it is inappropriate" by "shall not".
- New article on "Multilateral environmental agreements and labour conventions" : Belgium would like to include a best endeavour commitment ("continued and sustained efforts on their own initiative") to ratify the ILO fundamental conventions, as agreed in the Economic Partnership Agreement with Japan.
- New article on Impact assessment : Belgium welcomes the inclusion of this article and would like to receive more information from the Commission on the meaning of "appropriate time period" in paragraph 3.

Dispute Settlement

- Belgium welcomes the draft EU text proposal on dispute settlement topics that have been identified in the list of items for modernisation, in particular the inclusion of the new articles on transparency, intervention by third parties and third party funding. Since the aim is to reflect the EU approach in its investment protection agreements and the position taken by the EU in UNCITRAL WG III and ICSID, in the Modernised ECT, Belgium would support the inclusion of a disclaimer stating that proposed provisions are without prejudice to the overall policy of the European Union and its Member States regarding the systemic reform of investor-to-State dispute settlement through bilateral Investment Court Systems (ICS) and, in the longer term, a permanent multilateral investment court.
- Belgium regrets the absence of a proposed article ensuring that ongoing multilateral reforms of investor-to-state dispute settlement, such as those within UNCITRAL WG III and ICSID, will be applied to the ECT. Belgium would support the inclusion of a *rendezvous clause*.