

ELGAR COMMENTARIES

COMMENTARY ON THE ENERGY CHARTER TREATY

Second Edition



Edited by
Rafael Leal-Arcas



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ARTICLE 23

OBSERVANCE BY SUB-NATIONAL AUTHORITIES¹

Contributions by Costantino Grasso and Sara Almeshari

- (1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.
- (2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.

COMMENTARY

Costantino Grasso

- 23.01** While Article 22 enshrines a principle of responsibility for the participating countries in the case of state-owned enterprises, Article 23 establishes a criterion of attribution of liability in relation to regional or subregional authorities.
- 23.02** In particular, Article 23 deals with such territorial entities specifying that each Member State has to ensure that they act in accordance with the treaty. Such a duty implicitly implies that where a regional or local authority violates the rules set out by the Energy Charter Treaty (ECT), the Member State that exerts control over it shall be deemed responsible for those activities.
- 23.03** It is interesting to note that, during the negotiation process, the text of Article 23 was substantially modified. In its original version (at the time the provision was included in Art 26) the rule was structured as follows:

¹ See Final Act of the European Energy Charter Conference, Understanding 14 with respect to Arts 22 and 23.

Each Contracting Party shall take all measures available to it within its constitution to ensure observance of the provisions of this Agreement by the regional and local governments and other governmental authorities within its Domain.²

In particular, it appears that the original reference to ‘all measures available to [the state] within its constitution’ was abandoned not only to avoid giving Contracting Parties the possibility of using domestic legal sources as a way to circumvent the treaty but also because of the almost insurmountable difficulties that such a rule would have generated during settlement procedures. Suffice here to highlight the extraordinary diversity of the traditions of the various Contracting Parties as well as the extreme complexity that an arbitral tribunal would have faced to interpret the specific constitutional and administrative rules under its scrutiny. As a result, it makes sense that the final version of Article 23 included a reference to ‘**reasonable measures as may be available to** [the state]’, which although vague and generic, avoids the above-mentioned complexities through the adoption of a more equitable approach. 23.04

Not surprisingly, the provisions of this article proved to be particularly controversial. 23.05 It is emblematic that, from the comments included in the ECT draft of 20 December 1993, it emerges that during the discussion no agreement was reached on the text in not one of the first six versions.³ Specifically, while some delegations expressed the view that it was opportune to adopt the text that was selected for the GATT during the Uruguay Round negotiations, the US opted to revert to this article only after the overall balance of the ECT was clarified.⁴ It was not until the seventh draft of 17 March 1994 that the text of the article was eventually elaborated as it is in its final version.⁵

Article 23 enshrines the concept that all provisions of the ECT have to be observed by subnational authorities, with the consequence that, in the case of violations committed by those authorities, a Contracting Party may invoke the dispute settlement provisions of Parts II, IV and V of the ECT.⁶ This is expressly provided by Article 23(2). 23.06

This provision assumes particular importance in relation to the roles of the regions within the EU. Although generally speaking a region can be easily defined as a 23.07

² See European Energy Charter. ‘Draft Treaty’, 15 March 1993, Art 26. <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/15_-_ECT_1__15.03.93_.pdf> accessed 4 July 2018.

³ See European Energy Charter. ‘Draft Treaty’, 20 December 1993, Art 26. <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/20_-_ECT_6__20.12.93_.pdf> accessed 4 July 2018.

⁴ See European Energy Charter. ‘Draft Treaty’, 1 June 1993, Art 26. <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/17_-_ECT_3__01.06.93_.pdf> accessed 4 July 2018.

⁵ See European Energy Charter. ‘Draft Treaty’, 17 March 1994, Art 26. <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/17_-_ECT_3__01.06.93_.pdf> accessed 4 July 2018.

⁶ See Thomas Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Wolters Kluwer, 1996), p. 488.

territorial entity, both the terms 'region' and 'territory' bear a variety of meanings in the different historical traditions of the European states. It is not surprising that, from a judicial, political or administrative perspective, Europe does not possess a uniform level of regional government.⁷ Due to the fact that Article 23 expressly mentions the concept of '**regional government**', it appears clear that it refers to regions focusing on their institutional dimension instead of their social, political and economic one. From this perspective, regions have to be considered as an institutional system, either in the form of a regional government or as a group of institutions operating on a determined territory.⁸ In particular, it is possible to define the concept of regional government as any institution that works at an intermediary level between the state and municipal government.⁹ The adoption of such a broad notion can be useful to allow the variety of different regional institutions that can be identified, for example within the European context, to fall within the scope of Article 23. As a matter of fact, different types of regional authorities can be identified in Europe. Suffice here to mention the metropolitan regions established around large cities, the provincial regions resulting from the division of the entire state into large provinces, and the smaller regions generated as 'leftovers' after the establishment of larger neighbouring regions.¹⁰ The Nomenclature of Territorial Units for Statistics (NUTS) system used by the European Commission, which represents a heterogeneous aggregation of national administrative units, is emblematic of the difficulties of adopting a commonly shared legal definition of '**regional authority**' applicable to all Contracting Parties. The NUTS system categorises regions within three broad groups from NUTS level 1 to NUTS level 3 and allocates regions among them utilising quite vague criteria: NUTS level 1 includes 'major socio-economic regions' such as East of England and Southern Italy; NUTS level 2 includes 'basic regions for the application of regional policies' like Essex and Campania; NUTS level 3 includes 'small regions for specific diagnoses' such as West Essex and Napoli. As of 1 January 2015, the NUTS classification lists 98 regions at NUTS level 1, 276 regions at NUTS level 2 and 1,342 regions at NUTS level 3.¹¹

23.08 The lowest level of local authorities is represented by municipalities. Although they are territorially speaking the smallest in size, they play a significant role in relation to the business operations carried out under the rules of the ECT for at least two reasons.

7 See Michael Keating, 'Is there a Regional Level of Government in Europe?' in Patrick Le Galès and Christian Lequesne (eds), *Regions in Europe: The Paradox of Power* (Routledge, 1998), p. 11.

8 Ibid.

9 Ibid., at p. 19.

10 Ibid.

11 See European Commission - Eurostat, 'NUTS - Nomenclature of Territorial Units for Statistics'. <<http://ec.europa.eu/eurostat/wcb/nuts>> accessed 4 July 2018.

First, a specific area of cooperation that serves the general purpose of improving energy efficiency within the Contracting Countries expressly includes municipalities and local community services such as district heating systems, gas distribution systems, energy planning activities, and energy management in public buildings.¹² 23.09

Secondly, due to the fact that municipalities are the closest authorities to the citizens, they incarnate the crucial principle of subsidiarity. Under the principle of subsidiarity, as defined by Article 5 of the Treaty on the EU, it should be ensured that decisions are taken as closely as possible to the citizens and that constant checks are made to verify that action at supranational level is justified in light of the possibilities available at national, regional or local level.¹³ 23.10

Although from an administrative point of view there are differences in the way that local authorities are regulated, it is possible to identify three common features shared by local governments at least within the EU Member States: the political bodies in each municipality are chosen by democratic election; there is an identifiable political leader who leads the local authority (usually, but not always, defined as the mayor); there is at least one executive officer, whose primary role is to manage, coordinate and supervise government organisation, advise politicians and ensure public resources are used rationally, efficiently and in accordance with the law.¹⁴ 23.11

As the Council of European Municipalities and Regions¹⁵ has emphasised, the EU motto ‘United in diversity’ could not better reflect the wide range of municipalities and other larger subnational authorities existing in Europe and the different ways in which they run and develop their communities and territories.¹⁶ In the European continent, the number of municipalities varies from country to country from the 23 municipalities of Montenegro¹⁷ to the 36,658 municipalities of France.¹⁸ At the same time, their competences differ among the different countries. For instance, while in some countries like Cyprus they have only a handful of competences such as urban 23.12

¹² See Wälde, *supra* note 6, p. 543.

¹³ See European Union, EU law and publications, Eur-Lex. ‘Subsidiarity’. <<http://eur-lex.europa.eu/summary/glossary/subsidiarity.html>>.

¹⁴ See Xavier Bertrana Horta and Mariona Tomas Fornes, ‘Systems of Local Government in Europe and Their Chief Executive Officers’. *Diputació Barcelona Xarxa de Municipis*, p. 6.

¹⁵ The Council of European Municipalities and Regions (CEMR) is the oldest and broadest European association of local and regional governments. Since its creation in 1951, CEMR promotes the construction of a united, peaceful and democratic Europe founded on local self-government, respect for the principle of subsidiarity and the participation of citizens. See Council of European Municipalities and Regions. ‘Introducing CEMR’. <http://www.ccre.org/en/article/introducing_cemr> accessed 4 July 2018.

¹⁶ See the Council of European Municipalities and Regions. ‘Local and Regional Government in Europe – Structures and Competences’, at p. 1. <http://www.ccre.org/docs/Local_and_Regional_Government_in_Europe.EN.pdf> accessed 4 July 2018.

¹⁷ *Ibid.*, at p. 2.

¹⁸ *Ibid.*

planning, protection of the environment, water supply, land development and household refuse,¹⁹ in other countries, like Finland, they have a wide range of competences which expressly include building and maintenance of technical infrastructure in the energy sector.²⁰

- 23.13 Having said that, it is not surprising that Article 23, instead of offering a precise definition of subnational authorities, has opted for a generic reference to **'regional and local governments and authorities'**, which may include all the different types of existing local authorities irrespective of the administrative organisation that each Contracting Party has developed.
- 23.14 Under international trade law, the rule set out by Article 23 does not represent a distinctive trait of the sole ECT. The same principle included in the ECT has also been adopted within the General Agreement on Tariffs and Trade framework (GATT) of 1994.²¹ As a matter of fact, the wording of Article 23 resembles the one used by the Understanding on the Interpretation of Article XXIV of GATT 1994. Paragraph 13 of the General Agreement on Tariffs and Trade provides that each member is fully responsible for the observance of all provisions and shall 'ensure such observance by regional and local governments and authorities within its territory'.²² The ensuing paragraph 14 also specifies that the rules related to 'Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member'.²³
- 23.15 The WTO provisions are particularly relevant in relation to the case of trade in energy materials and products²⁴ and energy-related equipment²⁵ between Contracting Parties where at least one of them is not a member of the WTO. On such occasions, as established by Article 29 of the ECT, the provisions of the WTO Agreement shall be applied. In particular, Understanding No. 14 included in the Final Act of the ECT

19 Ibid., at p. 19.

20 Ibid., at p. 26.

21 The original General Agreement on Tariffs and Trade (GATT) was signed in April 1947 in Geneva. After several rounds, the agreement was updated in 1994. The most significant change that was included in GATT 1994 was the creation of the World Trade Organization (WTO), which was established in 1994 by the Marrakesh Agreement and came into existence in 1995. See Rafael Leal-Arcas, Costantino Grasso and Juan Alemany Ríos, *Energy Security, Trade and the EU: Regional and International Perspectives* (Edward Elgar, 2016) p. 55.

22 See General Agreement on Tariffs and Trade 1994, Part III, Article XXIV, C. Understanding on the Interpretation, at para 13. <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm> accessed 4 July 2018.

23 Ibid., at para 14.

24 A list of energy materials and products is included in Annex EM I107 to the ECT. Such a list includes: nuclear energy, coal, natural gas, petroleum and petroleum products, electrical energy, and other energy sources like fuel wood and wood charcoal.

25 A list of energy-related equipment is included in Annex EQ I to the ECT.

has clarified that, for the cases that fall under the provision of Article 29, Article XXIV(12) GATT will apply instead of Article 23 of the ECT.

Moreover, it has to be emphasised that a cornerstone of the ECT trade regime is represented by the non-derogation from WTO rules.²⁶ In particular, WTO Members could express a preference for WTO rules when enacting different treaties.²⁷ Such a choice has been made within the ECT legal framework by Article 4 that provides a non-derogation from WTO Agreement clause, which establishes that: 'Nothing in this Treaty shall derogate, as between particular Contracting Parties which are members of the WTO, from the provisions of the WTO Agreement as they are applied between those Contracting Parties'. As a result, for trade among parties to the GATT, Article 4 of the ECT safeguards the continued applicability of the provisions included in the General Agreement on Tariffs and Trade framework, and in practice generates the same legal effects achieved for non-parties to the GATT by the above-mentioned Understanding No. 14.²⁸ 23.16

COMMENTARY

Sara Almeshari

The EU and its Member States began a modernisation process in November 2018 in response to growing legal and political concerns regarding the ECT, focusing on investment protection standards, limiting the protection given to fossil fuels, and promoting sustainable development. On 27 November 2018, the Energy Charter Conference approved the list of modernisation topics, and on 5 December, the Council tasked the Commissariat with drafting a report on the modernisation process. To address the issue of the definition of economic activity in the energy sector, popularly known as the fossil-fuel carve-out, the EU submitted a supplemental proposal to the Energy Charter Secretariat on 15 February 2021.²⁹ 23.17

On 24 June 2022, the parties established a preliminary understanding regarding the modernisation of the ECT; changes to the Treaty's investment protection criteria and a mention of nations' rights to adopt regulatory measures for environmental protection or climate action are included.³⁰ 23.18

²⁶ See Yulia Selivanova, 'The Energy Charter and the International Energy Governance', in Yulia Selivanova (ed.), *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter* (Wolters Kluwer, 2011), p. 376.

²⁷ See Joost Pauwelyn, 'The Application of Non-WTO Rules of International Law in WTO Dispute Settlement', in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, 2007), p. 1419.

²⁸ See Wälde, *supra* note 6, p. 488.

²⁹ 'European Parliament Resolution of 24 November 2022 on the Outcome of the Modernisation of the Energy Charter Treaty European Parliament Resolution of 24 November 2022 on the Outcome of the Modernisation of the Energy Charter: Treaty'. <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html> accessed 16 May 2023

³⁰ *Ibid.*

- 23.19 It is less transparent than other EU trade and investment agreements because the official publication of the completed agreement's legal language has not yet taken place.³¹
- 23.20 Germany, France, Spain, the Netherlands, Poland, Slovenia and Luxembourg, which together account for more than 70% of the population of the EU, have declared their intention to leave the ECT after the end of negotiations; Italy left the ECT in 2016, and other Member States are still considering the possibility of leaving the ECT. In order for the modernisation of the ECT to be adopted at the Energy Charter Conference in November 2022, the Council needed to reach a qualified majority in favour of it. As a result, the modernisation was taken off the conference's agenda.³²
- 23.21 The number of EU Member States that are ECT contracting parties gives the EU a number of votes, but those Member States can only use their votes if the EU abstains from doing so. Ratification by those EU Member States that are ECT contracting parties must be done in accordance with their respective national ratification laws and the division of responsibilities between the EU and the Member States.
- 23.22 Before the EU could begin provisionally administering the modernised treaty, Parliament would have to approve the ECT modernisation, in accordance with the Commission's political guidelines; however, Parliament would have to approve the EU's withdrawal from the ECT.³³
- 23.23 The ECT is the most litigated of all investment protection agreements, wherein there are currently more than 40 intra-EU investment arbitration cases pending, wherein an alarming number of investment claims target environmental measures, where various nations, including Member States, are being sued in relation to climate or just transition policies, and wherein, as of 1 June 2022, the Energy Charter Secretariat estimates that at least 150 investment arbitration cases will be pending. Because it allows investment tribunals to interpret and apply EU law without introducing the necessary safeguards to preserve the EU's regulatory autonomy and because it has a negative effect on how EU institutions function within the EU's constitutional framework, the ECT is currently incompatible with the EU Treaties.³⁴
- 23.24 In its judgment of 6 March 2018 in Case C-284/16 (preliminary ruling on *Slovak Republic v. Achmea BV*)³⁵, the CJEU determined that investor-state arbitration clauses in international agreements concluded between EU Member States are contrary to the

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

35 Case C-284/16 *Slowakische Republik v. Achmea BV*. <<https://curia.europa.eu/juris/document/document.jsf?jsessionid=-2A32DB8C8D8AC8240EF3AB73198E03DF?text=&docid=205702&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=321763>> accessed 7 June 2023.

EU Treaties and, as a result, cannot be applied after the date on which the last of the parties to an intra-EU BIT became an EU Member State, while applying the same principles, in its judgment of 2 September 2021 in case C-2.

Since the implementation of the Treaty of Lisbon,³⁶ the EU has changed its investment protection model, and decided to replace ISDS with the investment court system, started talks to establish a multilateral investment court (MIC), adopted legislation to control foreign subsidies that distort the internal market, and adopted legislation for the screening of investment projects, all with the encouragement and support of the European Parliament. 23.25

The EU is in favour of the creation of the MIC and the ongoing UNCITRAL Working Group III negotiations and: 23.26

1. Considers the current ECT to be an outmoded instrument that no longer serves the interests of the European Union, particularly in light of the goal to become climate neutral by 2050; and recognises that the ECT has received significant criticism as a barrier to the transition to renewable energy and to the protection of energy security in the EU and its Member States;³⁷
2. Applauds the efforts of the EU and its Member States to drive the modernisation of the ECT; commends the Commission's efforts to align the ECT with the mandate it received from the Council in order to preserve the EU's ability to develop public policy measures consistent with the Paris Agreement, the objectives of the European Green Deal and the priorities of the European Parliament;³⁸
3. Recognises that the modernised ECT was negotiated in response to a persistent demand from EU Member States starting in November 2018; and stresses that changes to the ECT require a unanimous approval from all parties to the contract at the annual ECT meeting;³⁹
4. Reiterates its concern that many contracting parties, including high-income industrialised nations, do not appear to share the EU's ambitions for modernising the ECT, mitigating climate change, promoting sustainable development and supporting the energy transition, despite the fact that they are all signatories to the Paris Agreement;⁴⁰
5. Underlines that the final text of the modernised ECT integrates elements of the negotiating mandate given to the Commission; is not aligned with the Paris Agreement, the EU Climate Law or the objectives of the European Green Deal; is not in line with the objectives laid down by Parliament in its resolution of 23 June 2022 on the future of EU international investment policy, including, most notably, the immediate prohibition of fossil-fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels, in line with their international commitments, the significant shortening of the

³⁶ 'The Treaty of Lisbon'. <<https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon#:~:text=The%20Treaty%20of%20Lisbon%20gives,are%20compatible%20with%20EU%20law>> accessed 2 June 2023.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

- time frame for phasing out the protection of existing investments in fossil fuels, and the removal of the ISDS mechanism; stresses that Parliament has expressed the position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; reiterates that if established, the MIC could directly apply to all ongoing bilateral and multilateral investment agreements – including the ECT – of countries subscribing to it;⁴¹
6. Applauds the EU and UK's intention to exclude fossil-fuel investments from ECT protection; applauds the fact that, for the EU and its Member States, the majority of new fossil fuel investments will lose ECT protection on 15 August 2023;⁴²
 7. Notes that the modernised ECT proposal maintains protection for existing fossil fuel investments for at least ten years; notes that the ten-year countdown would start from the entry into force of the modernised ECT, a period that would begin on 15 August 2023 if the EU, its Member States and the other contracting parties were to agree to provisionally apply the agreement, and that it would otherwise only start after ratification by three-quarters of contracting parties, extending protection for fossil-fuel investment for a period close to the 20 years provided for in the ECT sunset clause; notes that the modernised ECT sets a cut-off date of 2040, by which all investments in fossil fuels will no longer be protected in the case of contracting parties opting in to the carve-out; expresses great concern that this timeline is at odds with current knowledge on the speed of fossil-fuel phase-out needed to limit global warming to 1.5°C above pre-industrial levels and that it will undermine the EU's climate objectives; recalls the fact that Parliament had taken the position that the ECT should 'immediately prohibit fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement'; notes that the definition of existing investments covers projects in the exploration phase and their potential future exploitation;⁴³
 8. Regrets that, pursuant to the modernised ECT, the majority of contracting parties have decided to continue protecting investors in fossil fuels indefinitely;⁴⁴
 9. Insists that the modernised ECT can only be used as the basis for new claims after its full entry into force, or if both the investor's host state and the respondent states provisionally apply the modernised ECT; regrets the lack of clarity this situation creates, as it leads to a piecemeal implementation and delays, and risks extending the application of the non-reformed ECT;⁴⁵
 10. Gives provisions on the right to regulate in the interest of legitimate public policy objectives, the urgent need to effectively combat climate change, the rights and obligations of the contracting parties under multilateral environmental and labour agreements including the Paris Agreement, and their commitment to promoting energy investment in a manner that would contribute to reducing greenhouse gas emissions;⁴⁶
 11. Reiterates its position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism; regrets that the modernised

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

46 Ibid.

ECT retained this outmoded dispute settlement mechanism; and emphasises the substantial evidence that investment arbitrators disregard states' intent to protect their public policy objectives, particularly when it comes to phasing out fossil fuels or protecting the environment;⁴⁷

12. Notes that if established, the MIC would directly apply to all ongoing bilateral and multilateral investment agreements – including the ECT – of countries subscribing to it; recalls that pursuant to Article 30(3) of the 1969 Vienna Convention, the EU and its Member States are pursuing the establishment of the MIC, which could become its competent adjudicatory body to resolve international investment disputes;⁴⁸
13. Instructs the Commission to expressly support the inclusion of a mechanism within the UNCITRAL process and outputs by which states can withdraw assent for ISDS from their treaties or terminate them;⁴⁹
14. Expresses concern that the 20-year sunset clause⁵⁰ in case of exit remains unchanged in the modernised text and regrets that this was not part of the EU's negotiating mandate, preventing nations that are still parties to the ECT from easily leaving the treaty should arbitrators continue to undermine states' ability to regulate; emphasises that withdrawing from the ECT would subject departing contracting parties to the ECT's 20-year sunset clause;⁵¹
15. Observes that proposed changes to provisions on damages awards would have little impact because arbitrators tend to interpret the concept of 'loss' very broadly, including expected future profits; observes that these methods are extremely controversial because of their extremely wide margin of discretion and reliance on expert opinion; regrets that the modernised ECT fails to address the critical issue of valuation techniques, allowing awards of compensation that vastly outweigh the amounts invested;⁵²
16. Welcomes the Court of Justice's clarification that ISDS provisions in the ECT are not applicable in the case of intra-EU disputes, as well as the inclusion in the modernised ECT of the principle that ISDS provisions do not apply among members of the same regional economic integration organisation; expresses concern, however, about the possibility that arbitrators may still decide to hear intra-EU disputes and that cases under the rules of the International Centre for Settlement of Investment Disputes still be enforced in the courts of other countries; notes with concern that the *Achmea* ruling did not deter arbitrators from continuing to repeatedly ignore the ruling and hear intra-EU disputes; welcomes the Commission's draft of an *inter se* agreement clarifying that the ECT and its sunset clause do not, and never did, apply in an intra-EU context; urges all Member States to ratify such agreements as soon as possible; calls on the Commission to reach out to partner countries and propose a second agreement allowing non-EU ECT contracting parties willing to withdraw to neutralise the sunset clause on a reciprocal basis;⁵³

47 Ibid.

48 Ibid.

49 Ibid.

50 'Sunset Clauses in International Law and Their Consequences for EU Law'. <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU\(2022\)703592_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU(2022)703592_EN.pdf)> accessed 4 June 2023.

51 Ibid.

52 Ibid.

53 Ibid.

17. Notes that the failure of modernisation efforts was due to the lack of a qualified majority of EU Member States willing to support the ECT modernisation; holds that neither the EU nor its Member States can remain parties to the current ECT because it is incompatible with EU law and EU policy;⁵⁴
18. Reiterates that the EU can only ratify the modernised ECT with Parliament's final consent and that Parliament will take into account its previous positions and the shortcomings of the modernisation if asked to consent to it. Takes the position that the EU should prepare a coordinated exit from the ECT and an agreement excluding the application of the sunset clause between willing contracting parties;⁵⁵
19. Congratulates the governments of Poland, the Netherlands, France, Slovakia, Germany and Luxembourg on their announcement that they intend to withdraw from the ECT, noting that in most cases, this decision was based on the results of the modernisation process;⁵⁶
20. Underlines the need for coordinated action in order to be stronger in the withdrawal negotiations, to limit the negative effects of the sunset clause, and to effectively prevent intra-EU disputes; urges the Commission to initiate immediately the process towards a coordinated exit of the EU from the ECT and calls on the Council to support such a proposal; believes this is the best way for the EU to achieve legal certainty and prevent the ECT from putting intra-EU disputes at risk;⁵⁷
21. Observes that, despite repeated demands from the Parliament since the start of modernisation negotiations, the Commission has not sufficiently prepared or disclosed any information about a coordinated withdrawal as a fallback in the case of unacceptable results or the failure of the modernisation process;⁵⁸
22. Draws attention to the inconsistency between the positions of some Member States on the ECT and their BITs, which continue to safeguard investments in fossil fuels and outdated provisions contrary to EU objectives and values;⁵⁹
23. Instructs its President to transmit this resolution to the Council, the Commission, the governments and parliaments of the Member States, the Secretariat of the Energy Charter Treaty, and the governments of the Energy Charter Treaty member countries.⁶⁰

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.