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CJEU to Seal the Fate of US$50 Million ECT Award Against Moldova?

Clement Fouchard (Reed Smith) · Monday, April 27th, 2020

The Paris Court of Appeal has recently sought a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of the Energy Charter Treaty (ECT) in the ongoing Republic of Moldova v. Komstroy case.

A 20-Year-Old Tale

The *Republic of Moldova v. Komstroy* case highlights the contradicting approaches to the notion of investment under the ECT of the French Courts.

This is a two-decade-old tale that takes us back to the late 1990s, when Ukrainian company Energoallians (Komstroy's predecessor-in-interest) concluded two tripartite contracts for the supply of electricity. The contracts provided that Energoallians would purchase electricity from Ukrenergo and resell it to Moldtranselectro, the Moldovan State-owned company in charge of operating the Moldovan power grid, via Derimen, a British Virgin Islands company.

Shortly afterwards, Moldtranselectro defaulted, and Derimen ultimately assigned the contractual claim against Moldtranselectro to Energoallians.

A dispute arose between the parties regarding the payment of Moldtranselectro's debt, with Energoallians considering that certain actions taken by the Republic of Moldova constituted a violation of the State's obligations under the ECT, as well as under the 1996 Ukraine-Moldova BIT.

Energoallians commenced Paris-seated UNCITRAL arbitration proceedings and in 2013, co-arbitrators Mikhail Savranskiy (Russia) and Viktor Volchinskiy (Moldova) rendered a majority award dismissing the Moldovan State's jurisdictional objections and ordering it to pay US$46.5m. Quite uncommonly, the dissenting arbitrator was the chair, Dominic Pellew (UK). In his view, in order for assets to qualify as "investments" within the meaning of the ECT, they must have characteristics of "investments" in the ordinary sense. Turning to Energoallians' debt assignment, he concluded in his dissenting opinion that it did not constitute an investment in the ordinary sense, due *inter alia* to the lack of contribution of capital or effort by the investor.

Shortly thereafter, Ukrainian company Komstroy bought Energoallians, acquiring the rights to the

award.

Moldova went on to initiate setting aside proceedings before the Paris Court of Appeal claiming that the tribunal wrongly declared itself competent and that the award was contrary to international public policy.

In a 2016 ruling, the Paris Court of Appeal set aside the award on the ground that the arbitral tribunal lacked jurisdiction over the dispute. The Court followed a three-step reasoning: first, "*claims to money*" referred to in Article 1(6) (c) ECT are claims pursuant to a contract associated to an investment; second, an "investment" involves a contribution of capital or resources ("*apport*" in French); and third, the claim originating from an electricity supply contract does not involve any "contribution" and thus cannot be deemed to be an investment.

In its ruling of 2016, the Paris Court of Appeal did not follow the stance taken in several arbitral awards such as the *Petrobart v. Kyrgyzstan* award where it was found that a right conferred by contract concerning the sale of gas condensate is an investment according to ECT (see also the *Fedax v. Venezuela* decision on Objections to Jurisdiction of 11 July 1997, the *Yukos Universal Limited v. The Russian Federation* Interim Award on Jurisdiction and Admissibility of 30 November 2009). The solution also departs from the positions taken by scholars and commentators,[1] as well as from the position taken by the Paris Court of Appeal itself in previous decisions.[2] The Court elected to take a leap into restrictive interpretation, holding that there was no protected investment by the ECT, due to the absence of contribution of capital and resources.

While the Court appeared to carry out a straight-forward interpretation of the conditions of the notion of investment under the ECT, it finally had recourse to an seemingly external additional condition of "contribution", which led to the contractual claim not qualifying as an investment.

Following an appeal from Komstroy, the French *Cour de cassation* rendered a ruling in 2018 quashing the 2016 Paris Court of Appeal decision and therefore reinstating the arbitral award, on the ground that the Paris Court of Appeal had wrongly introduced a jurisdictional requirement not contained in the ECT, namely the condition of a contribution of capital or resources.

The case was thus remanded to the Paris Court of Appeal, this time constituted with different judges. In this instance, the Republic of Moldova requested that the Court set aside the 2013 arbitral award, claiming (just as in 2016) that the arbitral tribunal should have declined its jurisdiction in the absence of any protected investment due to the lack of any contribution from the investor. In the alternative, Moldova requested that the Court of Appeal seek a preliminary ruling from the CJEU regarding the interpretation of the term "investment" under the ECT.

In a judgment dated 24 September 2019, the Paris Court of Appeal stated that the response to Moldova's arguments depended on the interpretation of the ECT and consequently decided to suspend the proceedings and put the following questions to the CJEU:

- Whether article 1(6) ECT shall be interpreted in a sense that a debt arising out of an electricity sales contract that did not involve any form of contribution from the investor to the host State can be regarded as an "investment";
- Whether article 26(1) ECT shall be interpreted in a sense that the assignment of a non-ECT economic operator's debt (Derimen's) to an investor from an ECT Contracting State (Energoallians/Komstroy) can be regarded as an investment; and

- Whether article 26(1) ECT shall be interpreted in a sense that a debt arising from an electricity sales contract delivered to the border of the host State can be regarded as an investment made "in the area" of the host State, where no economic activity has actually been carried out on its territory.

ECT Interpretation: A Trap for The Unwary to Heed?

Historically, the main purpose of the ECT was to encourage investment flows mainly from the West to the former soviet economies, by providing broad protection to investors investing in the region.[3)]

Those more accustomed to a narrower definition of foreign investment should be wary of the ECT's deliberately comprehensive definition, which proves faithful to the historical view according to which property rights in the general sense – and not only foreign capital – may be regarded as a protected investment.

Interpreting Article 1(6) ECT is a delicate process. On the one hand, it includes a rather classic broad-type definition referring to a non-exhaustive list of examples, but on the other hand, the last paragraph inserts a general condition according to which "*the 'Investment' refers to any investment associated with an Economic Activity in the Energy Sector*". It has been commented that consequently "*not every asset constitutes an 'Investment' under the ECT, but only those assets that satisfy a double threshold: they are investments within the ordinary meaning of the term and they are associated with an Economic Activity in the Energy Sector*". It derives however from other provisions of the ECT (see articles 1(4), 1(5) and 27.16 of Annex EM I107) that the "*Economic Activity in the Energy Sector*" includes an activity concerning the sale of "*electrical energy*". This contributes to further blurring the lines as the sale of electricity was the underlying subject-matter of the Energoallians' claim. In this context, determining what would be an investment within the ordinary meaning is a perilous exercise.

The two other questions to the CJEU appear to be less critical. Indeed, should the CJEU rule that a debt arising out of an electricity sales contract is an investment within the meaning of the ECT, the fact that the debt has been assigned by a non-ECT economic operator and that the electricity has been delivered to the border of the host State is unlikely to change the qualification of investment.

Passing The Buck or Sign of Resistance?

One may wonder whether seeking a preliminary ruling from the CJEU on questions which in essence constitute the whole dispute it has been entrusted with is nothing more than an attempt to pass the buck.

Another interpretation is that the Court is actually resisting the *Cour de cassation*'s directions, and counts on a restrictive interpretation by the CJEU on the matter. The general approach of the CJEU since Achmea against investor-State arbitration could indeed lead it to narrow down the definition of investment and, beyond that, the jurisdiction of ECT-based arbitral tribunals.

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References

?1 *See* in Thomas Wälde (ed), The Energy Charter Treaty: An East-West Gateway for Investment and Trade (1996): Thomas Wälde, "International Investment under the 1994 Energy Charter Treaty," pp. 271-273 and Esa Paasivirta, "The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts," pp. 356-358.

?2 *See* the *Czech Republic v. Pre Nekra* decision dated 25 September 2008, *Revue de l'arbitrage*, 2009, issue no. 2, p. 337.

?3 *See* for instance the Concluding Document of the Hague Conference on the ECT which is included in the ECT itself, and abovementioned Thomas Wälde (ed), The Energy Charter Treaty: An East-West Gateway for Investment and Trade, spec. pp. 252-253 and 270-272.

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