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CJEU Ruling in Moldova v. Komstroy: the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment)

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The Court of Justice of the European Union (CJEU) ruled that the Investor-State Dispute Settlement mechanism provided for by the Energy Charter Treaty (ECT) (Article 26(2)c) is not applicable to intra-EU disputes (C-741/19). In the same decision, it also decided that the acquisition of a claim arising from an electricity supply contract does not constitute an 'investment' under Articles 1(6) and 26(1) ECT.

Just three and a half years after the *Achmea decision*, the CJEU continues to reshape the intra-EU investment dispute settlement landscape. In a much awaited decision, it ruled, in the *Republic of Moldova v. Komstroy case*, that ECT based intra-EU arbitrations are contrary to EU law.

The background of the case is well known. At its origin were several questions referred to the CJEU by the Paris Court of Appeal regarding the notion of 'investment' under the ECT, which arose in setting aside proceedings of a Paris-seated UNCITRAL award rendered in 2013.

Since the arbitration proceedings, the debate focused on whether the tribunal had *ratione materiae* jurisdiction over the claimant's contractual rights, and more specifically whether the acquisition of a claim arising out of an electricity supply contract constitutes an 'investment' under the ECT. The discussion continued before the French Courts with Moldova challenging the award. In the latest instance, the Paris Court of Appeal (to which the case had been remanded after the Cour de cassation overturned its first decision) referred the question of the interpretation of the term "investment" under the ECT to the CJEU.

At the hearing, the European Commission and several EU Member States 'hijacked' the debate and introduced the question of the validity of intra-EU ECT arbitration, even though the dispute at issue involved a non-EU investor and a non-EU Member State. In March 2021, Advocate General Szpunar opined not only on the interpretation of the notion of 'investment' under the ECT, but also on the validity of intra-EU ECT arbitration.

Solution and reasoning

The CJEU's jurisdiction was debatable (and disputed by the claimant and several Member States). The CJEU nevertheless upheld jurisdiction on the basis of Article 267 TFEU (see para. 22) and the fact that the questions referred to it concerned the notion of investment (see para. 25), with investments falling under EU's competence (see para. 26). The CJEU noted that it does not, in principle, have jurisdiction to interpret an international agreement regarding its application to disputes not covered by EU law. Yet, it upheld jurisdiction, on account of (i) the interest of the EU in the uniform interpretation of the disputed provisions, and (ii) the fact that the arbitration's seat was Paris, France: this called for the application of EU law by the French courts, and the ensuing obligation to ensure compliance with EU law in accordance with Article 19 TEU (see para. 34).

As regards the merits of the dispute, the CJEU first had to justify ruling on the question of validity of the ECT arbitration clause in intra-EU disputes. It noted that answering the question referred to it required clarifying which disputes may be brought to arbitration pursuant to Article 26(2)(c) ECT (see para. 40). Then, all the while admitting that the dispute at issue was an *extra*-EU dispute, the CJEU simply stated (i) that this does not preclude its jurisdiction and (ii) that it cannot be inferred that Article 26(2)(c) ECT also applies to *intra*-EU disputes (see para. 41).

Thereafter, the CJEU followed dutifully its reasoning in *Achmea*, recalling the autonomy of the EU legal system and the necessity to preserve it, notably by putting in place a judicial system to ensure consistency and uniformity in the interpretation of EU law. Then, it examined whether the conditions set in *Achmea* for arbitration to be valid are fulfilled. In the case of Article 26 ECT, the CJEU noted that:

- Arbitral tribunals constituted under Article 26(6) ECT are required to interpret, and even apply, EU law;
- Such tribunals are not located within the judicial system of the EU, and cannot be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU, and
- Awards rendered pursuant to Article 26 ECT are not subject to review by a court of a Member State capable of ensuring full compliance with EU law and guaranteeing that questions of EU law can, if necessary, be submitted to the CJEU for a preliminary ruling.

Turning then to the initial question of the Parisian Court, the CJEU held "*that the acquisition […] of a claim arising from a contract for the supply of electricity, which is not connected with an investment, […] does not constitute an 'investment' within the meaning of [Articles 1(6) and 26(1) ECT].*"

The CJEU's analysis focused on two questions relating to the definition of 'investment' in Article 1(6) ECT:

- Does the contract involve an 'investment' as defined at the first subparagraph of Article 1(6) ECT, as: (i) "*every kind of asset, owned or controlled directly or indirectly by an investor*" (ii) including one of the elements listed in paragraphs a-f of that provision?
- In the affirmative, is the contract associated with an economic activity in the energy sector as per subparagraph 3 of the provision?

The CJEU answered the first question by the negative: although the first condition (an "*investor*") is fulfilled, the asset at issue does not constitute an investment listed at Article 1(6)(a-f), as:

- The acquisition of a claim arising out of a simple contract for the sale of electricity cannot, in itself, be regarded as aiming at undertaking an economic activity in the energy sector as per

Article 1(6)(f) ECT; and

- The claim does not arise from a contract connected with an investment under Article 1(6)(c) ECT as the contractual relationship concerned only the supply of electricity, *e.* a commercial transaction which cannot, in itself, constitute an investment, and this irrespective of whether an economic contribution is necessary for a given transaction to constitute an investment.

Analysis

The ruling first raises a question of legitimacy. Was the CJEU competent to rule on the validity of ECT arbitration in intra-EU disputes? The case at hand was arguably not the best to extend the *Achmea* solution to ECT arbitration: (i) this was not the question referred to the CJEU, (ii) the dispute was not intra-EU and EU law was not directly applicable, and (iii) no EU public policy concerns were flagged.

Unlike the *Achmea* ruling, *Komstroy v. Moldova* hardly comes as a surprise. AG Szpunar's opinion had paved the way for it. More generally, the entire EU and EU Member States' agenda (the plurilateral treaty for the termination of all intra-EU BITs, the EU's proposal in the ECT modernisation process, advocating for a future multilateral investment court applicable to disputes under the ECT) announced it.

However, like the *Achmea ruling*, *Komstroy v. Moldova* will most likely generate an intense debate in the EU and arbitration circles. Without being exhaustive, preliminary takeaways include:

- The addition to the *Achmea* reasoning of a reference to a European "*constitutional framework that is unique to it*" (see para. 44) – thus reinforcing the CJEU's position of a European legal order justifying the existence of a uniform European international investment law within the Member States;
- The CJEU upholding jurisdiction, on the basis notably of the need for a uniform interpretation of the concept of investment under the ECT – which appears to reinforce the message of a unified European international investment law that will not suffer any exception within the EU;
- The question of how arbitral tribunals will react immediately comes to mind. Even after the *Achmea* decision, a number of tribunals refused to decline jurisdiction although the claims were based on intra-EU BITs. Given the similarities in the CJEU's reasoning, one could expect tribunals constituted in intra-EU ECT arbitrations to react in the same way;
- *Achmea* led parties in intra-EU arbitrations to post-award judicial races and conflicting decisions, as investors attempted to enforce awards in arbitration-friendly non-EU jurisdictions, while EU States challenged them. It is likely that the same battles will occur in relation to intra-EU ECT arbitrations, thus creating legal uncertainty that might only be resolved with the establishment of the future EU investment court;
- Regarding the narrower question of the notion of 'investment' under Article 1(6) ECT, the CJEU considers that the types of assets amounting to an investment set forth in Article 1(6) constitute an exhaustive, rather than indicative, list (80 *et seq*). This finding is contrary to many previous decisions of investment tribunals. Interestingly, the CJEU does not rely on the absence of contribution of capital or resources to the host state to deny the characterisation of 'investment', although this was called for by the Paris Court's question (i.e., whether a claim arising from a sale contract *which did not involve any contribution on the part of the investor in the host state* can constitute an "investment").

- The CJEU's special care to explain the "*clear distinction*" made in the ECT between the concept of 'investment' (Part III ECT – protected by arbitration under Article 26 ECT), and that of 'trade' (Part II ECT – which does not fall in the ambit of that provision), (see para. 69) appears as a testament to the restrictive approach to the definition of investment and augurs difficult discussions between the EU and the other ECT Contracting Parties over the ECT reform.

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