Achmea Catches up to the ECT: CJEU Advocate General Opines against Intra-EU Arbitration under the ECT

8 March 2021

On 3 March 2021, Advocate General Maciej Szpunar of the Court of Justice of the European Union issued an opinion in *Moldova v. Komstroy*, concluding that the investor-state dispute settlement mechanism in Article 26 of the Energy Charter Treaty is incompatible with European Union law, insofar as it permits arbitration between EU investors and member states, and that the investors' debt claim under an electricity supply contract in the underlying arbitration would not constitute a protected "investment" under the ECT.

The *Komstroy* case is one of several references currently pending before the CJEU in which the Court is asked to determine whether arbitration under the ECT between EU investors and EU Member States is compatible with EU law. The AG's opinion aligns with the position of the European Commission and the majority of EU Member States, as we reported here. Unless the CJEU declines to follow the AG's opinion—which is unlikely, but not impossible—investors can expect continued *Achmea*-based objections to jurisdiction and enforcement to continue in ECT cases.

Meanwhile, the AG's opinion will also no doubt resonate in the context of the European Union's and certain Member States' proposals to renegotiate the definition of "investment" in the ECT, as well as the scope of its substantive standards of protection. Multilateral negotiations for the "modernization" of the ECT have been taking place since last year, including a proposal to redefine the scope of covered investments to require some of the attributes that the AG mentioned in his opinion.

Background to the *Energoalians (now Komstroy) v. Moldova* Dispute. Pursuant to contracts concluded in 1999, Ukrainian electricity producer Ukrenergo sold electricity to Ukrainian electricity distributor Energoalians, which then resold it to a British Virgin Islands company, Derimen. Derimen in turn resold electricity to the Moldavian public company Moldtranselectro. In 2000, Derimen sold its claim to payment from Moldtranselectro back to Energoalians. Moldtranselectro failed to pay in full, and Energoalians eventually commenced arbitration proceedings against Moldova under the ECT.

In October 2013, a Paris-seated tribunal found (by majority) that Moldova had breached the ECT and ordered Moldova to pay damages to Energoalians. Moldova sought set-aside of the award in the French courts, arguing that the tribunal lacked jurisdiction because there was no protected investment.

On 24 September 2019, the Paris Court of Appeal stayed the set-aside proceedings and referred three questions, focusing on the interpretation of the definition of "investment" under the ECT to the CJEU for a preliminary ruling.[1] Even though the case involved a non-EU investor and a non-EU respondent State, the European Commission and several Member States called on the CJEU to also rule whether, consistent with its decision in *Achmea*, intra-EU investor-State arbitration under the ECT was incompatible with EU law. The Commission, Spain, Italy, Germany, France, Poland and the Netherlands took the position that it was incompatible, for the same reasons as in *Achmea*, while Hungary, Finland, and Sweden argued that *Achmea's* holding should not be extended to the ECT.[2]

The AG's Opinion That Intra-EU Arbitration under the ECT Is Incompatible with EU Law. Recognizing the conflicting positions taken by Member States on whether or not the reasoning in *Achmea* applies to intra-EU arbitration under the ECT, AG Szpunar opined that the ECT is materially indistinguishable. In particular, disputes submitted to arbitral tribunals under ECT Article 26 could "relate to the interpretation of EU law," but the arbitral tribunal could not refer questions regarding the interpretation of EU law to the CJEU. AG Szpunar concluded that the Article 26 dispute resolution mechanism is detrimental to the "autonomy of EU law," as well as the principle of mutual trust between Member States.[3] AG Szpunar specifically rejected the argument that the EU's status as a party to the ECT is a distinguishing factor.

The AG's Opinion on the Notion of "Investment" under the ECT. The ECT contains a broad definition of "investment" as "every kind of asset, owned or controlled directly or indirectly by an Investor" as long as it is "associated with an Economic Activity in the

---

1 Paris Court of Appeal (Chamber 1), 24 September 2019, No. 18/14721.

2 In a January 2019 declaration, 22 Member States took the position that the *Achmea* reasoning applies to intra-EU arbitration under the ECT. The remaining six Member States—Finland, Luxembourg, Malta, Slovenia, Sweden and Hungary—concluded that the *Achmea* judgment is silent on the question of intra-EU investor-State arbitration under the ECT.

3 *Moldova v. Komstroy*, CJEU, Case C–741/19, Opinion of Advocate General Maciej Szpunar, 3 March 2021, ¶¶ 79, 87; see also *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others (C 798/18), Athesia Energy Srl and Others, (C 799/18) v. Ministero dello Sviluppo Economico, Gestore dei servizi energetici (GSE) SpA*, Opinion of Advocate General Saugmandsgaard, 29 October 2020, footnote 55 (opining that "it seems to me that, inasmuch as Article 26 of the Energy Charter, which is headed 'Settlement of disputes between an investor and a Contracting Party", provides that such disputes may be resolved by arbitral tribunals, that provision is not applicable to intra-Community disputes. In my view it may even be the case, having regard to the observations made by the Court in that judgment—especially in relation to the particular nature of the law established by the Treaties and the principle of mutual trust between the Member States—that the Energy Charter is entirely inapplicable to such disputes.").

Energy Sector."[4] With respect to claims to money in particular, the ECT requires that the claim to money also be "pursuant to [a] contract having an economic value and associated with an Investment."[5] Relying on these dual textual limitations, AG Szpunar opined that a claim to money arising out of a contract for the supply of electricity that did not involve any contribution by the creditor did not qualify as a "claim to money . . . pursuant to contract having an economic value and associated with an Investment" within the meaning of Article 1(6) of the ECT.[6]

AG Szpunar also observed that this conclusion was supported by how arbitral tribunals and academic commentators have interpreted the notion of "investment," including under the ICSID Convention; the claim to money at issue in *Komstroy* was, in his view, "a simple commercial transaction" that "implies no contribution and no expectation of profit depending on the contribution."[7] He noted however that, if the CJEU found that the claim to money did qualify as an investment, then (1) it would not matter that the claim in question was acquired from an operator that was not a national of an ECT party, and (2) it would qualify as an investment in Moldova, because it is enough that Moldova is where the debtor company was based.[8]

The AG's opinion is consistent with the European Union's proposal to amend the definition of "investment" under the ECT to require that the asset in question possess "the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk" and to specify that claims to money in particular "do[] not include claims to money that arise solely from commercial transactions for the sale of goods or services . . . or the extension of credit in relation to such transactions."[9]

It is also the second development in recent months on the topic of coverage of financial assets under the ECT. It was reported that in *Portigon v. Spain*, the arbitral tribunal found (by majority) that project finance loans and hedging instruments constituted a protected investment under the Energy Charter Treaty and the ICSID Convention.[10] That decision is consistent with previous investment treaty tribunal decisions that have

---

4 ECT, Art. 1(6).

5 ECT, Art. 1(6)(c).

6 *Moldova v. Komstroy*, CJEU, Case C–741/19, Opinion of Advocate General Maciej Szpunar, 3 March 2021, ¶¶ 110–120.

7 *Moldova v. Komstroy*, CJEU, Case C–741/19, Opinion of Advocate General Maciej Szpunar, 3 March 2021, ¶ 118.

8 *Moldova v. Komstroy*, CJEU, Case C–741/19, Opinion of Advocate General Maciej Szpunar, 3 March 2021, ¶¶ 130–144, 145–154.

9 European Union text proposal for the modernization of the Energy Charter Treaty, as amended on 15 February 2021, available at: https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf).

10 *Portigon AG v. Kingdom of Spain*, ICSID Case No. ARB/17/15, Decision on Jurisdiction dated 20 August 2020. The award is not yet publicly available.

confirmed that loans, promissory notes, hedging instruments and sovereign bonds may constitute protected investments under the terms of the relevant treaties at issue in those cases.

Implications for Investors. As a practical matter, the AG's position is not surprising and will likely have limited consequences for investors in the short term. It is a non-binding opinion, and in substance it aligns with positions that the Commission and several Member States have taken over the years since *Achmea* and in the context of negotiations for the modernization of the ECT. Ultimately, it remains to be seen how the CJEU will decide the question—whether in this case, or in one of the two other instances in which the question of the applicability of the *Achmea* reasoning to the ECT has been squarely referred to the Court.[11]

Meanwhile, EU Member States continue to make *Achmea*-based objections to arbitral tribunals' jurisdiction, both under the ECT and other intra-EU treaties, while arbitral tribunals overall continue to reject them.[12] These opposing views are most likely to play out at the post-award stage, where the European Commission has been intervening to support requests for set-aside and oppose enforcement of intra-EU awards.[13]

Accordingly, investors considering intra-EU arbitration, whether under the ECT or a bilateral treaty, may need to be ready to play the long game. At the same time, the European Union and several Member States are pursuing various initiatives, especially in the renewable energy sector, aimed at creating a favorable investment climate and new investment opportunities.[14] Appropriate investment structuring can maximize the availability of international arbitration for such projects despite the uncertainty that the *Achmea* judgment has created for intra-EU investors.

* * *

Please do not hesitate to contact us with any questions.

---

[11] *Italian Republic v. Athena Investments, NovEnergia II Energy & Environment and NovEnergia II Italian Portfolio*, Case no T 3229-19; Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty, Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, 3 December 2020.

[12] See, most recently, *ČEZ a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/16/24, Decision on Jurisdiction dated 2 March 2021; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction dated 8 October 2020; *Raiffeisen Bank International AG et al. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Jurisdiction dated 30 September 2020.

[13] See e.g. *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Case no. 1:20-cv-01708-EGS, Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of the Kingdom of Spain, 29 January 2021; *Infrared Environmental Infrastructure GP Limited et al. v Kingdom of Spain*, case no. 1:20-cv-00817, Order Granting Motion for Leave for EC to File Amicus Curiae, 4 March 2021.

[14] See e.g., What's New in Renewables? Risks and Opportunities for EU Energy Investors, Debevoise webcast, 19 January 2021, available here.

NEW YORK

Mark W. Friedman
mwfriedman@debevoise.com

Ina C. Popova
ipopova@debevoise.com

LONDON

Patrick Taylor
ptaylor@debevoise.com

Merryl Lawry-White
mlawrywhite@debevoise.com

Mark McCloskey
mmccloskey@debevoise.com

PARIS

Romain Zamour
rzamour@debevoise.com