Achmea Reaches the ECT: CJEU Rules That Intra-EU Arbitration under the ECT Is Also Incompatible with EU Law

September 8, 2021

On September 2, 2021, the Court of Justice of the European Union (the "CJEU") ruled in *Moldova v. Komstroy* that the investor-State dispute settlement mechanism in Article 26 of the Energy Charter Treaty ("ECT") is incompatible with European Union ("EU") law, insofar as it permits arbitration between EU investors and EU Member States. The CJEU adopted the same reasoning as its *Achmea* judgment concerning bilateral intra-EU treaties. The judgment is in line with the position of the European Commission and the majority of EU Member States and the opinion of CJEU Attorney General Szpunar, as we reported here and here.[1] The CJEU also ruled that the investors' debt claim under an electricity supply contract in the underlying arbitration did not constitute a protected "investment" under the ECT's definition of the term.[2]

Komstroy was one of several cases pending before the CJEU in which the Court was asked to determine whether intra-EU ECT arbitration is compatible with EU law. In arbitrations involving EU Member States and investors under the ECT, investors can now expect objections to the jurisdiction of arbitral tribunals and enforcement of the resulting arbitral awards.

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 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 to set

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[1] In January 2019, 22 of the 28 Member States had opined that the *Achmea* judgment applied equally to intra-EU ECT arbitration, and had undertaken to discuss with the European Commission any steps necessary to ensure its uniform application in this context.

[2] CJEU, September 2, 2021, *Republic of Moldova v. Komstroy*, C‑741/19.

aside 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 regarding the ECT's definition of "investment" to the CJEU for a preliminary ruling. Although 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, following its judgment in *Achmea*, intra-EU ECT arbitration 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 extend to the ECT (consistent with their January 2019 declaration, reported here).

Earlier this year, Attorney General Szpunar opined that the ECT was indistinguishable in material respects from the intra-EU bilateral investment treaty at issue in *Achmea*—even though the EU is itself a party to the ECT—and concluded that the investor-State arbitration mechanism in Article 26 of the ECT was detrimental to the autonomy of EU law and the principle of mutual trust between Member States (as we reported here). AG Szpunar also concluded that the commercial transaction at issue in the *Komstroy* case was not a qualifying investment for purposes of the ECT, including because it did not satisfy the ECT's dual textual requirements of being "associated with an Economic Activity in the Energy Sector" and "pursuant to [a] contract having an economic value and associated with an Investment."

The CJEU's Judgment. The main takeaways of the CJEU's judgment are as follows.

- **The CJEU has jurisdiction to interpret the ECT, even in a non-EU dispute.** The CJEU rejected arguments by the Council of the EU and the Hungarian, Finnish and Swedish governments that it was not competent to rule in a non-EU dispute and held that it is competent to interpret all acts adopted by EU institutions, including international treaties such as the ECT.[3] The Court added that, where a provision of an international agreement may apply equally to EU and non-EU law disputes, there is a clear interest in promoting that provision's uniform interpretation, irrespective of the conditions in which it is applied, in order to avoid interpretive divergence.[4]

- **Intra-EU ECT arbitration is incompatible with EU law.** The CJEU ruled that "the preservation of the autonomy and specific character of EU law" precludes the ECT from imposing obligations on Member States to arbitrate disputes with other

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[3] *Id*. at 21–29

[4] *Id*. at 29.

Member State national investors.[5] Referring to the *Achmea* judgment and AG Szpunar's opinion, the Court concluded that Article 26 of the ECT was detrimental to the principle of autonomy of EU law because ECT tribunals cannot seek a reference from EU courts on the interpretation of provisions of EU law that they may be called upon to apply.

The Court drew a distinction with commercial arbitration on the basis that commercial arbitration derives from party autonomy rather than a multilateral (or bilateral) treaty.[6] The Court further noted that compliance with EU law's fundamental provisions may be examined in the context of limited court review of commercial awards and, where appropriate, the enforcing court could seek a CJEU reference for a preliminary ruling.[7]

- **No protected investment.** The CJEU agreed with AG Szpunar that there was no protected investment under the ECT because the underlying supply contract from which the debt arose did not meet ECT Article 1(6)'s specific requirements that an asset be "associated with an Economic Activity in the Energy Sector" and that claims to money be "pursuant to [a] contract having an economic value and associated with an Investment."[8] In parallel, the EU has proposed amending the definition of "investment" under the ECT as part of the overall "modernization" of the treaty.[9]

Implications for Investors. As they have done since the *Achmea* judgment, EU Member States will likely continue to make *Achmea*-based objections to arbitral tribunals' jurisdiction under both ECT and intra-EU treaties. Arbitral tribunals overall continue to reject them, however. 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 proceedings and oppose enforcement of intra-EU awards.

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 EU 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. Appropriate investment structuring can maximize the availability of international arbitration for such projects despite the uncertainty that the *Achmea* and *Komstroy* judgments have created for intra-EU investors.

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5 *Id*. at 65 (authors' translation).

6 *Id*. at 59.

7 *Id*. at 58.

8 *Id*. at 72–80.

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).

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