# *Republic of Moldova v Komstroy LCC*: Arbitration under Article 26 ECT outlawed in Intra-EU Disputes by Obiter Dictum

**by**

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# *Republic of Moldova v Komstroy LCC*: Arbitration under Article 26 ECT outlawed in Intra-EU Disputes by Obiter Dictum

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Arbitral tribunals; Energy; International investment disputes; Investment treaty arbitration; Investor-state arbitration; Jurisdiction; Supremacy of EU law

## Abstract

*This comment is focused on the part of the* Komstroy *judgment in which the European Court of Justice (ECJ) sets forth its opinion that preservation of the autonomy and of the particular nature of EU law precludes the application of the arbitration mechanism in art.26 ECT in intra-EU disputes. It criticises the choice made by the Court to decide an issue of such significance by* obiter dictum*, and the quality of the reasoning offered to justify the Court's opinion on that issue. The comment concludes with thoughts on the next steps available to those advising investors affected by the judgment.*

## Introduction

The judgment in *Moldova v Komstroy*,[1] will mainly be remembered for the opinion expressed by the Court of Justice that preservation of the autonomy and of the particular nature of EU law precludes the application of the arbitral mechanism in art.26 ECT in disputes between an investor of a Member State of the EU and another Member State in which they have invested.[2] The term "opinion" is used advisedly. The Court cannot be said to have given a ruling on the issue, since the dispute in the main proceedings was wholly external to the EU—between Moldova and a Ukrainian company claiming to be an investor in that country; therefore, the issue did not figure in the questions referred to the Court by the Court of Appeal of Paris, nor in the *dispositif* of the judgment. The three questions actually before the Court were concerned with the substantive issue of the meaning of the term "investment" in art.1(6) and art.26(1) ECT.

Readers may be aware that the author of this comment published a piece entitled "Article 26 ECT — the Case against an Expansive Reading of Achmea" in the August 2021 issue of *European Law Review*,[3] which appeared almost simultaneously with the publication of the *Komstroy* judgment on 2 September 2021. The author was, of course, aware of the proceedings in *Komstroy*, and the Opinion of AG Szpunar is considered in that article. The unhappy coincidence of publication was due to misplaced confidence that the Court would never decide a matter, at once so controversial and so commercially significant as the intra-EU applicability of art.26 ECT, effectively by *obiter dictum*. Readers are respectfully referred to the August article, and an effort will be made to minimise repetition of the arguments deployed there.[4]

[1] *Moldova v Komstroy LLC* (C-741/19) EU:C:2021:655. Hereinafter, *Komstroy*.

[2] Commonly referred to as "an intra-EU dispute".

[3] A. Dashwood, "Article 26 ECT and Intra-EU Disputes—the Case against an Expansive Reading of Achmea" (2021) 46 E.L. Rev. 415. Referred to hereinafter as "the August article". The frequent references in this Note to "*Achmea*" relate to *Slovak Republic v Achmea BV* (C-284/16) EU:C:2018:158; [2018] 2 C.M.L.R. 40.

[4] In developing his views on the *Komstroy* judgment, the author benefited from participating in the webinar organised by the United Kingdom Association for European Law on the theme "CJEU Jurisdiction, the Autonomy of the EU Legal Order and Arbitration", on 10 November 2021, more particularly from the insights of his fellow panellists, Dr

## Facts and procedure

In essence, the case before the Court of Appeal of Paris concerned proceedings for the annulment of an arbitral award which had been obtained by a Ukrainian company in a dispute with the Republic of Moldova regarding partial non-payment for electricity it had purchased.

The legal and factual background to the dispute was convoluted, and this explains the terms in which the questions referred to the Court of Justice were framed.[5] Under contracts concluded in 1999, Ukrenergo, a Ukrainian electricity generator, sold electricity to Energoalians, a Ukrainian electricity distributor, which sold it on to Derimen Properties Ltd ("Derimen"), a company registered in the British Virgin Islands, and Derimen then sold the electricity to a Moldovan public undertaking, Moldtranselectro. Ukraine and Moldova are contracting parties to the ECT, while the British Virgin Islands is not. The volumes of electricity to be supplied under the contracts each month were fixed directly between Moldtranselectrico and Ukrenergo. They were supplied under the so-called "DAF Incoterms 1990", which means that delivery was deemed to take place at the border between Ukraine and Moldova, on the Ukrainian side. Electricity was supplied in the course of 1999 (with the exception of the period May to July) and of 2000. Payment for each month's supply was made to Energoalians by Derimen, which in turn received payment (at approximately twice the price it paid Energoalians) from Moldtranselectro. However, while Derimen paid Energoalians for all the electricity purchased, Moldtranselectro paid Derimen only in part. Derimen assigned its claim against Moldtranselectro to Energoalians and the latter, after obtaining some further satisfaction, sought unsuccessfully to recover the balance by bringing legal proceedings against Moldtranselectro before the Moldovan and subsequently the Ukrainian courts.

Considering that certain actions taken by the Moldovan authorities constituted breaches of the ECT, Energoalians commenced arbitral proceedings against Moldova under art.26 ECT, which resulted in an award in their favour on 25 October 2013. The arbitration took place under the UNCITRAL rules, with its seat established in Paris, and Moldova sought and obtained the annulment of the award by the Court of Appeal of Paris. There followed a successful appeal to the Cour de Cassation by Komstroy, which in the meantime had become the successor in law of Energoalians, and the case was sent back to the Court of Appeal of Paris sitting in a different composition, which decided to refer three questions for a preliminary ruling by the Court of Justice:

> "(1) Must [art. 1 (6) ECT] be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any contribution on the part of the investor in the host State can constitute an 'investment' within the meaning of that Article?
>
> (2) Must [art. 26 (1) ECT] be interpreted as meaning that the acquisition by an investor of a Contracting Party, of a claim established by an economic operator which is not one of the States that are Parties to that Treaty constitutes an investment?
>
> (3) Must [art. 26 (1) ECT] be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the territory of another Party, in the case where the investor does not carry out any economic activity in the territory of the latter contracting Party?"

It is evident from the drafting of the questions that the Court of Appeal of Paris was solely interested in the specific (and unusual) features of the dispute that was the subject of the arbitration.[6]

Isabelle Van Damme and Professor Takis Tridimas. He is also grateful to Dr Paschalis Paschalidis for his comments on a draft of this note. Any imperfections are the author's own work.

[5] The summary of background elements given here is derived from the Opinion of AG Szpunar in *Komstroy* (C-741/19) EU:C:2021:164 at [10]–[22], as well as from the judgment, *Komstroy* (C-741/19) EU:C:2021:655 at [8]–[20].

[6] This is confirmed in the judgment: *Komstroy* (C-741/19) EU:C:2021:655 at [19].

## The Opinion of AG Szpunar

The Opinion of AG Szpunar was quite fully discussed in the August 2021 article.[7] It is noted there that he sought to justify his extensive treatment of the art.26 intra-EU arbitration issue as going to the jurisdiction of the Court of Justice to give a preliminary ruling under art.267 TFEU in a dispute entirely external to the EU—unconvincingly, since there were grounds, other than that of possible recourse to art.26 in intra-EU disputes (which he rejected), on which the Court's jurisdiction could be founded, and which re reflected in the judgment.

The August article also criticises the view taken by the learned Advocate General, in applying the criteria of the *Achmea* judgment to art.26 ECT, that the phrase "applicable rules and principles of international law" in art.26(6), the ECT's applicable law clause, confers jurisdiction on ECT tribunals to treat EU law as part of the body of law at their disposal in determining the outcome of investment disputes. Reasons that militate against that interpretation, establishing rather that the phrase refers to general and customary international law, and not to sub-systems of international law created by treaties like the EU Treaties, are developed in the article.[8] The centrality of a proper understanding of the applicable law clause in art.26(6) ECT, as compared with the equivalent clause in art.8(6) of the Netherlands/Slovakia BIT, is recalled in the commentary below.

## The judgment

### *Jurisdiction to answer the questions referred*

The jurisdiction of the Court of Justice to answer the questions referred by the Court of Appeal of Paris was contested by the Council, by the governments of Hungary, Finland and Sweden and by Komstroy, on the ground that EU law was not applicable to the proceedings, because the parties to the dispute were external to the EU.[9] While in a dispute not covered by EU law, such as one between non-EU Member States, jurisdiction to interpret an international agreement may normally be lacking,[10] the judgment identifies two grounds for the admissibility of the preliminary reference in the instant case.

The first ground is,

> "that, where a provision of an international agreement can apply both to situations falling within the scope of EU law and to situations not covered by that law, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply".[11]

The judgment points out that a Member State court might well be called upon to interpret the provisions of the ECT in question in a dispute between a third State investor and a Member State,

> "not only, as in the present case, in the context of an application to set aside an arbitral award made by an arbitral tribunal which has its seat in the territory of a Member State, but also where the proceedings have been brought before the courts of the defendant Member State in accordance with Article 26 (2) (a) ECT".[12]

[7] Dashwood, "Article 26 ECT and Intra-EU Disputes" (2021) 46 E.L. Rev. 415 at 420–422.
[8] Dashwood, "Article 26 ECT and Intra-EU Disputes" (2021) 46 E.L. Rev. 415 at 428–429.
[9] *Komstroy* (C-741/19) EU:C:2021:655 at [21].
[10] *Komstroy* (C-741/19) EU:C:2021:655 at [28].
[11] *Komstroy* (C-741/19) EU:C:655 at [29], citing: *Giloy v Hauptzollampt Frankfurt am Main-Ost* (C-130/95) EU:C:1997:372 at [23] to [28]; *Hermes international v FHT Marketing Choice BV* (C-53/96) EU:C:1998:292 at [32]; See *Parfums Christian Dior SA v Tuk Consultancy BV* (C-300/98 & C-392/98) EU:C:2000:688 at [35].
[12] *Komstroy* (C-741/19) EU:C:655 at [31].

As formulated, this first ground of jurisdiction may be intended to go further than the three cases cited by the Court of Justice as authorities for it. In *Giloy*, a provision of the Community Customs Code had been reproduced in German legislation on the charging of turnover tax on imports, which governed the dispute before the referring court[13]; the case belonged to the line of case law descending from *Dzodzi*,[14] in which the Court has asserted jurisdiction to rule on the interpretation of an EU provision, where the dispute in the main proceedings related to national legislation referring to the content of that provision. In *Hermes*, a Dutch court requested the interpretation of art.50 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) regarding provisional protection of rights; it was deemed immaterial that the dispute in the main proceedings concerned the protection under Netherlands law of a Benelux trade mark, because art.50 would apply equally in proceedings for the provisional protection of Community trade marks.[15] In *Dior*, where art.50 of the TRIPS was again the subject of a preliminary reference, there was no EU form of the intellectual property right at issue (an industrial design); however, the logic of the *Hermes* judgment applied, because art.50 was a procedural provision relating to all intellectual property rights, including those, like trade marks, for which a Community form existed.[16] A common feature of the three cases was that the situations falling within the scope of EU law in which the provision in question might apply, bringing the risk of future differences of interpretation, were ones where EU legislation had already been adopted. The judgment in *Komstroy* appears to confirm (without saying so) that the same risk, and hence justification for the assertion of jurisdiction, applies irrespective of whether the EU's internal legislative competence has been exercised in the relevant field. Which seems right.

The second ground of jurisdiction mentioned in the judgment is said to apply "in any event"; in other words, presumably, without the need to demonstrate any risk of possible future differences of interpretation. The Court of Justice explains that the choice of Paris as the seat of the arbitration had the effect of rendering applicable French law as the *lex fori* to the dispute in the main proceedings, which would include EU law since it "forms part of the law in force of every Member State".[17] Consequently, the establishment of the seat of arbitration on the territory of a Member State entails, for the purposes of the proceedings brought there, the application of EU law, compliance with which the national court is required by art.19 TEU to ensure[18]; it being solely for the national court before which the dispute has been brought to determine both the need for a preliminary reference and the relevance of the questions referred, on which in principle the Court is required to give a ruling.[19] The Court distinguishes two cases in which it had previously declined to answer questions raised under the EEA Agreement, in spite of the fact that the questions were referred to it by Member State courts, because they related to situations that occurred during the period prior to the accession to the EU of the Member States (Sweden and Austria) in which those courts were located.[20]

The lesson appears to be that the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of a provision contained in an international agreement to which the EU is party in any case where the main proceedings are governed by the national law of a Member State, regardless of the nature of the dispute being litigated. This might be thought to render the *Hermes* case law redundant.

[13] The relevant EU provision was art.244 of Council Regulation 2913/92 establishing the Community Customs Code [1992] OJ L302/1.

[14] *Dzodzi v Belgium* (C-297/88) EU:C:1990:360.

[15] *Hermes international v FHT Marketing Choice BV* (C-53/96) EU:C:1998:292 at [27], [28] and [32].

[16] *Parfums Christian Dior SA* (C-300/98 & C-392/98) EU:C:2000:688 at [37].

[17] *Komstroy* (C-741/19) EU:C:655 at [32] and [33].

[18] *Komstroy* (C-741/19) EU:C:655 at [34].

[19] *Komstroy* (C-741/19) EU:C:655 at [35].

[20] *Komstroy* (C-741/19) EU:C:655 at [36] and [37]. The cases cited were: *Andersson v Sweden* (C-321/97) EU:C:1999:307; [2000] 2 C.M.L.R. 191 at [31]; *Salzmann* (C-300/01) EU:C:2003:283; [2004] 1 C.M.L.R. 29 at [69].

## *Purported justifications for addressing the Article 26 intra-EU arbitration issue*

In contrast to the approach adopted by Advocate General Szpunar, the art.26 ECT intra-EU arbitration issue is dealt with in the *Komstroy* judgment as part of the Court's answer to the first question. However, the grounds of jurisdiction just discussed manifestly do not justify responding to a question which the referring court did not ask. The purported justifications offered by the Court of Justice are so threadbare as to appear almost contemptuous,

> "…it is necessary first of all, as several Member States which have participated in the proceedings have observed, to specify which disputes between a Contracting Party and an investor of another Contracting Party concerning an investment made by the former in the territory of the latter may be brought before an arbitral tribunal pursuant to Article 26 ECT. [40]
>
> In that regard, it must be stated that, although the dispute at issue in the main proceedings, based on Article 26 (2) (c) ECT, is between an operator from one third State and another third State does not preclude, for the reasons stated in paragraphs 22 to 28 of the present judgment, the Court's jurisdiction to answer those questions, it cannot be inferred that that provision of the ECT also applies to a dispute between an operator from one Member State and another Member State". [41]

The statement at [40] is simply untrue. To provide a useful answer on the matters of actual concern to the referring court, there was no need at all for the Court to express a view, one way or the other, on the possibility of recourse to arbitration under art.26 ECT in intra-EU disputes.

As for [41], it is an unhelpful statement of the obvious. Of course, it does not follow, from the fact that the Court of Justice found that it had jurisdiction in proceedings based on art.26 ECT between an operator from a third State and another third State, that that provision also applies to intra-EU disputes. The vulgar response would be "So what?".

The reasons why the course of action adopted by the Court of Justice may be considered objectionable are discussed in the commentary below.

## *The reasoning in the judgment on the Article 26 intra-EU arbitration issue*

The reasoning in the *Komstroy* judgment closely tracks that of the judgment in *Achmea*, comprising three steps: a review of the constitutional fundamentals in the light of which the arbitration question falls to be assessed; the specific features of the arbitration mechanism in art.26 ECT that are perceived as problematic; and the fact that the mechanism has been created by an agreement between EU Member States.

The constitutional survey, of a type familiar from the *ECHR* Opinion,[21] *Achmea*[22] and the *CETA* Opinion,[23] is offered as an explanation of the significance the Court attaches to the principle of autonomy. It begins by recalling that an international agreement cannot affect the allocation of powers laid down by the EU Treaties and hence the autonomy of the EU legal order, observance of which is ensured by the Court. The principle of autonomy is said to be,

> "enshrined in particular in art.344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties".[24]

[21] *Opinion pursuant to Article 218(11) TFEU* (Opinion 2/13) EU:C:2014:2454; [2015] 2 C.M.L.R. 21 at [165]–[176].
[22] Cf *Achmea BV* (C-284/16) EU:C:2018:158 at [32]–[37].
[23] *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341; [2019] 3 C.M.L.R. 25 at [109]–[111].
[24] *Komstroy* (C-741/19) EU:C:65 at [42].

The justification for the principle is found in "the essential characteristics of the European Union and its law".[25] Those characteristics, and the role of the Court of Justice in preserving the unity and integrity of the EU legal order, notably through the procedure of art.267 TFEU, are then spelled out in a series of paragraphs, in which the corresponding paragraphs of the *Achmea* judgment are cited one after another, though with one intriguing exception. There is no reference to [34], which speaks of EU law being based on the premiss that Member States share a set of common values, and that this,

> "implies and justifies the existence of mutual trust between Member States that those values will be recognised, and therefore that the law of the EU that underpins them will be respected".

The surprising absence from *Komstroy* of the principle of mutual trust, so prominent in *Achmea*, is referred to in the commentary below.

The judgment proceeds systematically to find features of the arbitration mechanism of art.26 ECT corresponding to the three features of the arbitration mechanism in art.8 of the Netherlands/Slovakia BIT that were identified in *Achmea* as problematic.

The first of these features—that ECT tribunals have jurisdiction to interpret and apply EU law—is established with minimal reasoning. It will be remembered that in *Achmea*, the categories of applicable law identified by art.8(6) of the Netherlands/Slovakia BIT included "the law in force of the Contracting Parties" and "the provisions of…other relevant agreements between the Contracting Parties". These could readily be understood as references to EU law, which meant that any relevant rules of EU law would form part of the body of norms available to a tribunal deciding the outcome of an investment dispute governed by the BIT.[26] The applicable law clause in art.26(6) ECT is worded very differently: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law". Unlike AG Szpunar, the Court does not attempt to establish that EU law belongs within the category of "applicable rules and principles of international law", owing to its dual nature as an essentially municipal system of law derived from international Treaties; and, in the writer's respectful view, it was right not to do so, for reasons that are set out in the August article.[27] However, the Court does not draw the same inference as the August article: that ECT tribunals have not been given jurisdiction to treat EU law as applicable law in deciding disputes before them, though they may take any relevant EU rules into account as part of the factual matrix of a dispute.[28] Instead, having recited art.26(6) ECT, in two brief sentences the judgment in *Komstroy* recalls that "the ECT itself is an act of EU law"[29] and jumps to the immediate conclusion that "an arbitral tribunal such as that referred to in Article 26 (6) ECT is required to interpret, and even to apply EU law".[30] That position—that the reference in art.26(6) to "this Treaty" can be read as one to EU law—will be examined critically in the commentary below.

The presence of the second of the three features—the lack of a direct link with the Court of Justice—is incontestable. An ECT tribunal cannot be classified as a "court or tribunal of a Member State" within the meaning of art.267 TFEU and is not, therefore, entitled to refer questions to the Court of Justice for a preliminary ruling.[31]

The third feature is that arbitral awards made by an ECT tribunal are not subject to review by a court or tribunal of a Member State "capable of ensuring full compliance with EU law", and with access to the

[25] *Komstroy* (C-741/19) EU:C:655 at [43].

[26] *Achmea BV* (C-284/16) EU:C:2018:158 at [40]–[42].

[27] The arguments against the Advocate General's analysis are developed in the August article: see Dashwood, "Article 26 ECT and Intra-EU Disputes" (2021) 46 E.L. Rev. 415 428–429.

[28] See Dashwood, "Article 26 ECT and Intra-EU Disputes" (2021) 46 E.L. Rev. 415 425–430.

[29] As previously noted in *Komstroy* (C-741/19) EU:C:655 at [23].

[30] *Komstroy* (C-741/19) EU:C:655 at [48]–[50].

[31] *Komstroy* (C-741/19) EU:C:655 at [51]–[53].

preliminary reference procedure.[32] The review procedure in the instant case was considered wanting, because limited to what was permitted by French domestic law. This argument, and the corresponding one in *Achmea*,[33] is not wholly convincing, since in both cases the review process available under domestic law proved a perfectly adequate basis for the preliminary references that were considered necessary; though admittedly this would not have been the case, if the arbitration had taken place under the ICSID rules.

The final stage in the analysis is the differentiation of the arbitral mechanism in art.26 ECT from commercial arbitrations and from those dispute settlement mechanisms in mixed agreements which the Court of Justice has found compatible with EU law.[34] Regarding commercial arbitrations, the *Komstroy* judgment reiterates the argument in *Achmea* that, while these "originate in the freely expressed wishes of the parties concerned", the arbitration mechanism in art.26 ECT derives from a treaty whereby:

> "Member States agree to remove from the jurisdiction of their own courts and, hence, from the system of judicial remedies which the second subparagraph of Article 19 (1) TFEU requires them to establish in the fields covered by EU law…, disputes which may concern the application or interpretation of that law".[35]

As for the dispute settlement mechanisms of mixed agreements which have received the Court's approval, these were differentiated in *Achmea* from the jurisdiction of the tribunal referred to in art.8 of the Netherlands/Slovakia BIT, not only by the fact that disputes falling with the latter might relate to the interpretation "both of that agreement and of EU law", but also because,

> "the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States".[36]

In *Komstroy*, the Court's response to the fact that the EU is itself a contracting party to the ECT was that the EU's external competence,

> "cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed".[37]

It can be seen that, in both instances requiring differentiation, the arguments deployed by the Court in *Komstroy* presuppose that the jurisdiction conferred by art.26 ECT extends to the application or interpretation of EU law, which on the Court's analysis of art.26(6) appears contestable.

An argument, clearly meant to reinforce the analogy with the BIT in *Achmea*, is that, despite the multilateral character of the ECT, "a provision such as Article 26 ECT is intended, in reality, to govern bilateral relations between two of the Contracting Parties".[38] This, with respect, is misconceived, as will be shown in the commentary below on the international obligations accepted by all of the contracting parties under art.26 ECT.

The Court of Justice concludes on the art.26 ECT intra-EU arbitration issue in these terms:

[32] *Komstroy* (C-741/19) EU:C:655 at [54]–[57].
[33] *Achmea BV* (C-284/16) EU:C:2018:158 at [51]–[53].
[34] Examples of the latter are cited in *Achmea BV* (C-284/16) EU:C:2018:158 at [57].
[35] *Komstroy* (C-741/19) EU:C:655 at [59]. Cf *Achmea BV* (C-284/16) EU:C:2018:158 at [515]. The words deleted from the citation in the text above refer to *Associacao Sindical dos Juizes Portuguesas v Tribunal de Contas* (C-64/16) EU:C:2018:117; [2018] 3 C.M.L.R. 16 at [34].
[36] *Achmea BV* (C-284/16) EU:C:2018:158 at [57]–[58].
[37] *Komstroy* (C-741/19) EU:C:655 at [62].
[38] *Komstroy* (C-741/19) EU:C:655 at [64].

> "…although the ECT may require Member States to comply with the arbitral mechanisms for which it provides in their relations with investors from third States who are also contracting parties to that treaty as regards investments made by the latter in those Member States, preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves.
>
> In the light of the foregoing, it must be concluded that Article 26 (2) (c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State".[39]

This formulation raises yet further issues: as to why arbitration should be mandated with respect to disputes between EU Member States and third country investors, when it is considered so terribly harmful in the case of intra-EU disputes; and what it means that art.26(2)(c) ECT must be interpreted "as not being applicable" to such disputes. It is also worth remarking that, unlike in the *Achmea* judgment, the EU Treaty provisions that would be violated by the intra-EU application of the arbitration mechanism in art.26 ECT remain unspecified; though it seems likely that art.344 TFEU, at least, must one such provision, since it is mentioned at [42] of the judgment as enshrining the principle of autonomy. These are points for consideration in the commentary below.

## *The answer to the questions referred*

The Court of Justice reformulated the first question, incorporating elements from the second and third questions, which it therefore found unnecessary to answer.[40] In responding to the reformulated question, the Court held: that Komstroy must be regarded as an investor that directly owned an asset in the form of a claim arising under a contract for the supply of electricity, a status not affected by the fact that the claim was acquired from an undertaking of a third State to the ECT[41]; but that a mere supply contract was a commercial transaction, which could not in itself constitute an "investment" within the meaning of art.1(6) ECT, irrespective of whether an economic contribution was necessary in order for a given transaction to constitute an investment.[42] The answer given in the *dispositif* of the judgment was, therefore, that art.1(6) and art.26(1) of the ECT,

> "must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions".

The approach adopted by the Court of Justice to the definition of "investment" has been criticised by arbitration specialists as unduly narrow and as treating the issue as one purely of EU law, whereas it has been the subject of substantial jurisprudence in the field of arbitration.[43]

[39] *Komstroy* (C-741/19) EU:C:2021:655 at [65] and [66].
[40] For the text of the reformulated question, see *Komstroy* (C-741/19) EU:C:2021:655 at [39].
[41] *Komstroy* (C-741/19) EU:C:2021:655 at [70].
[42] *Komstroy* (C-741/19) EU:C:2021:655 at [79].
[43] This point was made by Dr Isabelle Van Damme in the webinar referenced in fn.4, above. The writer is indebted to Dr Van Damme for drawing his attention to the commentaries on *Komstroy* by Jeremy Jourdan-Marques, "Chronique d'Arbitrage: apres Komstroy Londre rit et Paris pleure" (12 October 2021) *Dalloz Actualite*, *https://www.dalloz-actualite.fr/flash/chronique-d-arbitrage-apres-komstroy-londres-rit-et-paris-pleure#.YbtxK73P3IU* [Accessed 16 December 2021]; and by Clement Fouchard and Vanessa Thieffrey, "CJEU Ruling in Moldova v Komstroy: the End of intra-EU Arbitration Under the Energy Charter Treaty (and a Restrictive Interpretation of the Notion of Protected Investment)" (7 September 2021) *Kluwer Arbitration Blog*, *http://arbitrationblog.kluwerarbitration.com/2021/09/07*

## Commentary

The commentary will be confined to the elements of the judgment in *Komstroy* concerned with the art.26 ECT intra-EU arbitration issue.

### *Deciding the Article 26 ECT intra-EU arbitration issue by obiter dictum*

The art.26 ECT intra-EU arbitration issue was brought to the forefront in *Komstroy* by the Court of Justice itself. It is understood that Germany and Poland, as well as the Commission, raised the issue in their written observations and the Court then proceeded to invite all the Member States and the EU Institutions to state their position on it at the hearing. There are serious constitutional and procedural grounds for regarding this initiative by the Court of Justice as misconceived.

The constitutional objection is that the Court chose deliberately to act in a matter falling outside its jurisdiction. Article 267 TFEU empowers the Court of Justice to give a preliminary ruling, if requested to do so by a national court on a question that has been raised before it, where the national court considers that a decision on the question is necessary to enable it to give judgment. As already remarked, the Court of Appeal of Paris had no need of a ruling on the art.26 ECT intra-EU arbitration issue in order to dispose of the case between Moldova and Komstroy, and did not ask for one. A commentator has neatly described the situation as one where the Court of Justice took advantage of a preliminary reference to ask itself a question of its own—not so much a judicial dialogue as a judicial monologue.[44] While another commentator has pointed out that the Court ignored its own case law, that it has no jurisdiction to give preliminary rulings on hypothetical questions, which in the context of *Komstroy* the intra-EU applicability of arbitration under art.26 ECT undoubtedly was.[45] The course of action taken by the Court amounts, at the very least, to a distortion of the preliminary ruling procedure. It also creates legal uncertainty. As a mere expression of opinion, not a ruling, the Court's *dictum* is incapable of constituting a binding precedent. Of course, it is likely that the Court will adopt the same position in future cases directly concerning arbitration in intra-EU disputes. In the meantime, however, it cannot be said that the issue has been settled.

The procedural objection to the course the Court of Justice adopted is that Member States other than Germany and Poland had no opportunity to develop their views on the art.26 intra-EU arbitration issue in writing. Making oral submissions in a hearing before the Court is not the same as developing an argument in writing on a complex and widely discussed matter. On a previous occasion, in the *Bernhard Pfeiffer* case,[46] where the Advocate General took a position on the horizontal direct effect of the Working Time Directive, on which the Court had not heard argument, the Member States and the EU institutions were invited to make both written and oral submissions, which should have happened here. Even that, it is submitted however, would not have been enough. Another serious procedural defect in *Komstroy* was the complete absence from the debate of the perspective of intra-EU investors, the private parties most directly affected by the denial of their right to arbitration under art.26 ECT. The parties to the dispute in the main proceedings, Moldova and Komstroy, would have been entirely indifferent to such an outcome, though they may well have been dismayed that so much attention was being lavished on an issue irrelevant to their situation.

*/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/* [Accessed 16 December 2021].

[44] See P. Paschalidis, "Komstroy: constitutional, procedural and substantive Implications" (27 September 2021) *Op-Ed: EU Law Live*, *https://eulawlive.com/op-ed-komstroy-constitutional-procedural-and-substantive-implications-by-paschalis-paschalidis/* [Accessed 16 December 2021].

[45] Dr Isabelle Van Damme, in the webinar referenced in fn.4, above.

[46] See *Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV* (C-397/01 to 403/01) EU:C:2004:584; [2005] 1 C.M.L.R. 44.

## *The core argument on the Article 26 ECT intra-EU arbitration issue*

The core argument on the art.26 intra-EU arbitration issue in the *Komstroy* judgment is that an ECT tribunal, not in dialogue with the Court of Justice, would have jurisdiction to interpret and apply EU law in the form of the ECT itself, which would represent a threat to the autonomy and to the particular nature of EU law, if the arbitration mechanism were applicable to intra-EU disputes. The argument invites three comments.

First, there is a real distinction between the law developed within and for the purposes of the EU as an autonomous legal order—effectively, a species of municipal law, of which an international tribunal needs to be informed by expert evidence—and a multilateral treaty like the EC, which is part of an international tribunal's stock-in-trade. The fact that the EU legal order chooses to give internal effect to the ECT cannot alter its character as international law. Nor does it give the Court of Justice special authority, let alone a monopoly, over the interpretation of the ECT, whose provisions must be assumed to have the same meaning for all the contracting parties, EU Member States and non-EU Member States alike.

This point was clearly grasped by the Court of Justice in the *CETA* Opinion. The Court of Justice said,

> "…with respect to international agreements entered into by the Union, the jurisdiction of the courts and tribunals specified in Article 19 TEU to interpret and apply those agreements does not take precedence over either the jurisdiction of the courts and tribunals of the non-Member States with which those agreements were concluded or that of the international courts or tribunals that are established by such agreements".[47]

The Court explained that, while the provisions of international agreements concluded by the EU form an integral part of EU law and are capable of being the subject of references for a preliminary ruling under art.267 TFEU, that would not prevent a tribunal established under such an agreement from interpreting and applying those provisions; though, because it stands outside the judicial system of the EU, the tribunal would be prevented from interpreting and applying other provisions of EU law.[48] The fact that the jurisdiction conferred on the CETA tribunals was confined to the CETA, interpreted in accordance with the rules and principles of international law, meant that, unlike the tribunal at issue in *Achmea*, they would not be called upon to interpret or apply EU law.[49] The view taken in *Komstroy* seems inconsistent with this insight.[50]

Secondly, a respectable argument can perhaps be made that, were ECT tribunals free to interpret and apply the EU Treaties and the body of law generated thereunder, on their own authority, among the norms available to them in deciding investment disputes (which seems to have been the intention with respect to the tribunal referred to in art.8 of the Netherlands/Slovakia BIT), there might be some risk to the coherent development of the EU legal order. Though even that is not wholly plausible, given that tribunals render one-off decisions incapable of creating precedents binding the EU institutions in the internal exercise of their powers.[51] What seems impossible to understand, however, is how the jurisdiction of an ECT tribunal

[47] *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341 at [116].

[48] *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341 at [117]–[118].

[49] *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341 at [123] and [126].

[50] The inconsistency between the two cases was remarked on by Dr Isabelle Van Damme in the seminar referenced in fn.4, above.

[51] In the pre-*Achmea* case law, the standard example of an adverse effect on the autonomy of the EU legal order was that of "binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law". See *Opinion pursuant to Article 218(11) TFEU* (Opinion 2/13) EU:C:2014:2454 at [183]–[184]. See also *Draft Agreement on a European Common Aviation Area, Re* (Opinion 1/00) EU:C:2002:231; [2002] 2 C.M.L.R. 3 at [13].

to interpret and apply the ECT itself, even in intra-EU disputes, would be liable to compromise the autonomy and particular nature of EU law in any other than a purely theoretical sense.

Thirdly, it is far from obvious why a jurisdiction, found to be so potentially harmful in the case of an intra-EU dispute, should be seen as perfectly acceptable in a dispute between an EU Member State and a third country investor.[52] The latter would still entail a tribunal beyond the control of the Court of Justice interpreting and applying "EU law" in order to reach a decision binding on the EU Member State concerned, and which may have to be enforced by its courts.

The irresistible conclusion, in the writer's respectful view, is that the core argument in the *Komstroy* judgment on the art.26 intra-EU arbitration issue lacks credibility.

## *The intended scope of the international obligations accepted under Article 26 ECT*

A lacuna in the *Komstroy* judgment is the failure to consider the intended scope of the international obligations accepted by the EU and the Member States parties to the ECT, in assenting to the inclusion of art.26(2)(c) in the Treaty. It is submitted that, interpreted,

> "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",

as required by art.31 of the Vienna Convention on the Law of Treaties (VCLT), art.26(2)(c) ECT provides for an arbitration mechanism that is intended to be available to the investors of any one of the contracting parties in disputes with any other contracting party hosting their investment, including where the dispute is between an investor of an EU Member State and another EU Member State. That seems abundantly clear from the inclusive language of the provisions of the ECT, in particular art.26(1),[53] combined with the absence of an express disconnection clause,[54] the extreme care taken to define any exceptions to the availability of the arbitration mechanism,[55] and the fact that, in the single case of an agreement given precedence over the ECT, the Svarlbard Treaty, this was spelled out in an express Decision.[56] The internal evidence that such was the contracting parties' intention is reinforced, consistently with art.32 of the VCLT on "supplementary means of interpretation", by the *travaux preparatoires* of the ECT. As recalled

[52] As acknowledged in *Komstroy* (C-741/19) EU:C:2021:655 at [65].

[53] Article 26 (1) ECT refers to "Disputes between a Contracting Party and an Investor of another Contracting Party relating to an investment of the latter in the Area of the former…".

[54] By the date of the ECT, the inclusion in multilateral international mixed agreements of a so-called "disconnection clause", making clear that, in case of any overlap with matters governed by EU law, the rules of the latter, and not those established by the treaty in question, would apply between EU Member States, was already well established in the international practice of the then European Community. See, *ex abundantia*, art.25(2) of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention) 21 June 1993 ETS. No.150 ("In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned").

[55] Article 26(3)(a) ECT provides: "Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with provisions of this Article". From the opening phase, "Subject only to subparagraphs (b) and (c)…", it is evident that the exceptions there specified from the contracting parties' unconditional consent to arbitration are intended to be exhaustive. Neither of the exceptions is relevant here. Subparagraph (b) applies where, prior to arbitration, a dispute has been submitted for resolution to the courts of the contracting party concerned, or in accordance with a previously agreed procedure. Subparagraph (c) applies to disputes arising in relation to the so-called "umbrella clause" in the last sentence of art.10(1) ECT, requiring each contracting party to "observe any obligation it has entered into with an investor or an investment of an investor of any Contracting Party".

[56] See Decision No.1, Annex 2 to the Final Act of the European Energy Charter Conference, Decisions with respect to the Energy Charter Treaty [1998] OJ L69/91.

by various arbitral tribunals, an attempt by the Commission to have a disconnection clause inserted into the text of the Treaty, that would have excluded the intra-EU application of art.26, was rejected.[57] This is a clear indication that the intra-EU application of the arbitration mechanism in art.26 ECT was intended to be among the international obligations undertaken by the EU contracting parties towards each other and the third country contracting parties, and that it was insisted upon by the latter.[58]

Two points emerge from the foregoing analysis. A first is the confirmation that, contrary to what is suggested at [64] of the judgment, art.26 ECT does not amount "in reality" to a bundle of bilateral relationships. On a true construction of the ECT in accordance with arts 31 and 32 VCLT, the intention was to create a coherent investment protection regime available to investors of all contracting parties against all other contracting parties. As noted in the August article, the provision of an arbitration mechanism like that of art.26 ECT, available in relations between Member States, as parties in their own right to a multilateral agreement, alongside the EU itself and many third countries, cannot plausibly be seen as a betrayal of the mutual trust Member States are required to display towards each other, nor as Member States colluding in breach of their duty of sincere cooperation, to circumvent the EU judicial system.[59] This provides a clear point of distinction from the *Achmea* judgment, and may explain why the principles of mutual trust and of sincere cooperation, given such prominence there, do not feature in *Komstroy*.

A second point concerns the statement at [66] of the *Komstroy* judgment, that art.26(2)(c) ECT "must be interpreted as not being applicable" to intra-EU disputes. This is misleading as a characterisation of the legal situation resulting from the finding that EU law precludes the application of the arbitration mechanism under art.26 ECT in such disputes. The Court surely cannot mean that the consent given by the EU and the Member States to the intra-EU applicability of the mechanism is negated by its (lately) perceived incompatibility with EU law. This would contradict art.46 VCLT, which says that a State may not invoke the violation of a provision of its internal law as invalidating its consent to a treaty, unless that violation was manifest and concerned a rule of its internal law of fundamental importance. While the Court would presumably take the view that the rules of EU law supposedly violated by the intra-EU application of art.26 are "fundamental", it cannot plausibly be argued that any breaches of those rules were "manifest". As AG Wathelet remarked trenchantly in his *Achmea* Opinion,

> "if no EU institution and no Member State sought an opinion from the Court on the compatibility of [the ECT] with the EU and FEU Treaties, that is because none of them had the slightest suspicion that it might be incompatible".

The legally correct position is, therefore, that the EU obligations of Member States, as found by the Court of Justice, are in conflict with the international obligations they accepted under the ECT and which continue to bind them. The conflict cannot simply be interpreted away. It can only be resolved by the amendment of the ECT with the consent of all contracting parties, or by the withdrawal of the EU and the EU Member State Parties, subject to the 20-year "grandfathering" period provided for by art.47(3) ECT.

## Conclusion—What may happen next?

Four concluding comments are here offered as to what may happen next.

[57] See *Blusun v Italian Republic* (ICSID Case No.ARB/14/3) Final Award (27 December 2016) at [280] (4); *Vattenfall AB v Federal Republic of Germany* (ICSID Case No.ARB/12/12) Decision on the Achmea issue (31 August 2018) at [205].

[58] Paschalidis identifies the United States and Japan among the third country parties to the ECT that insisted on the intra-EU application of art.26(2)(c) ECT: see P. Paschalidis, "Komstroy: constitutional, procedural and substantive Implications" (27 September 2021) *Op-Ed: EU Law Live*, p.4.

[59] The argument is more fully developed in Dashwood, "Article 26 ECT and Intra-EU Disputes" (2021) 46 E.L. Rev. 415, 430–433.

First, it is, of course, open to those representing investors in cases referred to the Court of Justice, in the context, say, of set-aside or enforcement proceedings, to invite the Court to reconsider or to qualify its opinion in *Komstroy*, as it has done in the past, albeit rarely.[60] There are, it is submitted, substantial grounds for such re-consideration in this case, notably the unsatisfactory conditions under which the art.26 intra-EU arbitration issue was debated in *Komstroy*, and the unconvincing notion that the power of an ECT tribunal to interpret and apply provisions of the ECT in an intra-EU dispute would represent a genuine risk to the autonomy of the EU legal order and the particular nature of EU law. The argument would be that the integrity of the EU legal order would be perfectly well protected by an approach similar to that taken in the *CETA* Opinion: accepting that it is the normal job of an ECT tribunal to interpret and apply the ECT,[61] just as it is that of a CETA tribunal to interpret and apply the CETA; but that, like CETA tribunals, ECT tribunals have no jurisdiction under art.26(6) ECT to interpret or apply other provisions of EU law, though they may treat such provisions as part of the national law of a respondent Member State, to be proved by expert evidence.[62] As an element of such an approach, the Court could specify firmly that, if an ECT tribunal exceeds its jurisdiction, by treating EU law as applicable (or governing) law in rendering an award, whether in an intra-EU dispute or one between an EU Member State and a third country investor, the award would be incompatible with EU law and unenforceable in any EU court.

Secondly, whatever the position in EU law, on a true construction of the ECT, as argued above, EU Member States remain under an international obligation to comply with the arbitration mechanism provided for by art.26 ECT in their relations with each other as well as in relations with the third country parties, and ECT tribunals retain jurisdiction under international law to entertain intra-EU disputes. Such tribunals seem even less likely than hitherto to renounce or decline jurisdiction, out of deference to the claim of incompatibility of the proceedings with EU law, given the poverty of the reasoning in *Komstroy*. The result is likely to be ongoing conflict and legal uncertainty, with investors seeking enforcement of arbitral awards in non-EU Member States, and the Commission treating the implementation of such awards as instances of unlawful State aid. This is a real risk, militating strongly in favour of an approach along the lines suggested in the preceding paragraph, which seems much more likely to win the acceptance of ECT tribunals.

Thirdly, it remains open to investors to request that any future adverse ruling by the Court of Justice on the art.26 intra-EU arbitration issue have purely prospective effect. The absence of an actual ruling in *Komstroy* means that they would not be caught by the rule that a temporal limitation can only be imposed by the judgment giving the interpretation sought, and not on a later occasion.[63] The power of the Court to derogate from the general rule on the application *ex tunc* of an interpretative ruling (that it expresses the true meaning of the provision in question retrospectively to the date of its entry into force) is exercised "quite exceptionally" in the interests of legal certainty, where serious economic repercussions would otherwise follow because of the large number of legal relationships, established in good faith, that are liable to be affected, and where the previous misinterpretation was due to "objective, significant uncertainty" regarding the implications of the EU provisions in question, to which the conduct of Member States or

[60] See *Cnl-Sucal NV SA v Hag GF AG* (C-10/89) EU:C:1990:359; [1990] 3 C.M.L.R. 571, in which the Court reversed its earlier ruling in *Van Zuylen Freres v Hag AG* (192/73) EU:C:1974:72; [1974] 2 C.M.L.R. 127 on the existence of a doctrine of "common origin" limiting the circumstances in which the owner of a trade mark in one Member State could restrain imports of products legally bearing the mark in another Member State. See also *Keck and Mithouard* (C-267/91 & 268/91) EU:C:1993:905; [1995] 1 C.M.L.R. 101 at [16], where the Court, "*contrary to what has previously been decided*", sought to exclude, from the scope of measures having an effect equivalent to quantitative restriction within the meaning of art.34 TFEU, "selling arrangements" (*in casu* the promotional tactic known as loss-leading) which are wholly non-discriminatory, as between imports and domestic products.

[61] See fns 50 and 51, above.

[62] *CETA Investment Court System (Belgium)* (Opinion 1/17) EU:C:2019:341 at [131].

[63] *Meilicke v Finanzamt Bonn-Innenstadt* (C-292/04) EU:C:2007:132; [2007] 2 C.M.L.R. 19 at [36].

the Commission may have contributed.[64] It is submitted that, at least, the investors who commenced arbitral proceedings prior to *Komstroy* would have a reasonable prospect of meeting those conditions. The economic repercussions of a ruling denying them recourse to arbitration under art.26 ECT would evidently be serious for the large body of investors concerned, many of whom will have been incurring high litigation costs over a number of years and may no longer have any realistic possibility of successfully pursuing other remedies; while it is undeniable that they acted in good faith, believing intra-EU arbitration under art.26 ECT to be compatible with EU law, any "objective, significant uncertainty" in this regard being attributable to conduct of the EU and the Member States.

Fourthly, and finally, there is an issue which, it is thought, has never been fully argued before the Court of Justice: whether art.344 TFEU, the provision in which, the Court says, the principle of autonomy is enshrined, is capable of having direct effect for individuals. More concretely, if the intra-EU applicability of arbitration under art.26 ECT must be seen as an infringement by the Member States of their undertaking in art.344 not to submit disputes concerning the interpretation and application of the EU Treaties to any method of settlement other than those provided for in the Treaties themselves, would this necessarily entail the invalidation (in the eyes of EU law) of the offer of arbitration made to investors by art.26(2) and (3) ECT? Any such infringement of art.344 would be the fault of the Member States that concluded the ECT without subjecting art.26 to a disconnection clause, as well as of the EU itself; whereas investors, who had accepted the offer of arbitration in good faith by commencing arbitration proceedings, would be entirely blameless. The disabling of such investors from relying on the "unconditional" offer in art.26(3) would thus have the consequence of allowing a Member State to profit from its own wrongdoing. It is hard to think of any precedent where Member States have been able, in this way, to exploit the principles of the direct effect and primacy of EU law to gain an advantage in litigation against a private party. In the case law on the direct effect of directives, the Court of Justice has always insisted that direct effect flows "upwards" rather than "downwards". In other words, while an individual may rely directly on provisions contained in a directive that are unconditional and sufficiently precise, in proceedings against the Member State that has failed to implement the directive properly, this principle does not apply in reverse; a Member State's authorities may not rely directly on the provisions of a directive they ought to have implemented, where this would be to the detriment of an individual.[65]

If given binding force through a future ruling under art.267 TFEU, the position taken by the Court of Justice in *Komstroy* would condone a gross instance of Member States profiting from their own wrong, through the reverse application of direct effect. Can the Court of Justice really intend such an outcome?

[64] See *Poland v PL Holdings Sarl* (C-109/20) EU:C:2021:875 at [58]–[60]. Hereinafter, *PL Holdings*.

[65] *Arcaro* (C-168/95) EU:C:1996:363; [1997] 1 C.M.L.R. 179 at [36] and the authorities there cited. In *PL Holdings* (C-109/20) EU:C:2021:875, the Court of Justice, and previously the Svea Court of Appeal, seem to have taken for granted that the incompatibility with EU law of arbitration under the BIT there in issue would directly affect the situation of individual investors. It is hoped that the strong objections to this abusive application of the direct effect principle will be reconsidered in any future proceedings where the Court is called upon to rule formally on the art.26 intra-EU arbitration issue.