

CJEU Expected to Rule on Notion of “Investment” in Energy Charter Treaty



On 24 September 2019, the Paris Court of Appeal handed down a judgment in which it decided to refer three questions for preliminary ruling to the Court of Justice of the European Union (the **CJEU**) regarding the definition of an “investment” in the Energy Charter Treaty (the **ECT**).

The upcoming decision of the CJEU is likely to have a great impact on the scope of future ECT based investment arbitration proceedings, which require, pursuant to Article 26(1) of the ECT, that the dispute relate to “an investment”.

Background of the proceedings

The dispute before the Paris Court of Appeal relate to the annulment proceedings of the 2013 arbitral award handed down in the case of *Energoalians TOB v. Republic of Moldova* for alleged violations of the ECT.

In that case, the arbitral tribunal awarded USD 49 million to *Energoalians* (an Ukrainian company now known as **Komstroy**) as compensation for the non-payment, by a Moldovan State-owned company called *Moldtranselectro*, of debts that *Moldtranselectro*

owed to *Derimen* (a third party located in the British Virgin Islands) and that were acquired by Komstroy.

When rendering its award, the arbitral tribunal was divided on the question of whether the debt that Komstroy had acquired from *Derimen* qualified as an “*investment*” under the ECT. Only two of the arbitrators found that the tribunal had jurisdiction to hear the dispute. The third arbitrator issued a dissenting opinion finding that the debt acquired by Komstroy did not qualify as an “*investment*” pursuant to the ECT and that as a result, the tribunal lacked jurisdiction to rule on the matter.

In 2016, the Paris Court of Appeal annulled the award precisely on the grounds that the tribunal had misinterpreted the subject debt as an “*investment*” under the ECT.

That decision was, however, reversed by the French Supreme Court which remanded the case to the Paris Court of Appeal.

In its second stint, the Paris Court of Appeal referred three questions to the CJEU regarding the scope of the notion of an “*investment*” in the ECT.

The questions referred to the CJEU

First, since Moldova maintained that the notion of “*investment*” under the ECT involved a “*contribution*”, and that Komstroy, by merely acquiring an existing debt from a third party, never contributed anything to the investment, the Paris Court of Appeal asked the CJEU whether a monetary claim arising out of a contract for the sale of electricity, and which did not involve any contribution from the investor, constitute an investment under Article 1(6) of the ECT (which provides for a definition of the term “*investment*“)?

The second question then inquired whether Article 26(1) of the ECT – which requires that any investor-State dispute under the ECT relate to an “*investment*” – allowed investment disputes

relating to monetary claims acquired from an entity whose country of origin is not a party to the ECT? On this point, Moldova argued that since Komstroy had acquired its alleged “investment” (i.e., the monetary claims) from *Derimen*, an entity registered in the British Virgin Islands (which are not a party to the ECT), this investment was beyond the ECT’s scope and Komstroy could thus not have made a valid investment under the ECT.

Finally, the third question asked whether Article 26(1) of the ECT – which requires that any investor-State dispute under the ECT relate to an “investment” made “in the area” of the host State – allowed investment disputes for which the contested investment resulted from a contract for the supply of electricity at the border of the Host State, and where no further economic activity, by the investor, took place in the Host State’s territory? In this regard, Moldova argued that Komstroy did not invest “in the area” of Moldova since the claims for money only related to providing electricity from Ukraine to the Moldovan border. Consequently, according to Moldova, Komstroy had no valid claim under the ECT.

On the CJEU’s jurisdiction

In its judgment of 24 September 2019, the Paris Court of Appeal justified the jurisdiction of the CJEU to rule on the above questions on the basis that Article 267 of the Treaty on the Functioning of the European Union (the **TFEU**) provides that the CJEU “*shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the [European] Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*” (emphasis added).

According to the Paris Court of Appeal, since mixed international agreements concluded between the EU (and its Member States) with third States fall within the category of “*acts of the institutions*”, the CJEU has jurisdiction to rule

on the matter.

According to me, this justification should be balanced by the fact that the CJEU has in principle, jurisdiction to give preliminary rulings in disputes whose subject matter is situated within the field of EU law.

However, in the case at hand, although the place of arbitration was Paris (and both France and the European Union are parties to the ECT), it is hard to see how the subject matter of the dispute effectively relate to EU law. The case does not require to define the scope of the obligations which France and the European Union assumed under the ECT. Instead, the questions relate to the obligations assumed by Moldova (a non-EU member) in relation to the rights enjoyed by an Ukrainian investor (*i.e.*, a non-EU citizen).

It is difficult to see why the CJEU should have any say on this matter (unless the questions trigger EU public policy concerns (which is doubtful)).

Should the CJEU confirm its jurisdiction to hear this case, it would amount to a self-arrogation by the CJEU of the right to interpret the ECT even in disputes in which the link with EU law is extremely weak.

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The case is currently filed under the number [C-741/19](#).

A final decision by the CJEU on this matter is not expected before a couple of months. The International Litigation Blog will of course keep you posted of any further developments in this case.

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