Some Initial Reflections on CJEU's Decision to Uphold Jurisdiction in Case C-741/19 (République de Moldavie)

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On 2 September 2021, the Court of Justice of the European Union (the ***CJEU*** or the ***Court***) rendered its decision in Case C-741/19 (*République de Moldavie*)[1]. The decision was given in the context of a reference for a preliminary ruling received from the Paris Court of Appeal on the interpretation of the Energy Charter Treaty (the ***ECT***) in proceedings to set aside an international arbitral award rendered in a dispute between a Ukrainian investor and Moldova.

Following the conclusions reached by Advocate General Szpunar last March[2], the Court concluded that:

> – it had jurisdiction to issue a preliminary ruling interpreting an international treaty to which the EU and some Member States are a party in a case which involved neither of them; and

– the application of the Investor State Dispute Settlement (***ISDS***) mechanism under Article 26 of the ECT between Member States is incompatible with EU law.

On this basis, the Court then moved to provide the referring French court with an interpretation of the concept of "*investment*" in Article 1(6) of the ECT.

This post sets out some initial thoughts on the decision of the CJEU to assume jurisdiction. After setting out the background of the dispute (section 1) and the reasoning of the CJEU on this point (Section 2), the post maintains that the judgment, and Advocate General Szpunar's Opinion that the Court closely followed, seem to go well beyond judicial precedents and appear decoupled from any concerns regarding the risk of fragmentation of EU law (Section 3).

The post then concludes that the judgment seems to suggest that any link, however small, with EU law may be relied upon by the Court to interpret international treaties to which the EU is a party, together with its Member States, even when they have a merely potential, future relevance for EU law (section 4). It is argued that the Court's decision in *République de Moldavie* seems to be guided by practical aims and seems to reveal that the Court intends to take an active role in shaping the external relations of the EU. The post finally observes that the Court's decision may have some relevant practical consequences: parties to future ISDS proceedings under EU agreements, whether mixed or exclusive, regardless of their ties with the EU, will want to keep this case in mind if they wish to avoid the involvement of the CJEU in follow on proceedings before the national courts of the Member States.

1. ***Background***

The case in C-741/19 arose out a request for a preliminary ruling referred to the CJEU by the Paris Court of Appeal in set aside proceedings initiated by the Republic of Moldova

against a 2013 UNCITRAL award rendered against it under Article 26 of the ECT[3].

The facts of the case were as follows: Moldova and Ukraine are both parties to the ECT, a plurilateral agreement to which the EU and some of its Member States have also separately acceded. Article 26 of the ECT includes an ISDS mechanism, which allows investors of a contracting party to bring direct disputes, for breach of its obligations of the ECT, against another contracting party before an arbitral tribunal.

In 2010, a Ukrainian investor started ISDS proceedings against Moldova under Article 26 of the ECT and under the ISDS provision contained in the 1995 Ukraine-Moldova BIT on the grounds of Moldova's alleged breach of contractual obligations to sell electricity to this investor. In an award dated 23 October 2013, Moldova was ordered by the UNCITRAL tribunal constituted to hear the case, to pay USD 49 million in compensation to the investor.

Moldova challenged the award before the Paris Court of Appeal on the grounds that the arbitral tribunal had wrongly assumed jurisdiction. The Court of Appeal ruled in favour of Moldova and thereby annulled the tribunal's decision. After the French Supreme Court (*Cour de Cassation*) quashed its decision on the grounds of an erroneous interpretation of the meaning of "*investment*" under Article 1(6) ECT, the Paris Court of Appeal referred the case to the CJEU, seeking a preliminary ruling on the correct interpretation of that provision.

Although the proceedings at issue before the Paris Court of Appeal involve neither the European Union nor the Member States, that court considered that the ECT, as a "mixed agreement", constituted an act adopted by the institutions, bodies, offices or agencies of the European Union. It therefore considered that the ECT formed an integral part of the EU legal order and thus fell within the jurisdiction of the CJEU to provide preliminary decisions under Article 267

TFEU.

2. ***The reasoning of the Court***

Both the CJEU and the Advocate General Szpunar agreed with the Paris Court of Appeal that the CJEU had jurisdiction to interpret the ECT. The starting point of their reasoning is that Article 267 TFEU provides that the CJEU "*shall have jurisdiction to give preliminary rulings concerning* […] *the interpretation of acts of the institutions of the Community*"[4]. And indeed, the consistent case-law of the Court provides that acts of accession to international treaties – adopted by the Council in accordance with Articles 217 and 218 TFEU – constitute such acts[5]. From their entry into force, the relevant international agreements thus form "*an integral part of the EU legal system*", and confer jurisdiction to the Court to give preliminary rulings concerning their interpretation.

The Court then tested its jurisdiction in principle against the competence of the European Union in relation to the facts of the case pending before the Paris Court of Appeal. Two main conclusions strengthened its finding of jurisdiction[6]: first, that such jurisdiction was not affected by the fact that the agreement at issue, the ECT, was a "mixed" agreement. Second, that the preliminary reference concerned an issue relating to foreign direct investments, which, as the Court found in its Opinion on the EU-Singapore Free Trade Agreement[7], fell within the EU's exclusive competences since the entry into force of the Lisbon Treaty[8].

The Court and Advocate General Szpunar then noted that the previous case-law of the Court subjects the CJEU's jurisdiction to rule on the interpretation of an international agreement to one additional condition, namely the application of that agreement *within* the EU legal order[9]. Following Advocate General Szpunar's Opinion, the Court concluded that

this was the case in the dispute at hand and that the fact that the main case before the Paris Court of Appeal concerned a dispute between third countries did not cast doubt on the Court's jurisdiction to interpret the ECT.

This was for three main reasons.

First, because the principles of law that need to be established to solve the dispute at issue before the referring French Court may also be relevant to resolve situations falling within the scope of EU law. According to the Court, that could, for instance, be the case for an application to set aside an arbitral award made by an arbitral tribunal which has its seat in the territory of a Member State or where proceedings have been brought before the courts of the defendant Member State in accordance with Article 26(2)(a) ECT. Relying on previous case-law of the Court[10], both the judgment and Advocate General Szpunar's Opinion concluded that, in the case at hand, it was "*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].

Second, because when the parties chose to submit their dispute to a tribunal established on the basis of the UNCITRAL rules and agreed that the seat of the arbitration would be Paris and that the applicable law would be French law (which includes EU law), they indirectly expressed their consent to apply the ECT within the EU legal order[12].

Third, because Article 267 TFEU provides the national courts with the responsibility to determine, in the light of the particular circumstances of a case, whether a preliminary ruling to the CJEU is necessary in order to enable that national court to deliver judgment. The CJEU recognized that in previous cases[13] it has declined national courts' requests

for preliminary rulings on the interpretation of international agreements. However, it distinguished those previous cases from the case at hand on the ground that, in those previous cases, it had been called on to decide disputes relating to the period prior to the accession to the European Union of the States in which those courts were located[14].

Both the CJEU and Advocate General Szpunar then added that the application of Article 26 of the ECT to intra-EU disputes was incompatible with EU law[15].

3. ***Analysis of the decision on jurisdiction***

The analysis of the Court's finding of jurisdiction in *République de Moldavie* can really be narrowed down to one main argument, *i.e.*, the need to forestall future differences in the future interpretation of the law in a case that potentially applies to disputes falling within the scope of EU law[16].

The Court's jurisdiction on forestalling future differences exists if the relevant provisions of EU law have been somehow adopted as a model by national legislation[17]. This would take place when, although the facts of the main proceedings are outside the direct scope of EU law, "*the provisions of EU law have been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, follows the same approach as that provided for by EU* law"[18] or where domestic law makes a reference to the content of the EU provisions at issue in order to determine the rules applicable to a situation which is purely internal to the Member State concerned[19]. The Court has found the rationale for such an approach to be the EU's interest in the uniform interpretation of EU law when there is a need to forestall future difficulties in interpretation.

Yet, this does not seem to be the case of the present decision, where the assertion of jurisdiction of the Court seemed far removed from any risks of fragmentation of EU law, and thus from an even potential need to forestall future complications in its application. To begin with, while the Court claimed to rely on its previous decisions in *Hermès* and *Parfums Dior*[20], the judgment ultimately seemed to stretch the jurisdiction of the CJEU well beyond its findings in those cases. It is true that the preliminary reference of the French Court in the case at hand related to the application of a mixed agreement (*i.e.,* the ECT), to which both the Union and some of its Member States are parties. However, the commonalities between *République de Moldavie* and that line of case-law seem to stop at that point. First, in *Hermès* and *Parfums Dior*, the Court was deciding on actions brought by operators of the Member States relating to trademarks. Second, in those decisions the legal framework that the Court was faced with included both national and EU measures implementing a procedural provision of the TRIPS Agreement (Article 50) that the Court was asked to interpret. It follows from this that a diverging interpretation of Article 50 of the TRIPS in *Hermès* and *Parfums Dior* would potentially have produced some fragmenting effects *within* the Union's legal order. The case in *République de Moldavie* instead shows: (i) a much thinner connection between the parties to the dispute before the national court and EU law – *i.e.,* the seat of the arbitration and the French law governing the grounds for set aside of arbitral awards; (ii) no potentially conflicting national and EU legislations regarding the interpretation and application of the norm subject to the preliminary reference procedure – *i.e.*, the definition of "*investment*" under the ECT; and (iii) little or no potential risk of fragmentation in the application of EU law, as the effects of the judgment of the French court – *i.e.*, the disbursement from Moldova and the enrichment of the Ukrainian company. – only produce substantive effects outside of the European Union.

Consequently, that case will ultimately produce its effects (or most of them) outside of the EU legal order. Given that the risk of divergent interpretations and fragmentation of EU law in the present case is extremely low (or even nil), the Court thus appears to go well beyond the broad scope of the previous case-law and asserts jurisdiction on the case at hand in the absence of any considerations relating to the immediate safeguarding of the unity of EU law.

The expansive approach to jurisdiction of the Court is also evident from the fact that the case-law that the Court takes as a starting point, *Hermès* and *Parfums Dior*, declaredly already embraced a very broad interpretation of the CJEU's own jurisdiction to interpret the TRIPS agreement for "*practical and legal reasons*"[21]. An approach that was criticised as allowing the Court to assert jurisdiction to give a preliminary ruling whenever the interpretation of a legal norm was of possible relevance to EU law. It is telling that in *République de Moldavie* the Court used those cases as a starting point to achieve an even more extensive interpretation of its own jurisdiction to interpret provisions of a mixed agreement.

This is not to say that the CJEU should in no circumstance interpret the ECT. As the Court correctly pointed out, for the purpose of EU law, the ECT is an act of the institutions and foreign direct investments are now an exclusive competence of the EU. So, considerations revolving around the "unity" and "indivisibility" of EU law may well justify decisions necessary to guide the development of a shared understanding of the law. That could potentially have been the case if the ECT could govern disputes among Member States, or in cases where the enforcement of the decisions had given rise to public policy concerns – as it previously has been the case for commercial awards on EU competition rules. Yet, it remains very hard to see why the Court would need to be involved in decisions that have little to do with EU law, such as set

aside proceedings of awards rendered between third countries that will have effects outside of the EU.

At a closer look, the situation in this case shows striking similarities with previous decisions in which the Court declined jurisdiction to interpret international agreements (EEA Agreement) and that both Advocate General Szpunar and CJEU attempted to depart themselves from (namely *Andersson and Wåkerås-Andersson* and *Salzmann*[22]). Much like those decisions, the present case highlights a merely *potential*, *future* link with EU law – as it cannot be excluded that similar questions on the interpretation of the international agreement will eventually become relevant within the EU. As in those cases, the facts in *République de Moldavie* are too far removed from any risk for the unity of EU law to justify the jurisdiction of the Court.

4. ***Conclusions***

The recent decision of the CJEU in *République de Moldavie* sets out a very broad interpretation of the Court's jurisdiction to interpret "mixed" international agreements of the EU. An interpretation that goes well beyond its precedents and seems decoupled from any considerations as regards the risk of fragmentation of EU law. All in all, the judgment seems to conclude that any link, however small, with EU law may be relied upon by the Court to interpret international treaties to which the EU is a party together with its Member States in cases that are of mere potential and future relevance for the Union.

The decision of the Court may be explained on the basis of some "practical" considerations: on the one hand, ascertaining jurisdiction enabled the CJEU to accept Advocate General Szpunar's invitation to put an end to the longstanding question of the compatibility of the application of Article 26 of the ECT to intra-EU disputes[23]. On the other hand, it also

enabled it to participate in the international dialogue on the interpretation of the ECT as a whole, putting forward the Union's interpretation of its provisions.

République de Moldavie thus seems telling as regards to the role that the Court intends to play in the context of the mixed agreements of the EU: an active player that can set standards able to influence and orient the decisions of other international courts. From this standpoint, the case seems to follow the trend of "activism" found in other decisions of the Court, such as the one in Case C-66/18[24], where the Court effectively signalled its willingness to review any Member State measure falling within the scope of the WTO agreements and affecting trade with third States. A trend that is also found in its decisions regarding the "autonomy" of EU law, which all share the same "precautionary" approach and "language of possibility" also found in the present case[25]. To what extent it is appropriate and desirable that the CJEU should play this role, remains a matter for discussion.

More immediately, the decision seems to potentially produce some very practical consequences in the context of international dispute settlement also under mixed agreements of the EU, such as the ECT. The most evident relates to the conduct of ISDS proceedings: regardless of their ties with EU countries, litigants in these proceedings will want to carefully consider the procedural connections of their cases with EU law – such as the choice of the seat of arbitration, the applicable law, and the arbitration rules – if they wish to avoid the involvement of the CJEU in potential follow-on proceedings before the national courts of the Member States.

[1] C-741/19, *République de Moldavie* [2021], ECLI:EU:C:2021:655.

[2] C-741/19, *République de Moldavie* [2021], Opinion of Advocate General Szpunar, ECLI:EU:C:2021:164.

[3] *Energoalians TOB v. Republic of Moldova*, UNCITRAL, Award, 23 October 2013.

[4] Judgment, *République de Moldavie*, FN 1, paras 21-23 and Opinion, *République de Moldavie*, FN 2, paras 28-30.

[5] C-181/73, *R. & V. Haegeman v Belgian State* [1974], ECLI:EU:C:1974:41, paras 3-6.

[6] Judgment, *République de Moldavie*, FN 1, paras 24-27.

[7] Opinion 2/15, *EU-Singapore Free Trade Agreement* [2017], ECLI:EU:C:2017:376, paras 82, 238 and 243.

[8] Article 207 TFEU.

[9] Judgment, 28 and Opinion, *République de Moldavie*, FN 2, para. 30.

[10] C-130/95, *Bernd Giloy v Hauptzollamt Frankfurt am Main-Ost* [1997], ECLI:EU:C:1997:372, paras 23-28; C-53/96, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998], ECLI:EU:C:1998:292, para. 32; C-300/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* [2000], ECLI:EU:C:2000:688, para. 35.

[11] Judgment, *République de Moldavie*, FN 1, para. 29; Opinion, *République de Moldavie*, FN 2, para. 87.

[12] Judgment, *République de Moldavie*, FN 1, paras 32-33.

[13] C-321-97, *Ulla-Brith Andersson and Susanne Wåkerås-Andersson v Svenska staten (Swedish State)* [1999], ECLI:EU:C:1999:307, paras 28-32; C-300/01, *Doris Salzmann* [2003], ECLI:EU:C:2003:283, paras 66-70.

[14] Judgment, *République de Moldavie*, FN 1, paras 35-37.

[15] Interestingly enough, they do so in different ways: according to Advocate General Szpunar, the possibility that

the ECT may apply in intra-EU ECT investment disputes supports his view that a decision of the Court is necessary to ensure the ECT's consistent application in the EU, and thus supports the finding of the Court's jurisdiction in the dispute at hand (Opinion, *République de Moldavie*, FN 2, para. 99). The CJEU instead reaches the same conclusions after having already concluded its jurisdiction in the case at hand, as part of the interpretation of Article 1(6) of the ECT (Judgment, *République de Moldavie*, FN 1, paras 39 ss.).

[16] It is interesting to note that the second and third argument of the Court , i.e., that (a) the parties have implicitly accepted the application of EU law and, consequently, the jurisdiction of the CJEU, when establishing the tribunal's seat in Paris and accepting French law as *lex fori*; and that (b) the referring Court has the responsibility to decide when to request guidance from the CJEU in the interpretation and application of the treaties, seem to link the jurisdiction of the Court to an element of choice: the "choice" of the parties to establish the seat of the tribunal in France (argument no. 2); the "choice" of the Court of Appeal to make the reference (argument no. 3). While the fact that the investment tribunal was seated in Paris certainly played a role in the determination of the jurisdiction of the Court (in particular, because that determined the forum for the set aside proceedings), that element of "choice" appears misplaced. This is because the jurisdiction of the Court (unlike that of an arbitration tribunal) is not based on choice or consent, but is set out in the EU treaties – within which the Court can only operate. So, the fact that the litigants may or may not intend to involve the CJEU (argument no. 2), or that the referring court chooses to make a preliminary reference to the CJEU (argument no. 3) does not *per se* mean that the Court should rule on that reference. The Court will still have a duty to ensure that its jurisdiction, as set out in the treaties, is present in the specific case.

[17] E.g., Joined cases C-297/88 and C-197/89, *Massam Dzodzi v Belgian State* and *Dzodzi v Belgian State* [1990], ECLI:EU:C:1990:360, paras 36, 37, 41.

[18] C-268/15, *Fernand Ullens de Schooten v État belge* (Grand Chamber) [2016], ECLI:EU:C:2016:874, para. 53.

[19] C-3/04, *Poseidon Chartering* [2006], ECLI:EU:C:2006:176, para. 15.

[20] C-53/96, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV* [1998], ECLI:EU:C:1998:292; C-300/98, *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* [2000], ECLI:EU:C:2000:688.

[21] S. Peers, Constitutional Principles and International Trade, [1999] European Law Review 24(2) 185, 191.

[22] C-321-97, *Ulla-Brith Andersson and Susannne Wåkerås-Andersson v Svenska staten (Swedish State)* [1999], ECLI:EU:C:1999:307; C-300/01, *Doris Salzmann* [2003], ECLI:EU:C:2003:283.

[23] Opinion, *République de Moldavie*, FN 2, para. 48.

[24] The case focused on the infringement proceedings brought by the Commission against Hungary in relation to its treatment of the Central European University (CEU) and more in general on the requirements which Hungary applied to foreign higher education institutions seeking to supply services in its territory.

[25] In cases in which it discusses the “autonomy” of the EU legal order *vis-à-vis* international law, the Court often appears to find an incompatibility with EU law even in cases in which only a remote possibility exists that the dispute resolution mechanism set out in the scrutinised international treaty may sit uncomfortably with certain features of EU law.

For instance, in *Opinion 1/91*, on the EEA Court, the CJEU "feared" that the application of the provision seeking to create organic links between itself and the EEA Court may make it "*very difficult, if not impossible*" for the judges, when sitting on the (at the time) Court of Justice, to decide questions of law with completely open minds. The Court also deemed incompatible with EU law that the preliminary ruling it would have delivered to the EFTA states would have been purely advisory as this, again, "*may give rise to uncertainty about their legal value for courts in Member States of the Community*" (Opinion 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (EFTA I)* [1991], ECLI:EU:C:1991:490). In *Opinion 2/13* on the accession to the ECHR, the Court decided that the mechanism established by protocol 16 of that Convention, which allowed the highest courts and tribunals of the Member States to request advisory opinions to the ECHR on issues relating to the interpretation or application of the rights and freedoms protected by the Charter of Fundamental Rights of the EU, could affect the autonomy of the EU by impacting the preliminary ruling procedure in article 267 TFEU. The Court declared in that regard that "*it cannot be ruled out that a request for an advisory opinion* […] *might*" circumvent the mechanism of preliminary references. That mechanism of prior involvement of the CJEU in the decision-making activity of the ECtHR was also deemed incompatible with EU law on the basis that the agreement did not "*contain anything to suggest that* [the] *possibility is excluded*" that the ECtHR may be allowed to give a judgment on issues on which the CJEU has already delivered a judgment. The Court eventually decided that these and other reasons stood in the way of the accession of the EU to the ECHR (Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], ECLI:EU:C:2014:2454). More recently, in *Achmea*, the Court observed (i) that "*the arbitral*

tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law“; (ii) that “*disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law*“; (iii) that “*an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*“; and (iv) that “*by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law*” (C-284/16, *Slowakische Republik* v *Achmea BV* [2018], ECLI:EU:C:2018:158).
