Can EU Member States Replicate Plurilateral Agreement on Intra-EU BITs to Implement Komstroy Judgment?

On 2 September 2021, the Court of Justice of the European Union (the ***CJEU***) handed down a judgment in *Republic of Moldova v. Komstroy LLC*, in which it ruled that intra-EU investment arbitration under the Energy Charter Treaty (***ECT***) was incompatible with EU law.

As a consequence of that judgment, the European Union and the EU Member States will soon need to take appropriate actions to implement and manage the legal consequences of that decision.

In this short blog post, I share some of my thoughts that I developed when preparing for my presentation at the 2020 EFILA Conference and where I specifically discussed the possibility for EU Member States to exclude intra-EU ISDS arbitral proceedings from the scope of the ECT through the adoption of a plurilateral *inter se* agreement (the ***Plurilateral Agreement***) similar to the one they adopted to terminate their respective intra-EU BITs.

Background

The judgment of the CJEU in *Komstroy* will have various implications both in the EU and also for non-EU parties to the ECT. Among other things, this judgment makes clear, *first*, that Article 26 of the ECT can no longer serve as a legal basis for initiating intra-EU investment disputes relating to the energy sector. *Second*, the judgment confirms the application of EU law to ECT investment disputes which have their seat in the EU (irrespective of whether or not they involve EU parties).

However, this judgment does not necessarily put an immediate end to all the discussions regarding the (in)validity of intra-EU ECT investment disputes. This is particularly the case since – as a matter of international law and irrespective of the CJEU's decision in *Komstroy* – States which are party to the ECT remain bound by the current text of the ECT. It is therefore arguable whether the CJEU's judgment has any immediate effect on the rights and obligations that those EU Member States have undertaken when they became parties to the ECT. Consequently, as was the case following the *Achmea* judgment, arbitral tribunals or national courts in non-EU Member States might still refuse to give full effect to the *Komstroy* judgment. Arbitral tribunals in particular might consider that the *Komstroy* judgment operates exclusively within the EU legal order whilst their jurisdiction is rooted under international law.

In light of these uncertainties, the European Union and its Member States will soon likely have to take actions to implement and manage the legal consequences arising out of the *Komstroy* judgment.

Potential conclusion of an inter se agreement between the European Union and its Member States

Following the *Achmea* judgment, the EU Member States negotiated

(and ultimately concluded) a Plurilateral Agreement which terminated the EU Member States' respective intra-EU BITs (including the sunset clauses contained in those intra-EU BITs) and addressed key transitional issues regarding the status of pending intra-EU investment disputes and the initiation of new arbitral proceedings. This Plurilateral Agreement, however, does not apply to ECT-based intra-EU investment arbitration.

Although it remains unclear how the EU and its Member States will manage the legal consequences of the *Komstroy* judgment, I believe that it is unlikely that the European Union and its Member States will simply be able to replicate – with respect to the ECT – the provisions contained in the Plurilateral Agreement.

First, contrary to the plurilateral agreement which terminated all intra-EU BITs (including their respective sunset clauses), it is hardly conceivable that the European Union and its Member States will simply withdraw from the ECT or that all the parties to the ECT (including the non-EU contracting States) will agree to terminate the ECT.

Second, whilst Article 41 of the Vienna Convention of the Law of Treaties (the ***VCLT***) allows the European Union and its Member States to conclude a new treaty between themselves (a so-called *inter se* treaty) in order to limit, among themselves only, the scope of Article 26 of the ECT, this option might also be difficult to translate into practice[1].

Article 41(1) of the VCLT indeed provides that:

> "[t]*wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:*
>
> *(a) The possibility of such a modification is provided for by the treaty;*

> *(b) The modification in question is not prohibited by the treaty and:*
>
> *(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;*
>
> *(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*"

In the case at hand, however, the option offered under **Article 41(1)(a)** of the VCLT does not seem to be available to the European Union and its Member States since Article 42 of the ECT (which offers the possibility, for all Contracting Parties, to work, together, on a modification of the ECT) does not explicitly envisage the possibility that only a limited number of Contracting Parties amend the ECT between themselves. In addition, Article 46 of the ECT makes it clear that State parties may not offer reservations when joining the ECT. Consequently, the ECT is wholly applicable between the Contracting Parties and the EU Member States cannot unilaterally decide to withdraw only from the arbitration clause contained in Article 26 or to consider that this provision is not applicable in intra-EU situations.

The option offered by **Article 41(1)(b)** of the VCLT might also be difficult to apply since the possibility for the European Union and its Member States to conclude an *inter se* agreement cannot be "*prohibited by the treaty*" itself and cannot "*relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole*". In the case of the ECT, however, Article 16 of the ECT clearly stipulates that the provisions of the ECT on Investment protection and those on ISDS can, under no circumstances, be replaced by other international treaties between individual parties to the ECT if this would result in negative effects for the investors.

Whilst the EU and its Member States will certainly argue that removing intra-EU investment arbitration proceedings from the scope of Article 26 of the ECT will not negatively affect investors, this assessment will necessitate a careful analysis of whether EU law (and legal proceedings before national courts) offers similar levels of protection to those offered under the ECT. *A priori*, it might be difficult to argue that removing intra-EU investment arbitration from the scope of the ECT (and potentially also amending the sunset clause in the ECT) does not result in negative effects for investors since this scenario will precisely limit the legal options (and eventually potential remedies) available to them.

Conclusion

In light of the likely legal obstacles to the conclusion of an *inter se* agreement, the European Union and its Member States may simply be more tempted to address the consequences of the *Komstroy* judgement in a multilateral forum such as the ECT modernisation process that is currently under way. Of course, this is probably easier said than done…

[1] It must be emphasised that, not all the Contracting Parties to the ECT are parties to the VCLT. For instance, France and the European Union are parties to the ECT but are not parties to the VCLT. Consequently, strictly speaking, the VCLT does not apply to the ECT. However, since Article 41 of the VCLT is generally considered as reflecting customary international law, I see no obstacles which would preclude the application of Article 41 of the VCLT to the ECT.
