Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration?

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Alessandro Monti and Matteo Fermeglia

With the adoption, in May 2020, of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the EU (Termination Agreement), the teeth of the Achmea judgment have been sharpened, reducing at the source the risk of intra-EU disputes before international investment tribunals. While killing most birds with the same stone (see here), the Termination Agreement left unaddressed the question concerning the intra-EU applicability of investment arbitration under Article 26 of the Energy Charter Treaty (ECT). The decision rendered by the Grand Chamber of the Court of Justice in the Komstroy case (C-741/19) represents the first (and most likely not the last) attempt by the EU’s highest judicial organ to complete the work initiated with the Achmea decision and the Termination Agreement, and pull the plug also on intra-EU investor-State dispute settlement (ISDS) under the ECT.

As also argued in this Op-Ed by Edoardo Stoppioni, the underlying juridical considerations upon which the Court of Justice grounds its reasoning in the Komstroy decision follow suit from the Achmea judgment, and pertain to the potential threats to the primacy of EU law. This is due to the fact that arbitral tribunals established under Article 26(6) ECT would be ‘required to interpret, and even apply, EU law’ (paragraph 50), without having the possibility to refer to the Court of Justice for a preliminary ruling (paragraph 53), not meeting the requirements provided under Article 267 TFEU.

Moreover, the Komstroy pronouncement has been rendered in the context of growing political pressure for a modernisation or termination of the ECT, which has been exerted on the European
Commission by the European Parliament, civil society (see here and here) and some Member States, namely France. In this connection, it is also important to remember that unilateral withdrawal from the ECT by EU Member States is always on the table, as the case of Italy in 2016 has shown. The persistent resort to intra-EU arbitration under the ECT, most recently by coal investors RWE and Uniper in two cases against The Netherlands, adds fuel to the fire, posing a new threat to the achievement of the goals set under the European Green Deal (see here).

In light of such arguments, we appreciate the Court of Justice’s concerns about halting the seemingly ceaseless flow of intra-EU legal disputes under the ECT. However, it occurs to us that the Court’s verdict in the Komstroy case pursues this objective in a controversial fashion from an international law perspective. Additionally, we doubt that the Komstroy judgment will concretely be able to determine the outcome of future intra-EU investor-State disputes under the ECT.

An unsolicited decision: Terminating intra-EU investment arbitration at all costs?

Starting from the future relevance of the judgment’s analysis on Article 26 ECT, it is noteworthy that in the dispute at stake both Advocate General (AG) Szpunar and the Court have spent considerable argumentative effort in dealing with the applicability of this provision in intra-EU disputes, while the case itself, which concerns a Ukrainian investor and the Moldovan State, is of blatantly extra-EU character. The issue as to the compatibility of ISDS arbitration under Article 26 ECT with EU law was introduced by the Commission at the hearing before the Grand Chamber, and discussed at length by AG Szpunar in his Opinion (points 72-73), despite the feeble connection with the facts of the dispute. To justify its analysis on this aspect, the Court of Justice hence links the need to rule out the applicability of Article 26 ECT in intra-EU cases with its positive resolution of the question on jurisdiction (paragraph 41). Yet, as also pointed out in this Op-Ed by Michael de Boeck, the logical connection between these two aspects appears rather weak. In fact, the analysis rendered by the Court on the intra-EU applicability of Article 26 ECT does not affect the outcome of the case, thus not permeating the operative part of the judgment. In light of its character as an obiter dictum, we argue that the Court’s affirmation according to which ‘Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor or another Member State concerning an investment made by the latter in the first Member State’ (paragraph 66), will be of rather limited relevance in future intra-EU ISDS disputes.

It is true that, in theoretical terms, the Komstroy judgment could entail a threefold set of consequences for ISDS in energy matters. Firstly, it would no longer be possible to file intra-EU ECT-grounded investor-State disputes. Secondly, ISDS panels already constituted under the ECT (such as, among others, the vast majority of those dealing with the reversal of renewable energy incentives in Spain and Italy) would have to decline their jurisdiction. Thirdly, Member States’ domestic courts would have to set aside, or refuse to enforce, awards rendered under the
ECT. However, the experience gained in the wake of the Achmea decision unfolds ISDS tribunals’ stark resistance to give deference to such arguments when questioned upon their jurisdiction by host EU Member States. For example, in the well-known Vattenfall II case the tribunal rejected Germany’s Achmea-based objection to its jurisdiction by stating that EU law was not deemed to constitute ‘applicable rules and principles of international law’ under Article 26(6) ECT, and therefore should not be regarded as ‘relevant rules of international law applicable in the relations between the parties’ under Article 31(3)(c) VCLT (paragraph 153). Furthermore, the ISDS tribunal in Eskosol v. Italy (paragraph 181) emphasised that the ECT and the EU treaties belong to separate and distinct sub-systems of international law, which co-exist ‘with no precise hierarchy’, so that ‘a given State may be subject to obligations arising from both types of decisions’.

The above quotations summarise what has been referred to as ‘a splendid manifestation of intentional fragmentation of the international legal order’. As pointed out by the same Eskosol tribunal (paragraphs 125-126), there is no room to argue as a matter of international law that a judgment emitted by the Court of Justice can automatically invalidate an international treaty such as the ECT or a part thereof (namely the consent to arbitration under Article 26 ECT). Such a decision would operate against the general principle of pacta sunt servanda, which grounds all the obligations entered into by the Parties to an international treaty, as well as Article 216 TFEU, which states that all international agreements concluded by the EU are binding upon its institutions and its Member States. Such aspect represents a specific concern with regard to the ECT – a multilateral treaty, to which the EU itself is a part – as opposed to bilateral investment treaties (BITs) between Member States.

In both the Komstroy and Achmea cases, the Court of Justice openly aims at preserving the autonomy and primacy of the EU legal order. At the same time, the Court acknowledges that the EU remains bound vis-à-vis third countries under the ECT, and therefore bears potential responsibility for internationally wrongful acts should it disregard Article 26 ECT. In particular, in the Komstroy case the Court recognises that ‘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’ (paragraph 68). Although ISDS tribunals have consistently held that EU law ‘simply is not part of the applicable law of any ECT dispute, and therefore will be regarded as a purely matter of fact’ according to Article 26(6) ECT (Eskosol, paragraph 69), one might envisage that ISDS tribunals could be called upon to interpret and apply EU law in those cases. In this respect, it is worth noting that ECT cases are also being filed by investors directly against the EU, in response to regulatory measures adopted at EU level. The Nord Stream 2 case, in which a Swiss investor has filed an arbitration against the Commission seeking compensation due to amendments made to the Gas Directive, exemplifies such a situation. In these cases, EU law lies at the core of the merits, and yet, such cases would arguably withstand the Komstroy doctrine.
Following its decision in the Komstroy case, it is reasonable to expect that the Court of Justice will return on the issue of the intra-EU applicability of the ECT in the near future. In fact, this question has been recently raised in a request for preliminary ruling by the Court of Appeal of Svea in Sweden (Svea hovrätt) in the dispute Italy v. Athena Investments A/S (Case C-155/21), as well as in a request for an opinion by Belgium (Opinion C-1/20). It will be important to observe whether in any of these pronouncements the Court of Justice will reiterate the dictum expressed in the Komstroy decision. At the time of writing, this seems highly plausible, since the latter judgment clearly suggests that it is the Court’s intention to phase out investment arbitration in all intra-EU disputes. However, differently from the Komstroy case, in Italy v Athena the question concerning the intra-EU applicability of the arbitration clause under Article 26 of the ECT has been directly submitted to the attention of the Court. Therefore, a decision on this matter might be more impactful in future cases. If not directly in investment disputes, at least in annulment proceedings before Member States’ domestic courts.

Leaving aside any potential further developments, the legal reasoning upon which the Court has based its decision in Komstroy is not fully convincing in addressing the fact that the EU itself is one of the signatory parties to the ECT. To this end, we maintain that an alternative solution grounded on international law, be it a ‘modernisation’ of the ECT or the EU’s unilateral withdrawal (in the Commission’s view, modernisation appears as the preferred option, see here), would be advisable. Indeed, the slow progress of negotiations does not speak in favour of a swift resolution of the challenges currently existing on the political plane. However, encouraging signs in terms of a stable and predictable regulatory framework for investors can be seen in the broader European Green Deal context. Examples in this sense are given by the planning and reporting mechanism provided under the Regulation on the Governance of the Energy Union, the framework of the EU Taxonomy for sustainable activities or the recent proposal for a corporate due diligence Directive. In our view, such normative tools can provide investors with a more reliable regulatory landscape, thereby reducing their need for intra-EU protection under the ECT and realigning the two, apparently adversarial, legal orders of EU law and international investment law.

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