ICSID tribunal declines to revisit its decision in light of the CJEU's judgment in *Komstroy*

23 February 2022

On 1 February 2022, the tribunal in *Infracapital v. Kingdom of Spain* (ICSID Case No. ARB/16/18) dismissed Spain's request to reconsider the tribunal's jurisdiction to hear a dispute under the Energy Charter Treaty ("ECT"). In its Reconsideration Decision, the tribunal examines and rejects Spain's intra-EU jurisdictional objection based on the judgment of the Court of Justice of the European Union ("CJEU") in Case C-741/19, *Republic of Moldova v. Komstroy LLC* ("*Komstroy*") (see our client alert). According to the tribunal, *the Komstroy* judgment is entirely irrelevant to its rulings on jurisdiction and on liability.

Factual background

Between 2012 and 2014, Spain enacted reform of the regulatory regime applicable to energy production from renewable sources. Infracapital F1 and Infracapital Solar ("the claimants"), two private companies incorporated in Luxembourg and the Netherlands respectively, brought claims against Spain, alleging breach of the ECT in relation to their investments in Spanish photovoltaic plants.

On 13 September 2021, the tribunal (Eduardo Siqueiros; Peter Cameron; Luiz Gonzalez Garcia) established under the rules of the International Centre for Settlement of Investment Disputes ("ICSID") rendered its decision on jurisdiction and liability. The tribunal found that it had jurisdiction to hear the majority of the claims put forward and that Spain had breached Article 10(1) ECT. The decision of the tribunal did not however address the CJEU's judgment in *Komstroy* (which had been issued nearly two weeks earlier on 2 September 2021).

The tribunal's decision of 13 September 2021

In the arbitration, Spain had argued that the tribunal lacked jurisdiction over the dispute. Spain relied on the CJEU's judgment in Case C-284/16, *Slovak Republic v. Achmea* ("*Achmea*") (see our client alert). The tribunal rejected this contention, observing that "*Achmea and this case are totally different and there can be no analogies found*".

First, the tribunal observed that the EU is a party to the ECT. The tribunal inferred from this fact that the EU granted "*unconditional consent to the submission of a dispute to international arbitration*". Second, the tribunal distinguished *Achmea* on the ground that the bilateral investment treaty ("BIT") in that case called on the tribunal to apply the law of the contracting party concerned, which included EU law. Therefore, that BIT was capable of adversely affecting the autonomy of EU law. By contrast, a tribunal under the ECT can only apply the terms of the ECT and international law, which, in turn, does not lead to the same concerns over the autonomy of EU law. Third, in so far as Article 26(6) requires the tribunal to apply EU state aid law in determining the merits, that is not an argument to object to the tribunal's jurisdiction under the ECT.

Fourth, the tribunal noted the lack of agreement among EU Member States as regards the application of *Achmea* to the ECT.

The CJEU's judgment in *Republic of Moldova v. Komstroy*

The tribunal issued its decision on jurisdiction and liability on 13 September 2021 notwithstanding that the CJEU had issued a judgment in the *Komstroy* case relating to the applicability of the ECT in intra-EU investment disputes on 2 September 2021. In answering certain questions concerning the meaning of "investment" under the ECT (which had been posed by the Paris Court of Appeal as part of a preliminary reference), the CJEU deemed it necessary also to specify which disputes could be subject to arbitration under Article 26(2)(c) ECT. The CJEU found that the ECT is an act of EU law and that, under Article 26(6) ECT, an arbitral tribunal must apply EU law to the merits of the dispute. Following the *Achmea* reasoning, the autonomy of EU law could be threatened if an arbitral tribunal – which is outside the judicial system of the EU – was capable of interpreting and applying EU law. As a result, the CJEU considered that Article 26(2)(c) ECT cannot apply to disputes between an EU Member State and an investor of another EU Member State. According to the CJEU, intra-EU investment arbitration under the ECT is precluded.

Reconsideration based on Komstroy

In light of the CJEU's judgment in *Komstroy*, in October 2021, Spain requested the tribunal to reconsider its decision on jurisdiction and liability arguing that it was manifestly erroneous. Spain argued that the handing down of the judgment in *Komstroy* amounted to discovery of a new fact capable of decisively affecting the tribunal's decision. As part of the request, Spain revived the argument that the tribunal lacked jurisdiction under the ECT where the dispute relates to intra-EU investments. Furthermore, it reiterated that Article 26(6) of the ECT requires the tribunal to apply EU state aid law, contrary to the principle of autonomy of EU law.

Pursuant to Article 44 of the ICSID Convention, the tribunal held that it had authority to consider Spain's request for reconsideration and examined whether the nature of the *Komstroy* judgment was such that it could have a decisive effect on its earlier decision. It concluded however that in fact *Komstroy* was irrelevant and did not deprive the tribunal of jurisdiction.

First, the tribunal emphasised that the law applicable to the tribunal's jurisdiction and to the merits of the dispute is international law, "*and not principles of sub-systems of international law such as EU treaties*". The tribunal went on to reject the CJEU's conclusion that the ECT is an act of EU law (and an ECT tribunal must apply EU law) by virtue of the EU's participation in that treaty. It followed that Article 26(6) ECT could not require a tribunal to apply EU law in determining the merits of a claim under the ECT.

Second, the tribunal questioned the CJEU's interpretation of Article 26 ECT which had not been undertaken in accordance with applicable principles of international law. The tribunal observed that the ECT must be interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT). Any considerations relating to the autonomy of EU law were regarded as extraneous to, and inappropriate in the context of, the interpretation of Article 26 ECT under the VCLT.

Furthermore, the tribunal noted that the *Komstroy* judgment in effect proposes that there should be separate and different treatment for intra-EU disputes and non-intra-EU disputes. On this basis, investors of an EU Member State would not be able to access arbitration against an EU Member State for breach of the ECT

and international law. The tribunal was satisfied that such separate treatment was contrary to the wording and objectives of the ECT. According to the tribunal, "*nothing in the ECT gives an ECT tribunal the authority to disregard or modify the explicit provisions of the ECT and decline jurisdiction on the basis of a Contracting Party's status or its obligations under a different legal order*".

Third, the tribunal rejected the argument that the EU and its Member States impliedly disconnected from Article 26 ECT through the ratification of the Lisbon Treaty. As held in the decision on jurisdiction, it follows from the fact that the ECT expressly contains an "*irrevocable consent*" to arbitration that disconnection also needs to be express.

Fourth, the tribunal held that it would be improper to remove the claimants' claims from the jurisdiction of the tribunal based on the *Komstroy* judgment because that judgment was issued several years after the claimant filed the request for arbitration and ICSID registered it. Indeed, Spain's consent to arbitration was perfected in June 2016 before the *Komstroy* judgment and could not be retroactively invalidated by it.

The tribunal's overall conclusion was therefore that it did not "*consider that the Komstroy Judgment has any relevance to the Tribunal's conclusions of the applicable law of the dispute…it finds the judgment entirely irrelevant to the Tribunal's rulings on jurisdiction and on liability*".

Commentary

To date, nearly 50 tribunals established pursuant to the ECT are known to have considered jurisdictional objections based on the CJEU rulings in relation to intra-EU arbitration, and each has rejected them. This includes a number of tribunals which expressly considered objections based on the CJEU's judgment *Komstroy*. The outcome of Spain's request for reconsideration is therefore unsurprising.

The tribunal in *Infracapital* adopted a very clear position in relation to the relevance of the *Komstroy* judgment to intra-EU investment arbitration. In particular, the tribunal took issue with the CJEU's claim that its judgment was based on an interpretation of the ECT. The tribunal stressed that the ECT and the EU treaties belong to different orders of international law. It is clear from the decision that, as far as an ECT tribunal is concerned, the provisions of the ECT and customary international law take primacy over EU law on questions of jurisdiction in an ECT arbitration, regardless of the identity of the parties.

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