CHAPTER 10

Paradigm Shift: Reflections on the Interpretation of International Investment Agreements by National and Supranational Courts Post-*Achmea*

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The Court of Justice of the European Union (CJEU or the Court) in *Republic of Moldova v. Komstroy,* Case C-741/19, was called upon to answer the questions posed by the Paris Cour d'Appel, essentially addressing the interpretation of the notions of 'investment' and 'investor' under Article 1(6) and 1(7) of the Energy Charter Treaty (ECT),[1] even though the underlying case had no immediate qualifications for the jurisdiction of the CJEU. National courts undertake the interpretation of international investment agreements (IIAs) in connection with the set aside or recognition and enforcement of investment arbitration awards. For example, the Paris Cour d'Appel in *Venezuela v. Serafín García Armas and Karina García Gruber* has set aside an investment arbitration award, deciding that the definitions of 'investment' and 'investor' in the Spain-Venezuela Bilateral Investment Treaty (BIT) required that assets were 'invested by investors' of the other contracting State and, hence, that investors must satisfy the nationality requirement when making the investment. In *Clorox Spain S.L. v. Venezuela*, the Swiss Federal Tribunal set aside an investment arbitration award noting that Article 1(2) of the Spain-Venezuela BIT reflects an asset-based definition of the notion of 'investment', and that the relevant BIT does not include a denial of benefits clause, nor additional requirements in establishing the nationality of an investor, which could

1. The Energy Charter Treaty was signed on 17 December 1994 and entered into force on 16 April 1998, 34 ILM 373 (1995).

justify the interpretation of the notion of 'investment' in a narrow sense, with emphasis on the wording 'invested by investors'.[2]

The topic of the interpretation of IIAs by national or supranational courts is relevant for several reasons. First, the choice between an arbitration under the Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[3] and non-ICSID Convention arbitration has gained new connotations taking into consideration both the nationality of the claimant-investor in the light of the intra-European Union (EU) concerns in a post-*Achmea*[4] world, as well as any consequences on the set aside and recognition and enforcement of arbitral awards. Second, the standard of review of the investment arbitration awards is considerably different between ICSID and non-ICSID awards. Under the ICSID Convention, the grounds upon which an award can be annulled are set forth in Article 52 of the ICSID Convention and are limited in scope, while the annulment proceedings are within the self-contained system of ICSID, before the ICSID annulment committees. Furthermore, under Article 53(1) of the ICSID Convention, an award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the ICSID Convention. On the recognition and enforcement of awards, Article 54(1) of the ICSID Convention provides for the direct recognition of pecuniary arbitral awards, as if they were final judgments of a court in the State of enforcement. On the contrary, non-ICSID investment arbitral awards, either institutional or ad hoc, would be subject to the scrutiny of the courts at the seat of arbitration, and the recognition and enforcement proceedings submitted, most often, under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 ('New York Convention'). It is not only that the set aside grounds and the grounds for the refusal of the recognition and enforcement of an award become more 'national' rather than 'a-national' in the context of a non-ICSID arbitration, given the fact that each national court will have to apply its *lex fori,* but also policy concerns can also become relevant, especially in the context of national courts of Member States that are part of regional economic international organizations, such as the EU. As such, the seat of arbitration for non-ICSID investment arbitrations becomes even more important in this context, and it is particularly important how the courts at the seat approach the interpretation of IIAs and whether they are rather flexible in remitting these issues to the supranational court, such as the CJEU. Last but not least, the exposure to the post-award scrutiny by a national and supranational court may be used to invalidate international treaties validly entered into by their contracting States. The latter point is particularly relevant for the current approach taken by the CJEU, commencing with the ECT and continuing with the EU's possible position on the intra-EU application of the ICSID Convention.

2. *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, Decision of the Swiss Federal Tribunal of 25 March 2020, Case No. 4A_306/2019.
3. Convention for the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966, 1 ICSID Reports 3 (1993). The ICSID Convention established the International Centre for Settlement of Investment Disputes (ICSID).
4. *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment of the CJEU of 6 March 2018, in Case C-284/16.

This analysis will focus first on the power of the interpretation of IIAs by national courts and then move to the *Moldova v. Komstroy* CJEU case and analyse the manner in which the court addressed the interpretation of the relevant provisions in the ECT. The paper is concerned with the manner in which national and supranational courts proceed with such interpretation.

§10.01 NATIONAL COURTS AND TREATY INTERPRETATION

As mentioned, it is undisputed that where national courts are competent to set aside or recognize and enforce arbitral awards, they are also competent to interpret the terms of the underlying treaty.[5]

In *Ecuador v. Occidental*, the English High Court[6] and the English Court of Appeal[7] confirmed that the court can proceed with the interpretation of the relevant BIT in the light of the provisions of the Vienna Convention on the Law of Treaties (VCLT). Similarly, the Swedish courts have endorsed their power to interpret the underlying treaty provisions based on the fact that the relevant BIT provides that the place of arbitration would be a New York Convention state.[8]

The standard of review of the national courts is not uniform, but it certainly does not contemplate a review on the merits of the case. However, jurisdictional matters are often brought before the national courts and then the interpretation of the definitions in an IIA by the court becomes central. In the case of jurisdictional issues, courts in leading arbitration jurisdictions, including France, Sweden and England, take the approach that this is a de novo review.[9]

For example, the Swedish Arbitration Act provides for a de novo standard of judicial review in section 2, for the negative jurisdictional decisions, and in section 36, for the positive jurisdictional decisions. The decision of the Swedish Supreme Court of 21 April 2016 in Case No. Ö 1429-15 concludes that '[t]he most obvious interpretation of this provision [i.e. Section 2 of the Swedish Arbitration Act] is that the jurisdictional issues that can be considered by the court are the same as those that can considered by the arbitral tribunal. Thus, the wording of the provision would imply that the scope of

5. Broadly on the compliance by States with the investment arbitration awards against them, *see* Emmanuel Gaillard and Illija Mitrev Penushliski, *State Compliance with Investment Awards,* 35(3) ICSID Review 2020, 540–594.
6. *The Republic of Ecuador v. Occidental Exploration & Production Company* [2006] EWHC 345 (Comm) (2 March 2006).
7. *The Republic of Ecuador v. Occidental Exploration & Production Company* [2007] EWCA Civ 656 (4 July 2007).
8. *The Russian Federation v. Mr. Franz Sedelmayer*, Decision of the Stockholm District Court on the Set Aside Application of 18 December 2002.
9. *See* further, John Christopher Thomas and Harpreet Kaur Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32(3) ICSID Review-Foreign Investment Law Journal 2017, 459–502, at pp. 494 et seq. Also on the approach of the Canadian courts, *see* Céline Lévesque, *Correctness' as the Proper Standard of Review Applicable to 'True' Questions of Jurisdiction in the Set-Aside of Treaty-Based Investor-State Awards Get access Arrow*, 5(1) Journal of International Dispute Settlement (2014), 69–103.

the arbitral tribunal's and the court's jurisdictional review is intended to be identical'.[10] In *Ecuador v. Occidental*, the English High Court further elaborated on the applicable standard of review by the court in the context of jurisdictional matters and interpretation of IIAs being one of a re-hearing, meaning whether the arbitral tribunal was 'correct' in its decision, rather than whether the arbitral tribunal was 'entitled' to reach the decision on its jurisdiction:

> It is now well-established that a challenge to the jurisdiction of an arbitration panel under section 67 proceeds by way of a rehearing of the matters before the arbitrators. The test for the court is: was the Tribunal correct in its decision on jurisdiction? The test is not: was the Tribunal entitled to reach the decision that it did.[11]

As to the interpretation of treaties, the English High Court in *GPF GP S.À.R.L. v. Poland*[12] confirmed the approach of the English courts in *Ecuador v. Occidental* that an arbitration agreement in a bilateral or multilateral IIA is governed by international law.[13] The High Court in *GPF GP S.À.R.L. v. Poland* went further and explained that the interpretation of the arbitration agreement and of the jurisdiction of the arbitral tribunal under the applicable IIA will be done in accordance with the principles of interpretation in the VCLT which codify international law.[14] The High Court then proceeded to analyse Articles 31 and 32 of the VCLT. Looking first at Article 31 of the VCLT,[15] the High Court in *GPF GP S.À.R.L. v. Poland* emphasized that this provision 'sets out the essential primary, or fundamental, rule of interpretation',[16] and that this

10. Judgment of the Supreme Court of 21 April 2016, Case No. Ö 1429-15, para. 18.
11. *The Republic of Ecuador v. Occidental Exploration & Production Company* [2006] EWHC 345 (Comm) (2 March 2006), para. 7, emphasis in original removed.
12. *GPF GP S.À.R.L. v. The Republic of Poland* [2018] EWHC 409 (Comm) (2 March 2018).
13. *GPF GP S.À.R.L. v. Poland*, para. 46.
14. *GPF GP S.À.R.L. v. Poland*, para. 47.
15. Article 31 of the VCLT: General rule of interpretation:

    1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
    2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
       (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
       (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
    2. There shall be taken into account, together with the context:
       (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
       (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
       (c) any relevant rules of international law applicable in the relations between the parties.
    3. A special meaning shall be given to a term if it is established that the parties so intended.

16. *GPF GP S.À.R.L. v. Poland*, para. 48.

rule of interpretation is 'textual'.[17] As explained by the High Court, this means that 'the text [of the treaty] is to be presumed to be the authentic expression of the intention of the parties (the textual approach to interpretation) and is not to be substituted for or overridden by the presumed intention of the parties (the teleological approach to interpretation)'.[18] Furthermore, as the High Court emphasized, the good faith interpretation principle under Article 31(1) of the VCLT, while it requires that provisions of treaties are to be interpreted so as render them effective rather than ineffective, does not justify going beyond the text of the treaty. The High Court also addressed the reference to the object and purpose of a treaty in Article 31 VCLT, emphasizing that 'any scope for the application of this principle in any event only arises in the event of their being an ambiguity'.[19] As to the relevance and application of Article 32 of the VCLT,[20] the High Court noted that the supplementary means of interpretation 'is applicable *only* to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable'.[21] As such, the High Court concluded, 'if the meaning resulting from the application of Article 31 is clear … the supplementary means of interpretation in Article 32 *cannot* be used to change or contradict the meaning resulting from the application of Article 31'.[22]

The position on the interpretation of IIAs by the English courts in *GPF GP S.À.R.L. v. Poland* was later confirmed by the English High Court in *PAO Tatneft v. Ukraine*.[23] As the High Court mentioned, 'the principles governing the construction of a treaty such as the BIT, including its arbitration provision, were as set out in the decision of Bryan J in GPF GP v Poland [2018] EWHC 409'.[24] The High Court summarized the reasoning of *GPF GP S.À.R.L. v. Poland* as follows:

> It is for the Court to interpret the BIT in accordance with international law, and the principles of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) ('the Vienna Convention'), which codifies customary international law ….
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> …

17. *GPF GP S.À.R.L. v. Poland*, para. 49.
18. *GPF GP S.À.R.L. v. Poland*, para. 49.
19. *GPF GP S.À.R.L. v. Poland*, para. 59.
20. Article 32 Supplementary means of interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

21. *GPF GP S.À.R.L. v. Poland*, para. 61, emphasis in original.
22. *GPF GP S.À.R.L. v. Poland*, para. 61, emphasis in original.
23. *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm) (13 July 2018).
24. *PAO Tatneft v. Ukraine*, para. 38.

> The rule of interpretation is textual, not teleological …. That is, 'interpretation must be based above all upon the text of the treaty' …. Accordingly, the text is presumed to be the authentic expression of the intention of the parties and is not to be substituted for or overridden by the presumed intention of the parties ….[25]

Before the Swedish courts, the interpretation of IIAs was addressed in the *Russian Federation v. GBI 9000 SICAV S.A, Orgor de Valores SICAV S.A, Quasar de Valores SICAV S.A, ALOS 34 SL*.[26] Stockholm District Court noted that it is undisputed that the ECT shall be interpreted in accordance with Articles 31 and 32 of the VCLT, whereas Article 31 provides general rules for interpretation, and Article 32 contains supplementary aids for interpretation.[27] Further, the Stockholm District Court noted, is the fact that all four elements of Article 31, i.e., good faith, ordinary meaning, context, and object and purpose, are of equal importance.[28]

The French Cour de Cassation in *Venezuela v. Garcia Armas*[29] considered the interpretation of the applicable BIT in the context of the jurisdiction of the arbitral tribunal and the dual nationality of investor, where one of the nationalities was of the respondent State. As such, the Cour de Cassation held that the interpretation of treaties is made under the rules of international law and, in particular, under the VCLT.[30] In particular, the Cour de Cassation held, in determining the coverage of dual nationals by the applicable BIT, the relevant treaty provision must be interpreted in the light of Article 31 of the VCLT, which codifies the customary rules on treaty interpretation.[31] Similarly, in *Etat d'Ukraine v. Société Pao Tatneft*, Paris Cour d'Appel held that the interpretation of the terms of the underlying BIT is made in the light of the rules of treaty interpretation of the VCLT.[32]

It is evident that while national courts in non-ICSID set aside or recognition and enforcement proceedings of investment arbitration awards are not shy in proceeding with a de novo review, they are careful in appreciating that the interpretation of the IIAs must always be based on public international law rules. It is noticeable also that great attention is devoted to the VCLT, as codifying the customary international law rules on treaty interpretation.[33]

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25. *PAO Tatneft v. Ukraine*, para. 38.
26. Judgment of the Stockholm District Court, 11 September 2014, Case No. T 15045-09, *Russian Federation v. GBI 9000 SICAV S.A, Orgor de Valores SICAV S.A, Quasar de Valores SICAV S.A, ALOS 34 SL.*
27. *Russian Federation v. GBI 9000 SICAV S.A, Orgor de Valores SICAV S.A, Quasar de Valores SICAV S.A, ALOS 34 SL*, p. 26.
28. *Russian Federation v. GBI 9000 SICAV S.A, Orgor de Valores SICAV S.A, Quasar de Valores SICAV S.A, ALOS 34 SL*, p. 26.
29. *Venezuela v. Serafin Garcia Armas and Karina Garcia Gruber*, Judgment No. 157 F-D of 13 February 2019.
30. *Venezuela v. Garcia Armas*, p. 13.
31. *Venezuela v. Garcia Armas*, p. 13.
32. *Etat d'Ukraine v. Société Pao Tatneft*, Paris Cour d'Appel, Judgment of 29 November 2016.
33. For further detailed analysis on the approach of national courts to post-award remedies in the context of investment arbitration awards, *see* further Kateryna Bondar, *Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review*, 32(6) Journal of International Arbitration 2015, 621–676; Alexander J. Marcopoulos, *Revisiting the Risk of Undesired Appeal in Investment Treaty Arbitration: Is Deference to the Tribunal's Award Still Less Likely in the ICSID Context?*, 37 Arbitration International, 685–706; Gaëtan Verhoosel, *Annulment and Enforcement*

§10.02 *KOMSTROY* AND THE INTERPRETATION OF THE ECT

As we have now seen the approach of national courts to the interpretation of IIAs, let us proceed with the position of the supranational courts and, in particular, with the CJEU reasoning in *Republic of Moldova v. Komstroy*.

On 3 March 2021, the CJEU Advocate General delivered the Opinion in *Republic of Moldova v. Komstroy* (the 'Opinion'), upon the request for a preliminary ruling by the Paris Cour d'Appel.[34] While most of the attention was captured by the application of *Achmea* to the ECT, the Opinion is also very much relevant in the context of the interpretation of treaties by the CJEU, and of the notions of 'investment' under Article 1(6) of the ECT, and 'investor' under Article 1(7) of the ECT.

In brief, on the underlying facts of the case and the subsequent resolution of the dispute,[35] Ukrenergo, a Ukrainian electricity generator, sold electricity to Energoalians, a Ukrainian electricity distributor, which then sold it to Derimen Properties Limited, a company registered in the British Virgin Islands, which in turn sold it to Moldtranselectro, a Moldovan public undertaking. The sale was made under two contracts concluded on 1 and 24 February 1999 and the volumes of electricity to be supplied were determined each month directly between Moldtranselectro and Ukrenergo. The electricity was supplied in 1999 and 2000, under 'DAF Incoterms 1990', to the border between Ukraine and Moldova, on the Ukrainian side. On 30 May 2000, Derimen assigned to Energoalians the claim which it held against Moldtranselectro, which in turn partially settled its debt by assigning several claims which it held to Energoalians. While initially Energoalians attempted to obtain payment of the remainder of its claims before the Moldovan and the Ukrainian courts, it eventually resorted to arbitration against Moldova under Article 26 of the ECT. The ad hoc arbitral tribunal seated in Paris, France, delivered its majority award on 25 October 2013, deciding that it had jurisdiction and, considering that the Republic of Moldova had failed to comply with its undertakings under the ECT, ordered Moldova to pay a certain amount to Energoalians. The dissenting opinion of the presiding arbitrator concerned the jurisdiction of the arbitral tribunal. Subsequently, Moldova brought an action for annulment against the arbitral award, alleging infringement of a public-policy provision related to the jurisdiction of the arbitral tribunal, pursuant to Article 1520 of the French Code of Civil Procedure. By judgment of 12 April 2016, the Paris Cour d'Appel annulled the award on the ground that the arbitral tribunal had wrongly declared itself to have jurisdiction. That Cour d'Appel held that the dispute between Energoalians and Moldova concerned a claim, assigned by Derimen, having as its sole purpose the sale of electricity and that in the absence of any contribution, such a claim could not be regarded as an investment within the meaning of the ECT. In October 2014, Komstroy became the successor in law of Energoalians and appealed the judgment of the Cour d'Appel to the French Cour de

Review of Treaty Awards: To ICSID or NOT to ICSID, 23(1) ICSID Review – Foreign Investment Law Journal, Spring 2008, pp. 119–154.

34. *Republic of Moldova v. Komstroy*, Opinion of Advocate General Szpunar of 3 March 2021 in Case C 741/19.

35. *See* paras 10–22 of the Opinion.

Cassation. By judgment of 28 March 2018, the Cour de Cassation set aside the judgment in the first instance and referred the case back to the Cour d'Appel. In the resubmitted case, Moldova argued that the arbitral tribunal should have declined jurisdiction in the absence of an 'investment', within the meaning of the ECT, 'of' an enterprise of a Contracting Party to the ECT, 'in the area of' Moldova. Further, even if that claim could constitute an investment, it was not 'of' an undertaking of a Contracting Party, since Derimen is an undertaking of the British Virgin Islands. Finally, and in any event, that claim relates to a transaction for the sale of electricity which did not take place 'in the area' of Moldova, since the electricity was sold and transmitted only to the border between Ukraine and Moldova, on the Ukrainian side. The Cour d'Appel decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

(1) Must (Article 1(6) of the ECT) be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any contribution on the part of the investor in the host State can constitute an 'investment' within the meaning of that article?
(2) Must (Article 26(1) of the ECT) be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Parties to that Treaty constitutes an investment?
(3) Must (Article 26(1) of the ECT) be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?

Before addressing the questions posed by the Cour d'Appel, the Advocate General had to first clarify how the provisions of the ECT are applicable in the EU legal order and why the CJEU has the interest and the powers to proceed with their interpretation. This is an essential matter dealt with by the Opinion, and subsequently by the CJEU, which may trigger important consequences for comparable situations in the future.

In a nutshell, *Komstroy v. Moldova* concerned neither the EU nor the Member States of the EU. Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the EU.[36] The Advocate General highlighted that it is understood that an international agreement concluded by the European Council, in accordance with Articles 217 and 218 TFEU, constitutes such an act, and that, as from its entry into force, the provisions of such an agreement form an integral part of the EU legal system, and thus the CJEU has jurisdiction to give preliminary

36. Opinion, para. 28.

rulings concerning the interpretation of such an agreement.[37] Furthermore, in the special case of the ECT, this treaty was signed by and approved on behalf of the EU, and, as such, this agreement must be regarded as an act of the institutions of the EU for the purposes of Article 267 TFEU, with the CJEU having jurisdiction to rule on the provisions of the ECT.[38] However, the Advocate General found that this is not sufficient to establish that the court has jurisdiction, and that it is, therefore, necessary to examine whether the fact that neither the EU nor the Member States of the EU are involved in the case at hand is likely to affect the CJEU's jurisdiction to answer the questions referred for a preliminary ruling.[39]

However, the specific features of the ECT have been held as having relevance for the discussion. First, the Advocate General looked at the fact that the ECT does not establish any court or tribunal responsible for ensuring the uniform interpretation of its provisions, such as the CJEU, and that such interpretation is only made in the course of the settlement of disputes by various arbitral tribunals and therefore cannot avoid divergences in interpretation.[40] Second, although the ECT is a multilateral agreement, it does consist of a set of bilateral obligations between the Contracting Parties, including the EU and the Member States, and, in theory, those obligations could also govern, within the EU itself, relations between the Member States and, consequently, apply within the EU legal order.[41] In concluding on the interest and the powers of the CJEU to interpret the provisions of the ECT, the Advocate General emphasized that the EU's interest in the uniform interpretation of the provisions of the ECT cannot be excluded and that the CJEU should assume jurisdiction to answer the questions referred for a preliminary ruling.[42] Moreover, as explained by the Advocate General, with specific reference to Article 1(6) of the ECT regarding the notion of 'investment', this provision as it determines the material scope of the ECT also has the effect of triggering the application of the substantive protective provisions of the ECT. Hence, the applicability in the EU legal order of that provision depends essentially on whether the substantive rules to which it gives effect are themselves applicable in the EU legal order, so that investors from one Member State can rely on them in proceedings against another Member State before the courts of that State.[43]

Having established that the CJEU is competent to interpret the provisions of the ECT, the Advocate General proceeded with the first question addressed by the Cour d'Appel:

> Must [Article 1(6) of the ECT] be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any contribution on the part of the investor in the host State can constitute an 'investment' within the meaning of that article?

37. Opinion, para. 28.
38. Opinion, para. 31.
39. Opinion, para. 32.
40. Opinion, para. 41.
41. Opinion, para. 42.
42. Opinion, para. 45.
43. Opinion, paras 92–93.

As explained by the Opinion, Article 1(6) of the ECT defines the concept of 'investment', and it is one of the introductory provisions of the ECT, which are intended more generally to establish the scope and purpose of that treaty and to define the terms used in its provisions.[44] In looking at the definition of the notion of 'investment' under Article 1(6), the Advocate General immediately concludes that this is 'an imprecise definition which seems, at first sight, to be limited only by the purpose of the activity with which that investment is associated'.[45] Furthermore, as explained by the Opinion, the notion of 'investment' within the meaning of the ECT must be associated with an economic activity in the energy sector,[46] and the definition is supplemented by a non-exhaustive list of specific examples of investments.[47] In looking at the facts of the underlying case, the Advocate General centres his analysis on clarifying the circumstances in which 'contractual claims' would constitute an 'investment' under the ECT. In his view, contractual claims are likely to fall under both Article 1(6)(c) and Article 1(6)(f) of the ECT, which refer to 'claims to money … pursuant to contract having an economic value and associated with an investment', and to 'any right conferred by … contract … to undertake any economic activity in the energy sector', respectively.[48] While these provisions provide examples of investments, the Opinion goes on to clarify that they also add further requirements for classification as an investment. As such, under Article 1(6)(c), the claim to money is an investment provided that it arises from a contract which is itself associated with an investment; while under Article 1(6)(f), a right conferred by a contract is an investment provided that it was conferred to undertake an economic activity in the energy sector.[49]

The Opinion explains that a contractual claim, in particular where it arises from a contract for the sale of electricity, cannot be considered to be an 'investment' under Article 1(6)(c), as this provision does not refer to a simple commercial transaction.[50] The Advocate General also expressed the view that the definition developed in relation to the concept of 'investment' under the ICSID Convention, although this being a special treaty, contains the essential elements of what may constitute an investment.[51] Accordingly, the Opinion concludes that a claim to money is an investment under Article 1(6) of the ECT, only if it has arisen from a contract which involved a contribution on the part of the presumed investor and the expectation of a gain, which is not guaranteed.[52] This is, however, not the case for an electricity supply contract, as the Advocate General noted.[53]

As to Article 1(6)(f) of the ECT referring to 'any right conferred by … contract … to undertake any economic activity in the energy sector', the Opinion indicates that

44. Opinion, para. 91.
45. Opinion, para. 104.
46. Opinion, para. 104.
47. Opinion, para. 105.
48. Opinion, para. 106.
49. Opinion, para. 107.
50. Opinion, para. 112.
51. Opinion, para. 116.
52. Opinion, para. 117.
53. Opinion, para. 119.

Article 1(6) provides, in general terms, that an investment within the meaning of the ECT must be associated with an economic activity in the energy sector, which also applied to Article 1(6)(f).[54] This is apparent from the wording of the provision which refers to the words 'to undertake' and which indicates that the contractual right in question must have been conferred for the purposes of undertaking an economic activity in the energy sector.[55] However, the Opinion explains that when the claim is acquired after its creation by the original holder, such 'claim gives its holder not the right to undertake an economic activity in the energy sector, but only the right to claim payment for it'.[56] Consequently, the Advocate General concludes that Article 1(6)(f) of the ECT cannot be interpreted as meaning that a claim arising from an electricity supply contract and involving no contribution is an investment within the meaning of the ECT.[57]

The Advocate General turns then to the second question posed by the Cour d'Appel:

> Must [Article 26(1) of the ECT] be interpreted as meaning that the acquisition, by an investor of a Contracting Party, of a claim established by an economic operator which is not from one of the States that are Parties to that Treaty constitutes an investment?

The Advocate General begins by looking at Article26(1) of the ECT which allows for the settlement of disputes between one Contracting Party and an investor from another Contracting Party where the dispute relates to an investment made by that investor:

> Disputes between a Contracting Party and an investor of another Contracting Party relating to an investment of the latter in the area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.[58]

Further, as the emphasis of the question is whether there must be an investment *made* by an investor, the Advocate General resorted to Article 1(8) of the ECT, which defines the term 'making of investments'. Under this provision, the Advocate General states that 'an investment may be made by the acquisition of all or part of existing investments', but it 'does not, however, require that the existing investment in question was originally made in a State party to the ECT'.[59] In addition to this, the Opinion also relies on the provisions of Article 1(7) of the ECT which defines the notion of 'investor' with respect to both Contracting Parties and third States. The Advocate General emphasizes that it is 'clearly accepted that an investor may be from a third State not party to the ECT, without this implying that the investments he makes are not

54. Opinion, para. 121.
55. Opinion, para. 122.
56. Opinion, para. 123.
57. Opinion, para. 126.
58. Opinion, para. 133.
59. Opinion, para. 135.

existing investments within the meaning of the ECT'.[60] Consequently, as the Opinion concludes, the acquisition, by an operator from a Contracting Party to the ECT, of a claim established by an economic operator from a third State not a party to the ECT, represents the acquisition of an existing investment and therefore constitutes an investment made by an investor from a Contracting Party for the purposes of the ECT.[61] In reaching this conclusion, the Advocate General also commented on the fact that this particular situation may raise the possibility of an abuse of rights, but that while this possibility exists, this is not sufficient to exclude from the coverage of the ECT an investment acquired from an operator from a third State not a party to the ECT.[62]

Finally, the Opinion discussed the third question asked by the Cour d'Appel:

> Must [Article 26(1) of the ECT] be interpreted as meaning that a claim held by an investor, which arose from a contract for the sale of electricity supplied at the border of the host State, can constitute an investment made in the area of another Contracting Party, in the case where the investor does not carry out any economic activity in the territory of that latter Contracting Party?

With respect to this final question, the Advocate General noted that the investment at issue is held by a Ukrainian investor against a company established in Moldova. Under Article 1(10) of the ECT, 'area' is defined as 'the territory under its sovereignty'. As explained by the Advocate General, a claim held against a company established on Moldovan territory can be regarded as an investment made in the area of that Contracting Party, since the location of the debtor of the claim is sufficient to establish this.[63] The Opinion also noted that the same result would be achieved by upholding Moldova's argument that it is necessary also to ascertain the area where the investment with which the contract giving rise to the claim is associated was made.[64] Although in this case the electricity is supplied up to the border with Moldova, the electricity is ultimately fed into the Moldovan network and this is at the heart of the matter.[65] In conclusion, the Advocate General highlighted that Article 26(1) of the ECT must be interpreted as meaning that a claim held by an investor of one Contracting Party against an operator of another Contracting Party is an investment of the former in the area of the latter.[66]

The Opinion of the Advocate General, including on the definition of the notion of 'investment', was confirmed by the CJEU in the subsequent judgment of September 2021 ('Judgment').[67] CJEU first addressed the competence to respond to the questions posed by the Cour d'Appel, in the light of the underlying facts of the case. The court began by confirming that, in accordance with Article 267 of the TFEU, CJEU has jurisdiction to interpret the acts of the institutions, bodies, offices or agencies of the

60. Opinion, para. 138.
61. Opinion, para. 140.
62. Opinion, para. 142.
63. Opinion, para. 151.
64. Opinion, para. 152.
65. Opinion, para. 153.
66. Opinion, para. 154.
67. *Republic of Moldova v. Komstroy*, Judgment of the CJEU of 2 September 2021 in Case C-741/19.

EU.[68] Confirming the approach taken by the Advocate General, the court viewed the ECT as an act of its institutions, in the light of the Treaty of Lisbon giving exclusive competence to the EU for foreign direct investment, and shared competence as regards investment that is not direct.[69] However, CJEU emphasized that the court does not, in principle, have jurisdiction to interpret an international agreement as regards its application in the context of a dispute not covered by EU law, as it is the case in this present reference.[70] Nonetheless, when a provision of an international agreement would apply to situations covered by EU law and situations outside the scope of the EU law, the EU has the interest for the provision to be interpreted uniformly, 'whatever the circumstances in which it is to apply'.[71] Furthermore, the court held that the establishment of the seat of arbitration on the territory of an EU Member State triggers the application of EU law, with which the court must comply.[72] On the question concerning the interpretation of the definition of 'investment' under Article 1(6) of the ECT, the court agreed with the Advocate General and found that the contractual relationship between Moldtranselectro and Derimen concerned only the supply of electricity, which was generated by other Ukrainian operators that merely sold it to Derimen.[73] As such, the court concluded, a 'mere supply contract is a commercial transaction which cannot, in itself, constitute an "investment" within the meaning of Article 1(6) ECT, irrespective of whether an economic contribution is necessary in order for a given transaction to constitute an investment'.[74]

§10.03 DEALING WITH THE ELEPHANT IN THE ROOM: IMPLICATIONS OF CJEU'S APPROACH TO THE INTERPRETATION OF IIAS

The Opinion of the Advocate General and the CJEU Judgment in *Republic of Moldova v. Komstroy* are visibly in stark contrast with the reviewed court decisions interpreting similar jurisdictional requirements under IIAs. The approach of the national courts is to give proper deference to the principles and rules of public international law and, in particular, in addressing the interpretation of treaties and of their terms in accordance with the VCLT, as codifying the customary international law on this.[75] On the opposite end, the Judgment in *Republic of Moldova v. Komstroy* does not include any mention of such rules of treaty interpretation, while the Opinion, in one short paragraph, indicates that the interpretation of Articles 1(6)(c) and (f) is necessary to be done in accordance with Article 31(1) of the VCLT, 'in good faith in accordance with the ordinary meaning

68. Judgment, para. 22.
69. Judgment, paras 23–26.
70. Judgment, para. 28.
71. Judgment, para. 29.
72. Judgment, para. 34.
73. Judgment, para. 78.
74. Judgment, para. 79.
75. Further on the interpretation of treaties, *see* Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008).

to be given to the terms of the treaty in their context and in the light of its object and purpose', without any further explanations on how that is done.[76]

This approach by the CJEU – addressing the interpretation of international multilateral treaties from the perspective of the EU law, without relying on the proper rules of treaty interpretation – must be further put in the context of the circumstances of the specific case. *Republic of Moldova v. Komstroy* is a case without readily visible connectors pointing to the competence of the CJEU. The CJEU itself admits this by noting that court does not, in principle, have jurisdiction to interpret an international agreement as regards its application in the context of a dispute not covered by EU law,[77] but that when a provision of an international agreement would apply to situations covered by EU law and situations outside the scope of the EU law, the EU has the interest for the provision to be interpreted uniformly, 'whatever the circumstances in which it is to apply'.[78]

Further to these observations, the CJEU noted a rather new and essential significance to the choice of the seat of arbitration in the post-*Achmea* world. As explained by CJEU, the establishment of the seat of arbitration on the territory of an EU Member State triggers the application of EU law, with which the court must comply.[79] In consideration of this, the applicable *lex loci arbitri* and the attitude of the national courts at the seat of arbitration must now be addressed as well in the context of the supranational law and the competence of the supranational courts.

The danger in endorsing the judgment in *Republic of Moldova v. Komstroy* in subsequent CJEU cases comes also from the potential of using this approach in the context of international multilateral treaties without EU participation, but to which the EU Member States are contracting States.

This future development can be previewed in the recent ECT cases before ICSID submitted against the Netherlands and concerning the phasing out of fossil fuel investments.[80] On 22 September 2021,[81] the European Commission responded by a letter to a request from the Netherlands to intervene as amicus curiae in the court proceedings before the German courts in the request for a declaratory judgment that *Achmea* should be given effect in the ICSID proceedings brought by RWE against the Netherlands under the ECT.[82] In its letter, the European Commission opined that the EU Member States judges should decide that the ICSID Convention is not applicable if they find it incompatible with the EU law, thus applying the principle of the supremacy of EU law. Subsequently, the Higher Regional Court of Cologne decided that the two intra-EU ICSID arbitrations brought against the Netherlands by Uniper and RWE are

76. Opinion, para. 109.
77. Judgment, para. 28.
78. Judgment, para. 29.
79. Judgment, para. 34.
80. *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, and *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.
81. European Commission Legal Service, Letter dated 22 September 2021, ARES (2021)5792228.
82. *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4.

inadmissible under German and EU law, since the investor-State arbitration provisions in Article 26 of the ECT are incompatible with EU law for disputes brought intra-EU.[83]

One can foresee here the danger of a referral to the CJEU so as to assess the compatibility of the ICSID Convention with the EU law, in the context of intra-EU investment disputes. Such an approach would, undoubtedly, result in a 'bilateralisation' of a multilateral treaty: as European Commission has already advanced in its Letter of 22 September 2021: a multilateral treaty becomes a 'bundle of bilateral international obligations' between the respondent state and the investor's home state. Such an approach is, undoubtedly, at the minimum questionable in the context of the provisions of the VCLT.

83. Lisa Bohmer, German court declares ECT/ICSID arbitrations against the Netherlands to be inadmissible due to their intra-EU nature, Investment Arbitration Reporter, 8 September 2022.