**The relationship between the ECT and the EU legal system through jurisdictional**

**issues**

C-741/19 Komstroy

The Komstroy case originated as a request for a preliminary ruling from the Paris Court of Appeal concerning the interpretation of art 1 (6) (on the definition of investment) and art 26 (on dispute settlement) of the ECT. The dispute was between the Republic of Moldova and Komstroy LLC, a Ukrainian investor. Komstroy and Energoalians initiated the arbitration procedure against the Republic of Moldova under article 26. In 2013 the arbitral tribunal declared that it had jurisdiction and found that Moldova had failed to comply with its obligations under the ECT. However, Moldova brought an action for annulment of the 2013 award, challenging jurisdiction. Later on, in 2016 the Paris Court of Appeal annulled the award on the grounds that the tribunal had wrongly declared itself to have jurisdiction since the dispute did not involve an “investment” within the meaning of the ECT. This decision was appealed and in 2018 the Court de Cassation set aside the 2016 judgment and referred the case back to the Paris Court of Appeal. The Court of Appeal referred three questions to the CJZU to interpret provisions of the ECT (art 1 (6) and art 26 (1).

Thus, the Court had to decide whether it has jurisdiction to hear the dispute.

In other words, can the Court of Justice consider a question referred for a preliminary ruling when the dispute in question is between a non-Member State and an investor who is a national of another non-Member State?

The Court of Justice ruled that it has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of the European Union.

The reasoning is similar to the Aechmea case: Union law is autonomous; arbitral tribunals are outside the system, in particular because they cannot submit preliminary questions; the ECT is part of the legal order of the Union. It follows from the combination of these three elements that the arbitral tribunals cannot hear an action intra-European dispute, to do so would be to undermine the autonomy of Union law.[[1]](#footnote-1)

Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain.

Both Danish companies (Green Power and SCE) had invested in photovoltaic plants in the Spanish solar energy market. When the investments were made between 2088 and 2011 they were intended to profit from the applicable regulatory framework providing a favourable tariff regime based on State subsidies. However Spain had adopted several measures between 2010 and 2014 which significantly altered this regulatory framework.

In September 2016 Claimants initiated arbitration proceedings at the SCC arguing that theses alterations violated Spain’s obligation under the ECT.

The tribunal declined jurisdiction following Achmea case, the Tribunal suggested to the parties to bifurcate the proceeding and to limit the hearing to issues of jurisdiction and admissibility, which the parties agreed to. It is the first tribunal ever that accepted the EU jurisdictional objections raised by an EU Member State[[2]](#footnote-2).

Para 469 of the judgment illustrates the conclusion of the tribunal summarizing the EU law perspective:

“primacy of EU law is not a matter of lex specialis or of lex posterior, but one of lex superior. EU Member States are part of a network of legal relations, including the ECT, EU law and many other norms and agreements. Some of these norms, including provisions of the EU Treaties, are deemed by them as superior and overriding with respect to some other norms. Which specific norms can display this overriding character can be ascertained by reference to the case law of the CJEU.”

1. *Dalloz actualité : Chronique d’arbitrage : après Komstroy, Londres rit et Paris pleure Jourdan-Marques 17 Septembre 2021* [↑](#footnote-ref-1)
2. Nikos Lavranos, Loukas Mistelis European Investment Law and Arbitration Review 2022 [↑](#footnote-ref-2)