



04 October 2021

60 Rue du Trône  
(3ème étage), Box 11,  
Ixelles, 1050 Bruxelles,  
Belgique

Dear Executive Vice-President Timmermans,

CC Commissioners: Kadri Simson (Energy), Virginijus Sinkevičius (Environment), Valdis Dombrovskis (Trade)

CC Directors General: Ditte Juul Jørgensen (DG Energy), Mauro Petriccione (DG Clima), Sabine Weyand (DG Trade)

**Re: Implications of Case C-741/19 Republic of Moldova v Komstroy for the modernisation process of the Energy Charter Treaty**

The recent ruling by the Court of Justice of the European Union in Case C-741/19 *Republic of Moldova v Komstroy*<sup>1</sup> has come as no surprise after the Court's landmark ruling *Achmea* in 2018.<sup>2</sup>

In the *Komstroy* ruling, the Court provided a long awaited and much needed clarification that the investor-state dispute settlement (ISDS) provision in the Energy Charter Treaty (ECT) is not applicable in intra-EU disputes.

Despite these very clear terms, there is a fierce legal debate as to whether or not arbitral tribunals are going to comply with and apply the Court's ruling when deciding upon their jurisdiction in pending and future intra-EU arbitration cases based on the ECT.<sup>3</sup> Indeed, the *Achmea* ruling did not deter arbitral tribunals from continuing to hear intra-EU investment disputes – and this in spite of relentless efforts from respondent Member States and the European Commission to contest tribunals' competence. One can, unfortunately, expect the same reaction from arbitral tribunals in pending and future ECT based disputes. The lack of compliance with the CJEU's ruling will undoubtedly and significantly undermine the rule of law within the EU and set a disastrous precedent.

<sup>1</sup> CJEU, Case C-741/19 Republic of Moldova v Komstroy, 2 September 2021

<sup>2</sup> CJEU, Case C-284/16, Slovak Republic v Achmea BV, 6 March 2018

<sup>3</sup> For e.g. see Gibson Dunn client update stating that "... what is now a well-established principle that EU law is not relevant to the question of jurisdiction under the ECT. Thus, the Decision (which is limited to an analysis under EU law) should have no bearing on an ECT tribunal's jurisdiction.", <https://www.gibsondunn.com/wp-content/uploads/2021/09/intra-eu-arbitration-under-the-ect-is-incompatible-with-eu-law-according-to-the-cjeu-in-republic-of-moldova-v-komstroy.pdf>

In parallel, EU's efforts to modernise the ECT and bring it in line with EU climate objectives and new investment standards are not yet bearing fruit. According to Article 36(1)(a) of the ECT, the adoption of any amendment to the ECT will require unanimity of the Contracting Parties present and voting at the meeting of the Charter Conference.<sup>4</sup> Satisfactory results in a reasonable timeframe on nearly any of the topics open for negotiations will thus be difficult to achieve. To date, with the little information available to the public, we understand that many non-EU contracting states remain reluctant to make significant changes, and no compromise has been reached on crucial aspects.

In the meantime, EU companies are suing EU Member States under the ECT for adopting climate measures. Prime examples are the claims German coal giants RWE and Uniper brought against the Netherlands' decision to phase out coal earlier this year.<sup>5</sup> Taken together, the two investors are claiming damages of more than EUR 2.4 billion. The ability for companies to use the ECT in this way presents a serious obstacle to climate action, both in the Netherlands and abroad.

The mistrust of the arbitration system for national judges that it aims to substitute, the likely failure of the modernisation process, and the recent trend of ISDS cases against climate measures, together indicate the ECT is simply irreconcilable with EU law and climate objectives.

We call on the European Commission to not let arbitration proceedings circumvent the jurisdiction of the CJEU and its case-law which forms an integral part of EU law. The Commission is neither in a position to amend the ECT to carve-out the intra-EU application of the ISDS provision,<sup>6</sup> nor in a position to include equivalent safeguards to those in CETA's investment chapter<sup>7</sup> in order to preserve the judicial and regulatory autonomy of the EU's unique legal order. This leaves therefore no other choice to the EU and its Member States than withdrawing from the ECT.

The European Commission could make use of the EU's political and economic leverage to push for the termination of the ECT. But as this would require the agreement of all contracting parties, the Commission should start preparing a coordinated EU withdrawal together with its Member States – and explore the possibility to abolish the sunset clause via an inter-se agreement in order to significantly reduce the risk of arbitration intra-EU.<sup>8</sup>

We call on the Commission to urgently design a plan to leave the ECT. Continued membership to the Charter will continue to allow companies to hamstring Member States on climate action, which will make the EU's own objectives impossible to achieve and prevent it from having a leading role in addressing the climate emergency.<sup>9</sup>

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<sup>4</sup> Furthermore, an amendment would only enter into force, if three quarters of the Contracting Parties ratify, accept or approve the amendment in accordance with Article 42(4) of the ECT.

<sup>5</sup> RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4); Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22)

<sup>6</sup> Article 26 ECT is not part of the list of items subject to the modernisation process.

<sup>7</sup> CJEU, Opinion 1/17 on CETA, 30 April 2019

<sup>8</sup> IISD and ClientEarth, Energy Charter Treaty Reform: Why withdrawal is an option, <https://www.clientearth.org/latest/documents/energy-charter-treaty-reform-why-withdrawal-is-an-option/>

<sup>9</sup> IISD, Reform or withdrawal from the ECT: What does it mean for coal?, 24 September 2021, <https://www.iisd.org/itn/en/2021/09/24/reform-or-withdrawal-from-the-ect-what-does-it-mean-for-coal/>

Yours sincerely,

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