

Case C-741/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

8 October 2019

Referring court:

Cour d'appel de Paris (France)

Date of the decision to refer:

24 September 2019

Appellant:

Republic of Moldova

Respondent:

Komstroy, a company the successor in law to the company Energoalians

I. Subject matter of the main proceedings

Assessment of the jurisdiction of an ad hoc arbitral tribunal established pursuant to Article 26(3) of the Energy Charter Treaty ('the ECT') with a view to resolving a financial dispute relating to the payment of a debt linked to a contract for the sale of electricity. The arbitral decision upholding the respondent's application was annulled by the cour d'appel de Paris (Court of Appeal, Paris) on the ground that the arbitral tribunal had wrongly declared itself to have jurisdiction. The Cour de cassation (Court of Cassation) set that judgment aside on the ground that the Cour d'appel had interpreted the concept of 'investment' within the meaning of Article 1.6 of the ECT too restrictively. The outcome of the dispute and, consequently, the jurisdiction of the arbitral tribunal are therefore dependent, in essence, on the interpretation of that concept.

II. Subject matter and legal basis of the request

The Cour d’appel de Paris, to which the Cour de cassation has remitted the case, takes the view that the Court of Justice has jurisdiction over questions of interpretation relating to the provisions of the ECT under Article 267 TFEU. The criterion for application of that article is based exclusively on the classification of the act the interpretation of which is sought. Mixed agreements concluded by the European Union and the Member States with third parties constitute acts adopted by the institutions, bodies, offices or agencies of the European Union (judgments of 30 September 1987, *Demirel*, 12/86, EU:C:1987:400, and of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, C-414/11, EU:C:2013:520). Since it is required to apply the provisions of the ECT in order to determine whether the arbitral tribunal has jurisdiction, the national court is entitled to refer those questions of interpretation to the Court of Justice with a view to ensuring the uniform application of EU law.

III. Questions referred for a preliminary ruling

‘(1) Must Article 1.6 of the Energy Charter Treaty 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 Energy Charter Treaty 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 Energy Charter Treaty 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?’

IV. Legal context

1. Provisions of the Energy Charter Treaty

‘Article 1: Definitions

As used in this Treaty:

...

6. “Investment” means every kind of asset, owned or controlled directly or indirectly by an investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to [a] contract having an economic value and associated with an investment;
- (d) intellectual property;
- (e) returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any economic activity in the energy sector.

A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the investor making the investment and that for the Contracting Party in the area of which the investment is made (hereinafter referred to as the “effective date”) provided that the Treaty shall only apply to matters affecting such investments after the effective date.

“Investment” refers to any investment associated with an economic activity in the energy sector and to investments or classes of investments designated by a Contracting Party in its area as “Charter efficiency projects” and so notified to the Secretariat.

(7) “Investor” means:

- (a) with respect to a Contracting Party:
 - (i) a natural person ...
 - (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;

...

(8) “Make Investments” or “making of investments” means establishing new investments, acquiring all or part of existing investments or moving into different fields of investment activity.

...

(10) “Area” means with respect to a State that is a Contracting Party:

(a) the territory under its sovereignty ...’

‘Article 26 — Settlement of disputes between an investor and a Contracting Party

(1) 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.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) ..., the investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

...

(c) in accordance with the following paragraphs of this Article.

(3) (a) ... to ... arbitration ...’

2. *National provision*

Article 1520 of the code de procédure civile (Code of Civil Procedure):

‘An action for annulment [against an international arbitral award delivered in France] is available only in the following cases:

1. Where the arbitral tribunal wrongly declared itself to have or not to have jurisdiction;

...; or

5. Where the recognition or enforcement of the award is contrary to international public policy.’

V. **Presentation of the facts and procedure in the main proceedings**

1 Ukraine and the Republic of Moldova are former Soviet republics with interconnected electricity networks. On 1 January 1995, a contract was signed for the parallel and reciprocal operation of the electricity networks of the two States.

2 Contract No 01/01 was concluded on 1 February 1999 between the following three companies: Ukrenergo, a Ukrainian electricity generator, Energoalians, a

Ukrainian private-law company specialising in the generation and distribution of electricity; and Moldtranselectro, a Moldovan public undertaking established in 1997. Under that contract, Energoalians purchased electricity from Ukrenergo with a view to exporting it to Moldova; the volumes of electricity to be supplied were agreed each month between Ukrenergo and Moldtranselectro.

- 3 By Contract No 24/02, signed in Kiev on 24 February 1999, Energoalians, Derimen, a company registered in the British Virgin Islands, and Moldtranselectro agreed that:
 - Energoalians, as supplier, would supply electricity to Derimen;
 - Derimen, as purchaser, would pay the price of the electricity to Energoalians;
 - Moldtranselectro, as ‘beneficiary’, would submit to Ukrenergo, before the 25th of each month, an order form stating the quantity of electricity required for the following month;
 - Ukrenergo would then supply the electricity subject to the DAF Incoterms 1990, that is to say, to the border between Ukraine and Moldova, on the Ukrainian side;
 - Derimen would recover from Moldtranselectro the price of the electricity sold.
- 4 That contract, which was initially concluded for the year 1999, and Contract No 01/01 of 1 February 1999 were renewed up to 31 December 2000. For each month of supply, Energoalians was required to collect the payment from Derimen within 80 days of delivery, while Derimen was required to collect the payment from Moldtranselectro. The prices applicable to the payments were fixed by various amendments to Contract No 24/02. Under the general terms of those amendments and depending on the month, the price paid by Moldtranselectro was approximately twice that paid by Derimen to Energoalians.
- 5 Electricity was supplied over the course of the two years (1999 and 2000), with the exception of May to July 1999. Moldtranselectro paid Derimen for part of the year 1999 (January and part of February 1999) and for the whole of the year 2000. The remainder of the electricity supplied in 1999 has remained unpaid. On 1 January 2000, the accumulated debt owed by Moldtranselectro to Derimen amounted to USD 18 132 898.94. However, no debt was owed to Energoalians, since Derimen paid it for all the electricity supplied.
- 6 By contract signed in Kiev on 30 May 2000, Derimen transferred to Energoalians the claim which it held against Moldtranselectro under Contract No 24/02.
- 7 Moldtranselectro settled its debt in part and reduced Energoalians’ claim in its regard to USD 16 287 185.94.

- 8 Energoalians attempted unsuccessfully to obtain payment of that sum by bringing proceedings before the Moldovan courts and subsequently the Ukrainian courts.
- 9 Taking the view that certain interventions by the Republic of Moldova constituted serious breaches of the undertakings made under the ECT, Energoalians initiated an ad hoc arbitration procedure.
- 10 By a majority decision given in Paris on 25 October 2013, the ad hoc arbitral tribunal, composed of three arbitrators, declared itself to have jurisdiction. It took the view that the Republic of Moldova had failed to comply with its international undertakings and ordered it to pay the total amount of 592 880 395 Moldovan lei to Energoalians on the basis of the ECT.
- 11 According to the arbitral tribunal, Energoalians held an ‘investment’ within the meaning of the ECT in respect of the public undertaking Moldtranselectro, since the ECT applied a rather broad definition of that concept. It relied both on legal literature and on other arbitral decisions. In its opinion, that term is part of an ‘overall and neutral concept’ and extends to ‘all types of contributions’. It observed that the case brought before it was squarely described in Article 1.6(c) of the ECT.
- 12 The president of the arbitral tribunal expressed a dissenting opinion as regards the jurisdiction of that tribunal. He took the view that the normal meaning of the word ‘investment’ means an investment of capital or of effort, with the expectation of a certain return, and that that concept presupposes some delay before that return is realised (that is, a term) and some uncertainty about the amount of the return (that is, a commercial risk).
- 13 The Republic of Moldova brought an action for annulment against that decision on 25 November 2013.
- 14 By act of 6 October 2014, Komstroy, a company governed by Ukrainian law, became the successor in law of Energoalians.
- 15 By judgment of 12 April 2016, the Cour d’appel de Paris annulled the decision. It held that the arbitral tribunal had wrongly declared itself to have jurisdiction on the ground that the claim to which the dispute related was concerned solely with the sale of electricity. Since there had been no contribution, there could be no investment within the meaning of the ECT.
- 16 On appeal on a point of law lodged by Komstroy, by judgment of 28 March 2018 delivered pursuant to Article 1520 of the Code of Civil Procedure, the Cour de cassation set aside the judgment of the Cour d’appel de Paris.
- 17 The Cour de cassation found that the provisions of the ECT do not specify the criteria which characterise an investment but rather simply list, in a non-exhaustive fashion, assets regarded as being investments. It inferred from that fact

that the Cour d'appel had infringed the ECT by adding to it a condition for which it did not provide.

- 18 It referred the case back to the Cour d'appel de Paris, sitting in a different composition.
- 19 The Republic of Moldova claims that the Cour d'appel should annul the arbitral decision of 25 October 2013 on the ground that the arbitral tribunal wrongly declared itself to have jurisdiction and that recognition or enforcement of the decision would be contrary to international public policy. In the alternative, it asks that a request for a preliminary ruling concerning the interpretation of the ECT be submitted to the Court of Justice.
- 20 Komstroy, the successor in law to Energoalians, contends that the Cour d'appel should dismiss the action for annulment brought by the Republic of Moldova and reject all of the latter's claims.

VI. The essential arguments of the parties in the main proceedings

- 21 The Republic of Moldova claims that the dispute does not relate to an investment within the meaning of the ECT and that, even assuming that there were an investment, that investment would have been made neither by an undertaking of a Contracting State nor in the area of Moldova.

1. The existence of an investment within the meaning of the ECT

- 22 (a) The Republic of Moldova submits that the claim acquired by Energoalians, which arose from a contract for the sale of electricity, is not an 'investment' within the meaning of the ECT. That Treaty refers to the ordinary meaning of the word 'investment', which requires that there be a contribution. Whilst it is true that the definition in the ECT does refer to 'every kind of asset' owned by an investor, the list of examples given by way of illustration demonstrates that not 'every asset' necessarily constitutes an investment.
- 23 Having regard to its ordinary meaning and in the light of the objectives of the ECT set out in its preamble, the term 'investment' is necessarily linked to the action by an investor of contributing or transferring capital or other resources needed to develop and maintain an investment activity. It is this meaning which was adopted by the president of the arbitral tribunal in his dissenting opinion and which reflects arbitral case-law.
- 24 It observes that Energoalians' claim against Moldtranselectro, which arises from Contract No 24/02, did not involve a contribution, that that contract to which the claim is related is not itself an investment since it concerns solely the sale of electricity, and that Derimen's activity consisted in factoring services, which are purely financial transactions.

- 25 **(b)** The respondent contends in response that the ECT defines the concept of ‘investment’ broadly, such that any asset controlled or owned by an investor may come within that concept. The electricity financing transaction from which Energoalians’ claim arises is indeed a transaction ‘associated with an economic activity in the energy sector’, within the meaning of Article 1.6 of the ECT, because it enabled power to be supplied to Moldtranselectro.
- 26 Derimen’s involvement, combined with Moldtranselectro’s obligation to pay to Derimen the amounts owed in respect of the energy supply, is an integral component of the investment transaction consisting in the supply of energy to Moldova.

2. *The identity of the investor*

- 27 **(a)** The Republic of Moldova submits that that investment was not made by Energoalians itself. An investor cannot submit for arbitration a dispute relating to an investment which he himself has not made, since the expression ‘making an investment’ is defined in Article 1.8 of the ECT.
- 28 It claims that, by acquiring Derimen’s claim, Energoalians did not acquire an ‘existing investment’ within the meaning of the ECT. Since the British Virgin Islands, being the place where Derimen is registered, are not a Contracting Party to the ECT, that company cannot enjoy the status of investor within the meaning of the ECT, and its assets cannot therefore constitute ‘investments’ within the meaning of that Treaty. That conclusion is consistent with the adage *nemo plus juris ad alium transferre potest quam ipse habet* (no one can transfer to another more rights than he himself has).
- 29 **(b)** The respondent replies that the Republic of Moldova is attempting to add to the ECT a condition which does not exist, namely that, in order to benefit from the protection of the ECT, an investor must acquire the investment from a company which is itself ‘protected’ by that Treaty. The existence of an investment may be inferred from ownership of an asset associated with an economic activity in the energy sector, regardless of the manner in which that investment was acquired. It is irrelevant whether or not Energoalians made the investment since it controls it.
- 30 The respondent also observes that only the French-language version of Article 26 of the ECT states that the investment must be ‘réalisé’ (‘made’) by the investor. However, the Russian-language version of the ECT was the authentic language version between the parties in the arbitral proceedings.

3. *The criterion of territoriality*

- 31 **(a)** The Republic of Moldova points out that Article 26(1) includes a criterion of territoriality, which makes the jurisdiction of the arbitral tribunal subject to the condition that the investment was made by an investor ‘in the area’ of the host

State, within the meaning of Article 1.10 of the ECT. It submits that no investment was made ‘in the area’ of Moldova, since the electricity was supplied before the border with Moldova and the companies Energoalians and Derimen were not carrying out any economic activity in the energy sector on Moldovan territory. It adds that the acquisition of an enforceable claim cannot itself be regarded as constituting an investment made ‘in the area’ of Moldova by Energoalians and Derimen, since the only consideration paid by Energoalians for that acquisition had to be paid to Derimen, an entity located in the British Virgin Islands.

- 32 (b) The respondent contends in response that the condition of territoriality is satisfied. There are a very significant number of territorial connecting factors to Moldova. Its claim over Moldtranselectro has its origin in the supply of electricity on the territory of Moldova, and the complex investment operation is solely concerned with the supply of electricity to Moldtranselectro, a Moldovan public company.
- 33 It further states in response that the investment claimed by Energoalians is the claim held over Moldtranselectro and not the underlying contract for the supply of electricity, and that the connection to the area of Moldova cannot be excluded solely on the basis of the presence of the DAF term in the contract for the supply of electricity.

VII. Succinct presentation of the reasoning in the reference for a preliminary ruling

- 34 The Cour d’appel de Paris takes the view that the outcome of the dispute depends on the interpretation of the concept of ‘investment’ within the meaning of Article 1.6 of the ECT and, where necessary, of the words ‘make investments’ or ‘making of investments’ within the meaning of Article 1.8 of the ECT.
- 35 With regard to territoriality, it takes the view that the question raised is whether the claim, which arose from a contract for the sale of electricity, can constitute an investment made in the area of another Contracting Party within the meaning of Article 26(1) of the ECT, in the absence of any economic activity undertaken by the holder of the claim within the territory of that Contracting Party.
- 36 It considers that the ECT is a mixed agreement, concluded by the European Union and the Member States with third parties, and that the Court of Justice has jurisdiction, under Article 267 TFEU, over questions of interpretation raised by that Treaty. The Cour d’appel de Paris, which has to apply the provisions of the ECT in order to assess the jurisdiction of the arbitral tribunal, is entitled to refer such questions of interpretation to the Court of Justice in order to ensure the uniform application of EU law.