School of Public Administration
Working Papers Series

# And Now For Something Completely Different…

## Disposing of pacta sunt servanda through an obiter dictum

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2022:34

UNIVERSITY OF GOTHENBURG
SCHOOL OF PUBLIC ADMINISTRATION

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2022:34
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ISSN 1651-5242

# And Now For Something Completely Different…

## Disposing of pacta sunt servanda through an obiter dictum

*By Allison Östlund and Jonas Hallberg*[1]

## 1 Introduction

On 2 September 2021, the Court of Justice of the European Union (CJEU) delivered its ruling in *Komstroy v Moldova*, a case that had initially concerned litigation external to the EU under the Energy Charter Treaty (ECT).[2] The preliminary reference procedure, however, progressed into something quite different, with repercussions not only for the parties and Sweden but for the EU as a whole, insofar that a prior investor-state arbitration ban was held to apply to intra-EU disputes under the ECT.[3] The ruling has *inter alia* been commented on by Stoppioni, who found its substantive outcome – the incompatibility of the ECT with EU law – unsurprising given the CJEU's earlier ruling in *Achmea.*[4] This finding was, together with the so-called Termination Agreement[5] (whereby most EU Member States agreed to terminate their intra-EU investment protection agreements), nevertheless understood to represent a significant tightening of *Achmea* by overall prohibiting arbitration as a forum for settling intra-EU investment disputes (so-called investor-state dispute settlement, ISDS).[6]

Unexpectedly, this *obiter dictum* clarification was given in an EU-external context, at the request of some interveners but under strong protests from others. The process leading up to the ruling was thus not straightforward, and it is in this paper questioned whether it is compatible with formal requirements of legal certainty to extend the ambit of the proceedings in a way that gives some interveners procedural advantages over others. In addition, the paper considers the CJEU's approach to the Vienna Convention on the Law of Treaties (VCLT).

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[1] Allison Östlund is Lecturer at the School of Public Administration of the University of Gothenburg, making this contribution as part of the research project *Separation of Powers for 21st Century Europe (Norface)*. Jonas Hallberg is investigator at Sweden's National Board of Trade, contributing commentary in a private capacity and not in any official or professional function. An extended version of this manuscript is currently under review for Europarättslig tidskrift*,* hopefully to become available in Swedish. The present open-access publication is disseminated for the purpose of participating in the lively international academic debate on this controversial topic.

[2] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655.

[3] de Boeck, M. Republic of Moldova v Komstroy (C-741/19): what next for the Energy Charter Treaty? EU Law Live, 15 September 2021, cf. case C-284/16, *Achmea v Slovakia,* EU:C:2018:158.

[4] Stoppioni, E. The Komstroy case: Common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021; cf. Dashwood, A., Article 26 ECT and Intra-EU Disputes-the Case against and Expansive Reading of Achmea, European Law Review, No 46 (4) 2021, 415-434, where the opposite outcome was recently predicted.

[5] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169/1, 29.5.2020.

[6] Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021.

Both aspects are relevant to the CJEU's continued legitimacy. Adherence to the subject-matter of proceedings is one of the cornerstones of adversarialism and thus of judicial protection. The CJEU's loyalty towards international law is, in its turn, fundamental to the way the EU is perceived by the remaining world and the authority with which the EU and its Member States can advocate that interactions between states be based on compliance and trust. Given these issues' importance, we hope to contribute to a critical discussion of the CJEU's handling of the current case.

## 2 Background

The dispute at issue in *Komstroy* concerned an arbitration proceeding under the ECT in which a purported investor from the Ukraine (Komstroy[7]) had assumed a claim for electricity. In order to obtain compensation from Moldova, Komstroy initiated arbitration proceedings on the ground that the defendant state had breached its obligations under the ECT concerning the conditions for foreign investments.

The appointed ad hoc arbitral tribunal was based in Paris, and the arbitration procedure was governed by the UNCITRAL arbitration rules.[8] The central issue of the dispute was whether claims for compensation for the sale of electricity was an investment within the meaning of Article 1(6) ECT. The provision contains a non-exhaustive list of what constitutes an investment, in which compensation pursuant to purely commercial transactions is not included. In order to enjoy any protection under the ECT, it became essential for Komstroy that its claim could be said to arise from an investment rather than a commercial dispute.

A majority of members of the arbitration panel granted the claim,[9] following which the respondent state successfully challenged the award before the *Cour d'Appel* of Paris. After an additional reference round at *Cour de Cassation* (the Constitutional Court of France), *the Cour d'Appel* put several questions to the CJEU in a request for a preliminary ruling concerning the interpretation of the concept of investment under the ECT and its implications for the current dispute between the Ukrainian investor and the Moldovan Republic.[10] The preliminary reference thus maintained a limited connection with the interpretation of EU primary law. Moreover, the underlying dispute was fundamentally not about the validity of a traditional EU legal act, but rather about the interpretation and application of the ECT in an EU external dispute, which is probably why both Advocate General Szpunar and the CJEU spent considerable space reasoning about the jurisdiction of the CJEU.

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[7] During the arbitration, Komstroy went under the name Energolians.

[8] https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration, last accessed 4 November 2021.

[9] Uncharacteristically, it was the chairman of the arbitration panel who dissented, arguing that Komstroy's claim did not qualify as an investment under the ECT, cf. Article 1.6.c.

[10] "[(1)] Must [Article 1(6) ECT] be interpreted as meaning that a claim which arose from a contract for the sale of electricity and which did not involve any economic 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) 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 Contracting Parties to that treaty constitutes an investment? [(3)] Must [Article 26(1) 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?"

In a previous preliminary ruling, *Achmea*, the CJEU had ruled that arbitration clauses in bilateral investment agreements,[11] as applied between EU Member States, were invalid under certain conditions due to incompatibility with EU law. As we have noted in other contexts, the implications of *Achmea* for ECT under EU law have been difficult to assess.[12] The preliminary reference in *Komstroy* was certainly unrelated to *Achmea;* other than hypothetically, insofar that one could possibly wonder what the outcome would have been if *Komstroy* had instead concerned an investor-state dispute within the EU. However, the link between the factual circumstances and the need for an interpretation under EU law seemed to reach no further than that, until the CJEU became interested in the question as to whether Article 26 ECT (governing arbitration under ECT) was compatible with EU law. The procedural rules that made this development possible and that circumscribed Member States' ability to respond to it are dealt with below.

## 3 Written procedure and oral hearing

National courts can refer a request for a preliminary ruling to the CJEU when they need help interpreting applicable Union law in the context of national proceedings.[13] The referring court then sends precise questions and asks the CJEU to give its opinion on them. These questions are then forwarded to, among others, the other Member States, the European Commission, and the European Council, which are given the opportunity to give their opinion in writing.[14]

The matter of applicability of the ECT between EU Member States was neither an issue in the case before the national court nor one of the questions referred to the CJEU. Sweden – together with most EU Member States – chose not to submit written observations to the CJEU, an indication that the investment law issues between Komstroy and Moldova were perceived as pivotal, while compatibility with EU law was not expected to be commented on as it fell outside the subject-matter.

Once the written replies have reached the CJEU, they are communicated to all Member States (as well as to the Commission and the Council), which then form an idea of the position of the others – but no further correspondence is allowed unless the CJEU decides otherwise.[15] The CJEU then sends out its own questions on which it considers that the intervenients should focus at the oral hearing.[16] The questions do not have to be the same as those posed by the national court, as the CJEU may make a different assessment of what is central to the case. During the Covid-19 pandemic, states had the opportunity to intervene via link, and each state's intervention was limited to a maximum of 15

[11] As investment agreements are the common term, "agreement" is used here synonymously with the more specific term "treaty".

[12] Östlund, A. & Hallberg, J. Kan nya EU-domar läggas till grund för förnyad prövning av slutgiltiga internationella skiljedomar? Juridisk Tidskrift, No 3 2018/19; Hallberg J. & Östlund, A. Början på slutet för skiljeförfaranden i internationella investeringsskyddsavtal? Juridisk Tidskrift, No 4 2017/18.

[13] It is also possible to refer the matter of the compatibility of the applicable EU secondary legislation with the EU Treaties; Article 267 TFEU.

[14] Articles 57, 94, 96-98 Rules of Procedure of the Court of Justice, 29.9.2012, Article 23 Protocol (No 3) on the Statute of the CJEU of the European Union, 7.6.2016.

[15] Article 57 Rules of Procedure of the Court of Justice, 29.9.2012.

[16] Article 61(1) Rules of Procedure of the Court of Justice, 29.9.2012.

minutes. After oral observations, the CJEU retains the option to ask questions and the hearing ends with an opportunity for the interveners to make closing remarks. [17]

When the CJEU in the present case sent out its questions to Member States and institutions before the oral hearing, in accordance with these rules, it became evident that three Member States had asked the CJEU in the written procedure to address the question of the applicability of the ECT between EU Member States (even though this question was neither part of the French court's request for a preliminary ruling nor had any bearing on the outcome of the French case). In their written submissions, these states took the opportunity to develop their own views on the compatibility issue,[18] despite that the subject-matter normally cannot be extended through submissions from the parties.[19]

A number of questions directly related to the national dispute were put to EU Member States and interested parties for the subsequent oral steps of the process – including the following: "Is the claim in question 'linked to an investment'?"[20] In addition, the following invitation was addressed to all interested parties prior to the oral hearing:

> Interested parties participating in the main hearing are invited to clarify their position on the compatibility of the ECT dispute settlement rules with Union law to the extent that the mechanism applies to disputes between Member States.[21]

In practice, this guidance, together with the procedural rules just described, meant that in the present case, issues first introduced by individual interveners in the written phase – such as the compatibility issue – could not be commented on by the other interveners other than through a brief oral submission. During the oral hearing, Sweden spent the allotted 15 minutes clarifying its position on the latter issue in a hypothetical relationship between parties to investment disputes within the EU. Sweden stressed that the matter of the compatibility of the dispute settlement mechanism of the ECT with EU law is both complex and controversial, requiring a more thorough and comprehensive treatment than can be achieved in the space available for an oral presentation. It was further argued that this was not within the jurisdiction of the CJEU, given that the wording of Article 267 TFEU provides that the CJEU shall receive questions "necessary to enable [the referring court] to give judgment".

The CJEU has in the past pointed out its own role in safeguarding the prerogative of Member States to submit observations on the basis of a full dossier containing sufficient legal information, given that only one written submission is permitted.[22] It was on this basis argued that, should the CJEU nevertheless choose to rule *obiter dictum,* all Member States and institutions should have been given the opportunity to develop their positions in writing, and not just to make an oral submission on the compatibility issue. Sweden's stance was shared by Finland, Hungary, and the European Council. As will be seen below, the position that it was not necessary to answer the question of the compatibility

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[17] Articles 61(2) and 81 Rules of Procedure of the Court of Justice, 29.9.2012.

[18] Of Spain's 27-page opinion, 8 were devoted to the question of whether the ECT is applicable between EU Member States. Of Germany's 12-page submission, 6 pages were devoted to the same issue. The submission from Poland devoted less pages to this issue but was very focused.

[19] See case C-21/13, *Simon, Evers & Co*, EU:C:2014:2154, 26-28; case C-8/19 PPU, *RH*, EU:C:2019:110, 37.

[20] Authors' translation from original formulation in French. We will return to these matters in section 6.

[21] Authors' translation.

[22] Article 23 Protocol (No 3) on the Statute of the CJEU of the European Union, 7.6.2016, see case C-434/15, *Asociación Profesional Elite Taxi*, EU:C:2017:981, 25.

of Article 26 ECT with Union law in the context of the present case was rejected by the Advocate General as well as by the CJEU.

## 4 The CJEU's jurisdiction to interpret the ECT

A bilateral agreement between two EU Member States formed the basis of the *Achmea* dispute. The EU is (in addition to its Member States) an independent party to the ECT, which means that the agreement at issue in *Komstroy* is a mixed agreement.[23] Given that the EU is a party to the agreement and that the EU is a monistic system, the ECT forms part of Union law.

Advocate General Szpunar's approach to answering the French court's questions was as follows. With respect to the CJEU's jurisdiction to interpret Article 26 ECT, and to whether the claim in question could be attributed to an investment, the ECT was considered to constitute an act of EU law.[24] This was, however, not sufficient to ensure the jurisdiction of the CJEU to interpret the ECT; rather it must be determined whether the provisions of the ECT are applicable in the Union legal order.[25] Although the dispute had arisen between extra-EU parties, i.e. Moldova and a Ukrainian company, the Advocate General considered that the CJEU should give a ruling according to the following reasoning:

> where a provision can apply both to situations falling within the scope of EU law and to situations not falling within that scope, it is clearly in the EU interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.[26]

The CJEU initially found that the ECT is an integral part of the Union legal order,[27] but, like the Advocate General, acknowledged that

> It is true 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. That is the case in particular where such a dispute is between an investor of a non-member State and another non-member State.[28]

The CJEU nevertheless attached importance to the fact that the parties chose to locate the seat of the arbitral tribunal in Paris, indirectly choosing EU law as the applicable law in a dispute settlement procedure, and in another (hypothetical) case the action could be brought directly before a court of a defendant Member State under Article 26(2)(a) ECT.[29] In addition, following the same reasoning as the Advocate General, the CJEU considered that *the uniform interpretation and application of the ECT* justified that the CJEU nevertheless give an opinion on the case.[30] Referring to its own case-law, the

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[23] Delgado Casteleiro, A. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021.

[24] Opinion of Advocate General Szpunar in case C-741/19, *Moldova v Komstroy*, EU:C:2021:164, 28f.

[25] Ibid., 34.

[26] Ibid., 37. This principle was established by the CJEU in case C-53/96, *Hermès International,* EU:C:1998:292, 32.

[27] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 23.

[28] Ibid., 28.

[29] Ibid., 31-35. Advocate General Szpunar also made this point in his Opinion in case C-741/19, *Moldova v Komstroy*, EU:C:2021:164, 99; see also Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 2.

[30] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 29.

CJEU held that "where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling."[31] Note that the CJEU specified "EU law" and not "a treaty to which the EU is a party". Any remaining doubt was dispelled by finding that since the ECT is an act of Union law, an arbitral tribunal must interpret and apply Union law.[32]

The CJEU's starting point – that an arbitral tribunal has to interpret and apply Union law – was far from evident from an international law perspective, especially since Article 26(6) of the ECT explicitly states that disputes shall be settled by reference to the ECT and the applicable rules and principles of international law.[33] All known arbitral tribunals have thus far in interim decisions and in arbitral awards found that the ECT, as an international treaty, is to be interpreted by reference to the VCLT[34]; not by reference to Union law.[35] Rules and principles of international law are based on the wording of the VCLT, whereas Union law is seen by these arbitral tribunals at most only as a substantive fact of the dispute, not something that the arbitral tribunal has to interpret and apply.

# 5 Intra-EU applicability of the ECT

Both the CJEU and the Advocate General found that Article 26 ECT regulates bilateral relations between EU Member States in a similar way as was precluded in *Achmea,*[36] so that the ECT could not apply in relations between a Member State and an investor from another Member State.[37] The idea of treating the ECT as bilateral relations was first introduced by the intervener Germany in a written submission, an argument which was then repeated by the Commission, *inter alia*, during the oral

[31] Ibid., 35.

[32] Ibid., 49f.

[33] "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

[34] An interpretation of the treaty is then based on Article 31: "*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 light of its object and purpose." The predominant interpretation of the application of Article 31 VCLT is based primarily on the ordinary meaning of the treaty text. If the text is not sufficiently clear, it is interpreted according to its context, then its object and finally its purpose; in other words, a step-by-step interpretation and not of an overall assessment. In addition, an interpretation would trigger Article 32 VCLT relating to *travaux préparatoires* as supplementary means of interpretation.

[35] See e.g. *Vattenfall v Germany*, ICSID case No ARB/12/12, decision of 31 August 2018. Some arbitral tribunals have stated that although EU law forms part of international law – i.e. as a regional subdivision – it does not constitute international law; e.g. *Eskosol S.P.A. in Liquidazione v Italy*, ICSID case No ARB/15/50, decision of 7 May 2019, 181: "The EU Treaties are one such sub-system, vesting authority in various organs including the Commission, the CJEU, etc. But the EU Treaties are not general international law displacing all other sub-systems of international law; rather, they exist side-by-side with other sub-systems, including those created by various multilateral treaties. The ECT is one such other sub-system of law, and it vests authority in arbitral tribunals such as this one. Each authority is empowered in its sub-system to render decisions within its sphere, such as the CJEU's Achmea Judgment under the EU Treaties and the awards of various arbitral tribunals under the ECT."

[36] Opinion of Advocate General Szpunar in case C-741/19 *Moldova v Komstroy*, EU:C:2021:164, 64. The CJEU has clarified the case C-284/16 *Achmea v Slovakia,* EU:C:2018:158, in case C-109/20, *PL Holdings v Poland*, EU:C:2021:875, 46, stating that arbitration clauses in *ad hoc* investor-state investment protection agreements are also incompatible with Union law because they undercut "not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU."

[37] Opinion of Advocate General Szpunar in case C-741/19, *Moldova v Komstroy*, EU:C:2021:164, 66.

hearing. Sweden, on the other hand, argued in its oral intervention that it is not correct to consider the ECT as a set of bilateral relations.

The Advocate General held that since arbitration provisions for intra-EU investment disputes are incompatible with Union law, the ECT could not be applied bilaterally between Member States in the same way as between the parties to the ECT in general.[38] The fact that the Union is a party to the ECT and thus also bound by the agreement was thus considered irrelevant, as an intra-EU application of Article 26 ECT is not compatible with the autonomy of Union law.[39] Advocate General Szpunar thus did not make a VCLT-analysis as to whether the ECT *is* applicable between EU Member States, instead giving his view on whether the agreement *should be* allowed to apply from a Union law perspective.

The CJEU, for its part, stated straightforwardly that an international treaty must not interfere with the legal order of the Union; ignoring the fact that the ECT is an international treaty binding both on the EU and on its institutions.[40] It was recalled under the heading "Consideration of the questions referred" that the *Achmea* decision prohibited EU Member States from settling intra-EU ISDS referrals to arbitration. Given that the ECT dispute resolution mechanism was considered to have been established by an EU act, whereby the arbitral tribunal risked interpreting and applying EU law, the *Achmea* prohibition was considered analogously applicable to mixed agreements like the ECT.[41] This was thus contrary to the autonomy of Union law, given that Article 26(6) of the ECT requires arbitral tribunals to interpret and apply Union law, while the latter have no possibility to refer questions concerning the interpretation and validity of EU law to the CJEU.[42] On the basis of the EU Treaties, the CJEU emphasized the primacy of Union law over national and international law and its own exclusive competence to give final interpretation of Union law, including the ECT as an act of Union law.[43]

We interpret this reasoning to mean that the CJEU considered that since ECT constitutes Union law, an arbitral tribunal by definition has to interpret and apply Union law.[44] An alternative or complement to this interpretation would be for the CJEU to equate Union law with the concept of "international

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[38] Ibid., 63, 89.

[39] Ibid., 81-83.

[40] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 64-66.

[41] On the risks of conflicts of competence and liability inherent to mixed contracts, see Casteleiro, E.D. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 2.

[42] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 49-50, see also 60: "the Member States which are parties to it established a mechanism for settling such a dispute that could exclude the possibility that that dispute, notwithstanding the fact that it concerns the interpretation or application of EU law, would be resolved in a manner that guarantees the full effectiveness of that law". The CJEU's starting point here, as in case C-284/16 *Achmea v Slovakia,* EU:C:2018:158, was the principle of mutual trust between the EU Member States, which refers to the legal systems of the States in general and the judiciary in particular. However, given that the Polish Constitutional Court stated on 8 October 2021 that they are not bound by the CJEU's pronouncements in all respects, it is now clear that mutual trust rests on loose ground; https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej accessed 4 November 2021; see e.g. https://www.europaportalen.se/2021/10/polsk-domstol-vi-kan-strunta-i-eu-ratten, accessed 4 November 2021. However, the CJEU did not acknowledge this at the time of the decision, even though there were clear indications even then; see case C-585/18, *A. K. v Krajowa Rada Sądownictwa ("Judicial independence in Poland")*, EU:C:2019:982.

[43] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 40-45.

[44] This reasoning is difficult to reconcile with Opinion 1/17 of the CJEU (CETA), EU:C:2019:34, see Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 3.

law" in Article 26(6) ECT (which thus sets out the applicable rules and principles, to which we will return below).[45] Advocate General Szpunar seems to have been following this track when he stated that EU law constitutes both national and international law, and that since the ECT is to be interpreted by reference to international law, an arbitral tribunal should interpret and apply Union law.[46] Thus, even if, according to the CJEU, it would be possible for Member States to maintain arbitration mechanisms with third countries, it is not allowed *between Member States*.[47] It is clear that the CJEU, like the Advocate General, came to this conclusion without using the VCLT; instead, favoring an exclusive Union law interpretation.

## 6 Consequences of relying on EU vs international law

At the core of the French court's questions to the CJEU lay the definition of "investment" in the ECT. As we have just indicated, the CJEU had to choose between interpreting the concept of investment by reference to the ECT or adopting an interpretation of the Treaty pursuant to Union law. As we have also discussed above, the EU is a party to the ECT and the treaty is therefore part of EU law; the ECT is thus both an international treaty and EU law.[48] As is well known, treaties are normally interpreted using the VCLT and EU law according to the principles of Union law.[49]

The basis of the CJEU's competence to interpret the ECT provides a clue for the attentive audience – that the ECT constituted an act of Union law deserving of a uniform interpretation was, as is well known, the ground for both the jurisdictional claim and the CJEU's interpretative prerogative. Let us now consider the substantive outcome of the uniform interpretation of the concept of investment advocated by the CJEU and the Advocate General.

Both construed the ECT's investment concept so as to mean that the monetary claim did not in the present case constitute an investment, thus making it impossible for the complainant to rely on the ECT to obtain compensation from Moldova.[50] The Advocate General as well as the CJEU approached the concept of investment from the wording of the ECT, which could be taken to imply that the analysis was carried on the basis, or at least in the spirit, of Article 31 VCLT.[51] The Advocate General advocated an interpretation of Articles 1(6)(c) and (f) ECT in accordance with Article 31(1) VCLT, i.e. "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[52] The CJEU did not mention the VCLT in its ruling.

When the Advocates General and the CJEU have interpreted international treaties in other contexts, explicit references to the VCLT as applicable law have been made. The absence of such analysis and

[45] The provision states: "A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

[46] Opinion of Advocate General Szpunar in case C-741/19, *Moldova v Komstroy*, EU:C:2021:164, 75.

[47] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 65.

[48] Cf. Opinion 1/15 and Casteleiro, E.D. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 2.

[49] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 29.

[50] See Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 4 regarding the investment law implications of this assessment.

[51] Opinion of Advocate General Szpunar in case C-741/19, *Moldova v Komstroy*, EU:C:2021:164, 66-85.

[52] Ibid., 109.

precise reference suggests that only Union law was used to interpret the meaning of the ECT.[53] One reason why no proper VCLT analysis was made may have been that the CJEU saw it as its task to interpret the intra-EU aspects of the ECT, which is not the same as interpreting the treaty itself.

How was this possible when the EU, including its institutions and Member States as parties under Article 216 TFEU,[54] is bound by the its external treaty obligations (*pacta sunt servanda*) and given that, as mentioned above, Article 26(6) ECT explicitly states that applicable law is the ECT itself together with rules and principles of international law?[55] Article 16 ECT moreover contains a conflict rule, *lex specialis*, which provides that if two or more Contracting Parties have concluded an earlier or later agreement that conflicts with Section III of the ECT on investment protection, the ECT takes precedence. Despite the fact that the EU Treaties were adopted more than a decade after the ECT, the principle of *lex posterior* thus cannot be invoked in support of favoring EU internal law.[56]

To be sure, Article 3(5) TEU states that the Union shall contribute to the strict observance of international law.[57] It is difficult to reconcile the right to interpret the agreement with international law; especially when more than half of the contracting parties to the ECT are third countries.[58]

We further recall Article 27 VCLT: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Interpretation of the ECT must then be done exclusively on the basis of international law (in a broader sense than Union law), whereas arbitral tribunals under the ECT cannot seek interpretative guidance in Union law.[59] Moving forwards, the CJEU's interpretation thus lacks relevance for any arbitral tribunals that will have to interpret the ECT in the future. [60]

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[53] Compare e.g. case C-104/16, *Council of the European Union v Polisario*, EU:C:2016:973,4-10 and case C-15/17, *Bosphorus Queen Shipping Ltd Corp. v Rajavartiolaitos*, EU:C:2018:557, 21-23.

[54] 216(2) TFEU: "Agreements concluded by the Union shall be binding on the institutions of the Union and on Member States."

[55] As Paschalidis points out in *Komstroy:* constitutional, procedural and substantive implications, EU Law Live, 24 September 2021, the CJEU's interpretation is also inconsistent with CJEU case C-386/08 *Firma Brita,* EUC:2010:91 and case C-464/14 *SECIL,* EU:C:2016:896, 94.

[56] "Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) (2) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment." In addition, it can and has been argued that the key provisions of Union law, which the ECT would breach, also existed prior to the Lisbon Treaty and that the ECT would thus be considered the later of the two treaties.

[57] See also Article 216 TFEU, and further comments in Casteleiro, E.D. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 2-3, Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 3.

[58] The fact that under Article 21 ECT, its Contracting Parties have some possibility to influence the jurisdiction of an arbitral tribunal with respect to whether a state measure constitutes taxation, lacks import for the present purposes.

[59] See Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 3.

[60] So far, all arbitral tribunals have chosen to ignore the outcome of case C-284/16 *Achmea v Slovakia,* EU:C:2018:158; see Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy

The respective underlying agreements at the basis of *Achmea* and *Komstroy* differ insofar that the former case concerned a bilateral agreement between EU Member States whereas the ECT is a multilateral agreement to which a number of third countries are also parties. The CJEU dealt with this by finding that Article 26 ECT "is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way to the provision of the bilateral investment treaty at issue in [...] *Achmea*..."[61] Hence, one may presume, the transformation of a mixed treaty with third countries (and the obligations it entails) into an intra-EU internal matter, seems to be key to understanding why the CJEU did not find itself to be bound by the VCLT.[62] This permitted the interpretation of the ECT to be made more liberally so as to facilitate adjustments in the bilateral relations of EU Member States under the ECT.

Regardless of whether EU law allows the CJEU to interpret an international treaty that forms part of EU law, it is questionable whether it is appropriate.[63] By interpreting the ECT through Union law, the CJEU appears to have sought to promote consistency in the interpretation of EU law, in line with its fundamental mission.[64] However, this has come at the cost of creating two parallel systems: one external to the EU where the ECT is interpreted using the VCLT, and another internal to the EU where the ECT is interpreted using Union law.

The *Komstroy* ruling also reveals that the localization of an arbitral tribunal's seat within the EU can activate EU law in the context of a challenge to an ECT award, with potentially direct bearing on the outcome of the challenge procedure, both in intra-EU and extra-EU disputes.[65] As a result, disputes may initially be settled by arbitral tribunals by interpreting the ECT using the VCLT, while the same dispute may upon appeal be settled by interpreting the ECT using Union law; even if neither party was from the EU and would not have had any reason to believe that the outcome of the arbitration via a challenge procedure could be settled by an interpretation of the ECT under Union law.[66] An even more

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case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 3; Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 2, 4. Casteleiro, E.D. argues, in The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 3, that *Komstroy* will not have an immediate noticeable impact either. This was confirmed by the ruling in *Mathias Kruck and Others v Spain*, ICSID case No ARB/15/23, Decision on Jurisdiction, 6 December 2021, where the arbitral tribunal stated that the CJEU's decision in *Komstroy* entailed a clash between fundamental norms of EU law and international law, whereas it did not affect the jurisdiction of the arbitral tribunal, 46. In *Landesbank Baden-Wurtenberg and others v Spain*, case No ARB/15/45, Decision on Jurisdiction of 11 November 2021, the arbitral tribunal found no reason to modify its previous decision on jurisdiction in relation to *Komstroy*, albeit on the basis that no new facts had been presented and that a modification of the decision was precluded by *res judicata*.

[61] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 64.

[62] See Casteleiro, E.D. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 3.

[63] See Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 2. This may ultimately also have an impact on the arbitration itself, provided that the arbitral tribunal anticipates the consequences of a future challenge.

[64] E.g. Article 19 TEU.

[65] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 31-35.

[66] An alternative scenario might, in the national *Komstroy* proceedings, be that the French court ultimately concludes that since none of the parties is from the EU, the interpretation of the CJEU is not relevant and that the ECT should therefore be interpreted under the VCLT. However, this outcome must be considered highly unlikely.

peculiar situation occurs when the EU is a respondent, as in *Nord Stream 2*.[67] If such an arbitral tribunal were based in the EU, the dispute would then be settled under EU law, and the CJEU could upon challenge ultimately change the outcome by interpreting the agreement in the EU's favor. The CJEU found no reason to comment on this potentiality in *Komstroy*, making it difficult to predict what other consequences the decision may have and with what credibility the EU can conclude treaties with third countries. Is the EU a reliable partner or should third countries expect that the EU might change the rules of the game afterwards by ignoring the VCLT and referring to EU law instead? If the EU were to ratify the European Convention on Human Rights (ECHR) in the future, would the CJEU be able to make its own interpretations of the ECHR in disputes between parties from different EU Member States?

Treating multilateral treaties as bilateral obligations is an interpretive approach that the Commission now wishes to bring to the ICSID Convention. In a letter to the Netherlands, that is actually addressed to a German court, the Commission has stated that the Convention cannot be applied between EU Member States, as this would violate the principles of loyal cooperation, mutual trust, and the primacy of EU law.[68] This is a dangerous road to pursue; few prospective EU investors will be interested in bringing arbitration proceedings against an EU Member State to the EU. Certainly, many third country investors will also opt out of the EU as a seat for ECT disputes as they otherwise risk an unexpected interpretation of the ECT by the CJEU.

Our primary agenda has so far not been to examine whether the CJEU's interpretation would have been different if it had been made with the VCLT; yet we doubt that in that case the CJEU would have unilaterally decided that a multilateral treaty between the EU, its Member States and third countries may not be applied between certain contracting states, when this is not clear from the text of the treaty (especially given the aforementioned conflict rule in Article 16 ECT).[69] It is also unclear whether the CJEU would have adopted the same interpretation of "investment".

## 7 Judicial adversarialism or dialogue?

As thus far argued in this paper, the case-specific and EU external elements of the reference could have been respectively analyzed without first considering the compatibility of the arbitration with EU law in an intra-EU scenario. Yet, the latter counterfactual analysis instead came to the forefront of the decision. Paschalidis has highlighted the implication of this in three categories: procedural,

[67] *Nord Stream 2 AG v European Union*, PCA case No 2020-07.

[68] https://www.iareporter.com/articles/revealed-european-commission-addresses-compatibility-of-icsid-convention-with-eu-law-for-the-purpose-of-intra-eu-arbitrations/ accessed 3 February 2022.

[69] In addition, earlier negotiated versions of the ECT (e.g. from 3 March 1992) contained a so-called disconnection clause, which meant that the ECT could only be applied between EU Member States to the extent that the matter in dispute was not covered by Union law. However, this provision was deleted and in a later negotiated version of 18 January 1994 it was placed in an annex. However, Article 46 of the ECT provides that no reservations may be made, and the annex was removed from the final version. Instead, the EU made a unilateral declaration regarding allocation between the EU and the EU Member States which was then replaced by Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26 (3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities (europa.eu). From this we can infer that during its negotiation, the Commission considered the ECT to be applicable between EU Member States, but we can also infer that the Commission understood that it would be problematic if a dispute required an arbitration panel to interpret or apply Union law. The Commission subsequently abandoned this position and has held for some 15 years that the ECT is not applicable at all between EU Member States.

substantive, and constitutional. Under the latter heading, Paschalidis pinpointed the problem at hand: "*Komstroy* seems however to mark the beginning of judicial monologues, whereby the Court of Justice takes the opportunity offered by a preliminary reference to ask itself a question of its own."[70] This reference to the preliminary ruling as a forum for dialogue contains an additional layer of irony: namely that the CJEU once stated in *Achmea* that it was not possible for international arbitration tribunals to refer questions to the CJEU (i.e. the underlying explanation for the ban on intra-EU ISDS).[71] Given that the CJEU essentially excluded arbitral tribunals from the pre-litigation process, we queried at the time whether the CJEU was serious about its call for judicial dialogue.[72]

Why, then, did the CJEU in *Komstroy*, in the absence of relevance to the questions referred and need to rule in the French complaint, choose to consider the matter of intra-EU applicability of the ECT? As is well known, the CJEU's competence to rule on this issue was formally rationalized by the need to ensure a uniform interpretation.[73] It might also have played in that key EU Member States introduced the issue. The fact that a large number of arbitrations and disputes, both settled and pending, are ultimately affected by the ruling may likewise have played a role, as well as the circumstance that in the intra-EU context, the amounts in dispute are very substantial.

Since *Achmea*, uncertainty has prevailed as to how narrowly that ban should be construed in relation to the ECT: does it require, for an arbitration clause to be deemed incompatible with the EU, that the parties originate from the EU? Or that EU law is specified in the relevant agreement as applicable law? Since 2018, there appeared for a while to remain a possibility to evade the applicability of *Achmea* by arguing that the relevant agreement or factual circumstances differed too much to allow an analogy, as in e.g. *PL Holdings*.[74] *Komstroy* can thus be interpreted, in response to such attempts, as an emphatic plea: "stop asking about arbitration clauses in x-y-z circumstances… Let us make it clear once and for all that *no* arbitration agreement which in any way affects or is capable of affecting relations between actors within the EU may be applied." By making this clear in a context that has seemed particularly far-fetched,[75] the message becomes almost theatrically clear; perhaps to its pedagogical merit.

Important as these clarifications may be, there are nevertheless compelling reasons against dealing with them *obiter dictum.* Firstly, two cases were already pending before the CJEU at the time of the *Komstroy* ruling. In *Athena Investments v Italy*, the Svea Court of Appeal of Sweden had requested a preliminary ruling on intra-EU arbitration under the ECT,[76] and in *Opinion 1/20*, Belgium had asked

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[70] Paschalidis, P. *Komstroy:* constitutional, procedural and substantive implications, EU Law Live, 24 September 2021

[71] On the choice made by the in Opinion 1/17 of the CJEU (CETA), EU:C:2019:341 and case C-284/16, *Achmea v Slovakia,* EU:C:2018:158 between commercial and international arbitration, see further Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021.

[72] Östlund, A. & Hallberg, J. Kan nya EU-domar läggas till grund för förnyad prövning av slutgiltiga internationella skiljedomar? Juridisk Tidskrift, No 3 2018/19; Hallberg J. & Östlund, A. Början på slutet för skiljeförfaranden i internationella investeringsskyddsavtal? Juridisk Tidskrift, No 4 2017/18.

[73] Case C-741/19, *Moldova v Komstroy,* EU:C:2021:655, 40.

[74] Cf. e.g. Opinion of Advocate General Kokott in C-109/20, *PL Holdings*, EU:C:2021:321 and Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 2

[75] See also e.g. Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 2.

[76] Case C-155/21, *Athena Investments and Others*, EU:C:2021:1032. However, this request was withdrawn by the Svea Court of Appeal in an interim order on 24 November 2021 with reference to case C-741/19, *Moldova v Komstroy,* EU:C:2021:655 and case C-109/20, *PL Holdings v Poland*, EU:C:2021:875. The decision was

whether the dispute resolution mechanism in the draft modernized ECT was compatible with the EU Treaties, in particular in view of the absence of a severability clause in the ECT.[77] The CJEU thus had all opportunity to review the compatibility issue non-hypothetically.[78]

Secondly, reasoning that does not inform operative parts of judgments is generally not considered to carry the legal force of a finding.[79] Although the CJEU considers its own judgments to be binding on the referring jurisdiction as well as on the other Member States, domestic implications of the CJEU's take on bindingness and retroactivity are tricky already as regards operative findings.[80] Thus, if the CJEU wished to pronounce itself authoritatively on a consequential controversy, *obiter dictum* is perhaps not the appropriate channel for effectuating real-world change, as national judges will more or less intuitively dismiss its significance on general or national procedural law grounds.[81]

Unless handled with care, *obiter dicta* pose potential risks to legal certainty; especially insofar as they concern elements introduced at a late stage. Established case law prevents the CJEU from giving "advisory opinions on general or hypothetical questions"[82] – any redrafting of questions must respond, where appropriate, to the national judiciary's need to resolve the referred dispute.[83] The CJEU should therefore avoid posing or addressing hypothetical questions to the extent that they do not respond to any objective needs of relevance to the referring court: It is the national judge who decides the subject-matter of the proceedings, which may not be extended by parties, interested parties, or for that matter *en passant* by the CJEU. [84]

In the present context, the timing of the CJEU meant that interveners who had argued in writing in favor of introducing the subsidiary question were given the opportunity to develop their arguments in detail, while those who had remained within the reference's ambit were deprived of the opportunity to exchange written submissions on the extended subject-matter. This is difficult to reconcile with Article 6 of the ECHR, since the other Member States are placed in a less advantaged procedural position than those who have submitted written observations on relevant aspects *(equality of arms)*. The European

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preceded by a letter from the CJEU asking, in reference to these two preliminary rulings, whether the Svea Court of Appeal upheld its request for a preliminary ruling. The letter may be understood as a semi-subtle request to the Svea Court of Appeal to withdraw the request.

[77] Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/20).

[78] de Boeck, M. Republic of Moldova v Komstroy (C-741/19): what next for the Energy Charter Treaty? EU Law Live, 15 September 2021; Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 4.

[79] In the case of Sweden, for example, this means that they cannot be used as a basis for other judgments, nor do they prevent amendment, renewal, or parallel review. Given that the aspect is outside the scope of the judgment, it is also not subject to appeal. In the EU legal context, these effects are less clear.

[80] Östlund, A. & Hallberg, J. Kan nya EU-domar läggas till grund för förnyad prövning av slutgiltiga internationella skiljedomar? Juridisk Tidskrift, No 3 2018/19, 693f., cf treatment of the second question of interpretation in case C-109/20, *PL Holdings v Poland*, EU:C:2021:875.

[81] Cf. Monti, A. & Fermeglia, M. Completing the unfinished Achmea business in the Komstroy case: farewell to intra-EU ECT-based investment arbitration? EU Law Live, 17 September 2021, 2.

[82] E.g. case C-621/18, *Wightman*, EU:C:2018:999, 28; case C-585/18, *A.K. ("Judicial independence in Poland")*, EU:C:2019:982, 70; case C-924/19 PPU, *Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:365, 167.

[83] Case C-61/98, *De Haan Beheer*, EU:C:1999:393, 47; case C-722/17, *Reitbauer and others*, EU:C:2019:577, 56.

[84] Case C-493/17 *Weiss*, EU:C:2018:1000, 165 and 166; case C-21/13, *Simon, Evers & Co*., EU:C:2014:2154, 28.

Court of Human Rights (ECtHR) has for the latter reason made it a requirement for courts carrying out *ex officio* review to give all interested parties the opportunity to comment on an equal footing on everything that has submitted or included in the casefile.[85]

To which parties does the ECHR does then lend its protection? In a national judicial process such as the French appeals procedure, as well as in international arbitration, adversarialism and equal treatment of the *parties* is fundamental and crucial to the legitimacy of the process. The CJEU, like the ECtHR, has insisted on procedural equal treatment and an adversarial process (*"inter partes"*).[86] However, the preliminary reference procedure is not constructed on the basis of adversarialism. The preliminary ruling is not designed for the CJEU to settle a dispute between parties, but to help national courts settle a domestic case involving Union law. The procedure is thus primarily intended to enable dialogue between national courts and the CJEU.[87] This interchange nevertheless (as pointed out earlier) provides an opportunity for actors other than parties to express their views. Why? As discussed in section 3 above, a preliminary ruling is binding not only on the referring jurisdiction for the purposes of its determination of the national dispute, but on all EU Member States;[88] one rationale for affording them certain procedural protection within the process's realm.[89] However, the EU procedural rules can be understood to represent a compromise with purely adversarial rules: although a formal division is made between parties and interveners, no real opportunity is given for formalized correspondence.[90]

The disadvantages associated with limiting the written exchange are in principle alleviated or compensated by a rigorous procedural framework; representing a possible rationale for avoiding ruling on matters beyond those referred by national courts.[91] The right of Member States to submit written pleadings[92] would be rendered meaningless if the CJEU were to generally permit itself to introduce other questions without relevance to the case at hand. In principle, Member States should also not be required to anticipate all eventualities (including the CJEU's possible deviation from its own doctrine on hypothetical issues), given that litigation on tangential but extraneous points of law would burden both the CJEU itself and interested parties by slowing down the process.

# 8 The ambit of the proceedings and the separation of powers

On a final note, we wish to draw attention to aspects relating to the political developments in Eastern Europe and the associated EU crisis. The CJEU has recently taken a stand against the politicization of Poland's judicial system, while in the present context maintaining mutual trust as central motive for

[85] ECtHR ruling in *Bulut v Austria*, 17358/90, 50, *Clinique des Acacias et al. v France*, 65399/01, 65406/01, 65405/01 and 65407/01, 39, *Prikyan and Angelova v Bulgaria*, 44624/98, 42, *Avotiņš v Latvia*, 17502/07, 98.

[86] Primarily infringement proceedings and cases appealed cases from the General Court; however, see also case C-506/04 *Wilson*, EU:C:2006:587, 48.

[87] E.g. case C-284/16, *Achmea v Slovakia*, EU:C:2018:158, 17, see also Opinion of Advocate General Wathelet in case C-284/16, *Achmea v Slovakia,* EU:C:2016:699, 133 and Opinion 2/13 of the CJEU on accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, 176 with case-law cited therein.

[88] And to some extent the EFTA Member States.

[89] Article 96-97 Rules of Procedure of the Court of Justice, 29.9.2012.

[90] Article 57, 96-97 Rules of Procedure of the Court of Justice, 29.9.2012.

[91] Case C-621/18, *Wightman*, EU:C:2018:999, 28; 19.11.19, case C-585/18, *A. K. v Krajowa Rada Sądownictwa ("Judicial independence in Poland")*, EU:C:2019:982, 167.

[92] Article 23 Protocol (No 3) on the Statute of the CJEU of the European Union, 7.6.2016.

rejecting intra-EU arbitration.[93] Whether a given jurisdiction follows a traditional *separation of powers* principle, a principle of popular sovereignty such as Sweden, or a balance of power hybrid such as the EU (*"institutional balance")*,[94] the *rule of law* remains a common standard and safeguard. [95]

A prerequisite for the rule of law is that the judiciary does not go on executive or legislative excursions. For instance, a restrictive use of *obiter dicta* can be seen to signal a wish to avoid making findings that are difficult to challenge, as described above. Although preliminary rulings can of course not be appealed, the problem of accountability can be transferred to the stayed national dispute, to be ultimately settled outside the CJEU's control. In order to achieve some measure of clarity in this implementation complex – but also for reasons of procedural equity already touched upon in this paper – one would expect the CJEU to avoid excursions as far as possible:

> One can go so far as stating that separation of powers, as well as the rule of law, rests on the basic assumption that judges interpret and apply legal norms in other – politically and democratically legitimised – fora and that the role of judges is constrained by and benefits from a particular formality that connects their decisions to the legitimacy of the entire legal order.[96]

As particularly regards *political* excursions, the references by the CJEU to its exclusive interpretative prerogative[97] and the autonomy of EU law sit uncomfortably with this.[98] The CJEU clearly does not wish to share its power with the bodies and organs scattered across the EU's institutional structure, which broadly include the EU's agencies, as well as the EU Member States' central and local courts and tribunals.[99] Jürgen Habermas has reasoned that: "Because it thus has administrative power at its

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[93] In *Achmea*, the CJEU rejected intra-EU arbitrations on the basis that they were contrary to the principle of mutual trust. However, this principle seems to be more of wishful thinking than a reality, as shown by the Polish constitutional court that rejected the EU courts interpretative prerogative; https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej accessed 4 November 2021; https://www.europaportalen.se/2021/10/polsk-domstol-vi-kan-strunta-i-eu-ratten, accessed 4 November 2021. See also Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 3, pointing out that international arbitration clauses are fundamentally motivated by a lack of trust in national legal systems.

[94] See Möllers, C. The three branches: A Comparative Model of Separation of Powers, OUP 2013, for an intra-European comparative approach to separation of powers. See Eckes, C., Sandberg, P. and Ghavanini, A. Conceptual framework for the project Separation of Powers for 21st Century Europe, ACELG research paper, No 2021-01, on separation of powers in the EU.

[95] Opinion of Advocate General Bobek in case C-132/20, *Getin Noble,* EU:C:2021:557.

[96] Eckes, C., Sandberg, P. and Ghavanini, A. Conceptual framework for the project Separation of Powers for 21st Century Europe, ACELG research paper, No 2021-01, p. 5.

[97] Casteleiro calls this the CJEU's own "external Foto-Frost principle", given that the CJEU gives itself an EU external interpretative prerogative which, like the EU internal one at issue in case C-314/85 *Foto-Frost*, EU:C:1987:452, is unlikely to be accepted by the relevant authorities with similar claims, see Casteleiro, E.D. The Komstroy judgment, the Union interest, and the autonomy of the EU Legal Order, EU Law Live, 21 September 2021, 1.

[98] We concur with the assessment of Stoppioni, E. The Komstroy case: common market philosophy, the ECT and intra-EU ISDS, EU Law Live, 9 September 2021, 3-4 that the decision in *Komstroy* is a hybrid between politics, ideology, and law enforcement.

[99] Eckes, C., Sandberg, P. and Ghavanini, A. Conceptual framework for the project Separation of Powers for 21st Century Europe, ACELG research paper, No 2021-01, 7ff., 17f.

disposal, the judiciary must be separated from the legislature and prevented from programming itself."[100]

If courts do not respect the ambit of the proceedings but takes on issues at its discretion, the judiciary becomes a policymaker and not an interpreter or implementer. In addition to disregarding the real issues and queries of the referring court and preventing Member States from participating in the process on an equal footing, the CJEU's reporting also raises concerns. When the CJEU delivered the most controversial ruling of the year, it failed to publish a press release as is customary for decisions of any import.[101] It is left to our imagination why the Court or its press service did not wish to draw additional attention to the ruling.

We would in reaction to this wish to conclude by dusting off the idiom that power tends to corrupt and complete power corrupts completely.[102] We have, through this paper, sought *inter alia* to report to wider circles what was put forward in written and oral submissions before the CJEU. These arguments deserve public attention as counterbalance to the more limited narrative conveyed through the *Komstroy* ruling.

[100] Habermas, J. Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy (MIT Press, 1996), 172.

[101] When case C-741/19, *Moldova v Komstroy,* EU:C:2021:655 was announced on 2 September 2021, a total of 154 decisions and opinions had already been announced through press releases that same year, including 10 with the same decision date as *Komstroy*.

[102] The quote is usually attributed Lord Acton, who (paraphrasing several contemporaries) in a letter to Bishop Mandell Creighton in 1887 wrote that "power tends to corrupt and absolute power corrupts absolutely".

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