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A GROUNDBREAKING WIN OR A CASTLE IN THE AIR? THE RELEVANCE OF THE GREEN POWER V. SPAIN AWARD IN THE EU-ISDS FEUD

Abstract: *The EU and ISDS have been embroiled in an exhausting feud over intra-EU investment disputes which may still not reach its climax despite several dramatic and radical moves by the European Union and its Member States against the nearly unfettered resistance of the ISDS. Green Power v. Spain is the first international investment case in which the tribunal denied jurisdiction due to an incompatibility of the arbitration clause in the Energy Charter Treaty with EU law in light of the Achmea case, but also the first case where the rule of lex superior was employed to tip the scale in favour of EU law. The overview of the award will be presented against different backgrounds: massive investment case law uniformly denying intra-EU preliminary objections on one hand, and concerted actions of the EU and its Member States to construct a dam against intra-EU investment cases, on the other. The aim of this case note is to review the possible relevance of the Green Power v. Spain arbitral award and the argument that EU law is lex superior as a matter of international law, in pending and future intra-EU investment disputes, and to assess to what extent different factors, such as the seat and rules of arbitration and general rules of international law, molded the reasoning of the tribunal. The arbitral award is a meticulous decision with instructive arguments on how to situate supremacy of EU law within the law of treaties while navigating the rough waters of enduring conflicts amid different international agreements and between various levels of governance. Given that the tribunal offered a variety of reasons to uphold the applicability of EU law to determine jurisdiction, there is the distinct possibility that the award might have an impact on other investment tribunals.*

Keywords: *intra-EU investment disputes, Achmea, Green Power v. Spain, conflict of international obligations.*

I INTRODUCTION

One of the most relevant game changers for both international investment law and EU law was the decision by the Court of Justice of the European Union (CJEU) in the *Achmea* case in which the CJEU ruled that arbitration clauses in intra-EU BITs, and consequently the arbitral awards handed down on the basis of these instruments, are incompatible with EU law.* The result of this finding was the annulment of the arbitral award¹ rendered in the *Achmea v. Slovakia*,² an UNCITRAL investment arbitration case decided on the basis of a Dutch-Slovak bilateral investment agreement. The CJEU sent a clear, distinctly unambiguous signal, that the time of intra-EU investment disputes is over. Regardless of the fact that similar signals honing in on the incompatibilities of specific instruments had already been seen coming from the EU, the *Achmea* made this agenda clear. However, there was still a lot of work to be done: a number of investment arbitrations were pending or on the way, especially following the EU stance that national subsidies in the energy sector were contrary to EU law and needed to be revoked. In addition, while the *Achmea* dealt specifically with intra-EU BITs there seemed still to be an open door for intra-EU investment disputes on the basis of multilateral and not exclusively EU agreements such as the Energy Charter Treaty (ECT). The status of a number of other intra-EU BITs and their sunset clauses still may have remained unclear.

Some of these issues were subsequently resolved by the CJEU decision in the 2021 *Komstroy* case in relation to the ECT,³ and in the 2021 *PL Holdings* in

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Case C-284/16, *Slovakische Republic (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 6 March 2018.

¹ Federal Court of Germany, decision on annulment of 31 October 2018 (BGH, 31.10.2018 – I ZB 2/15), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=89393&pos=0&anz=1> (30.11.2022).

² *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Final Award, 7 December 2012.

³ Case C-741/19, *Republic of Moldova v Komstroy*, Judgment of the CJEU (Grand Chamber), 2 September 2021 (hereinafter: *Komstroy*).

relation to *ad hoc* agreements,⁴ and by the adoption of the 2020 *Agreement for the termination of bilateral investment treaties between the Member States of the European Union*,⁵ but few remained unresolved. Moreover, it seemed that investment tribunals were adamant in rejecting the *Achmea* rationale: EU law was the law applicable to the dispute which in turn removed the validity of arbitration clauses in investment treaties. It is indeed remarkable how investment arbitral tribunals rejected all arguments based on EU law and *Achmea*, using a variety of argumentative techniques and explanations.⁶

That is until quite recently.

In June 2022, in the *Green Energy v. Spain* case,⁷ for the first time an international investment tribunal denied jurisdiction to hear claims on the grounds that EU law, as the law applicable to the determination of the validity of an offer to arbitrate by an EU Member State, denied jurisdiction to adjudicate the dispute. It was found that under EU law the offer to arbitrate was invalid. The tribunal showed great deference to the CJEU judgments in *Achmea*, *Komstroy* and *PL Holdings* cases and followed their findings that EU law is the law applicable to the dispute. Therefore, after a considerably long period of time and dashed hopes of the EU, its argument has finally prevailed in the investor-state dispute settlement (ISDS) arena. However, one needs to be cautious in interpreting the award as a win for EU and EU law for a variety of reasons. This is arbitration conducted under the rules of the Stockholm Chamber of Commerce (SCC) with the seat of arbitration in Stockholm, Sweden, with a predominantly European panel. All other cases where similar arguments of incompatibility were raised, were dealt with either outside of the EU or within the ICSID with European arbitrators belonging to the minority.

The purpose of this paper is to evaluate the relevance of the recent *Green Power v. Spain* arbitral decision and to assess to what extent factors such as the seat and rules of arbitration swayed the reasoning of the tribunal. Given that the tribunal offered a variety of reasons to uphold the applicability of EU law to determine jurisdiction, there is the real possibility that the award might have an impact on other investment tribunals.

⁴ In relation to *ad hoc* agreements between EU member states and EU-based investors. Case C-109/20, *Republiken Polen (Republic of Poland) v PL Holdings*, Judgment of the CJEU (Grand Chamber), 26 October 2021.

⁵ *Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union*, SN/4656/2019/INIT, OJ L 169, 29.5.2020, p. 1–41.

⁶ See, Sanja Djajić, “Post-Achmea Apocalypse for EU Law in International Investment Arbitration”, in: *Challenges in International Business Law and European Union Law – Liber Amicorum in Honour of Radovan D. Vukadinović* (eds. Allan Tatham et al.), Banja Luka – Kragujevac, 2020, pp. 133-158.

⁷ *Green Power Partners K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022 (hereinafter: *Green Power v. Spain*).

II GREEN POWER K/S AND SCE SOLAR DON BENITO APS V. KINGDOM OF SPAIN

This case is typical of over 50 investment cases involving Spain over its withdrawal of state subsidies in the solar energy sector.⁸ The claimants in this case made different investments in photovoltaic plants in the Spanish solar energy market between 2008 and 2011. The applicable regulatory framework at that time provided a favourable tariff regime based on state subsidies. However, between 2010 and 2014 Spain amended this regulatory framework. On 8 September 2016 the claimants launched a case under the Energy Charter Treaty (‘ECT’) and just like the whole line of other foreign investors in similar cases, claimed that these regulatory changes adversely affected their investment and were in breach of standards of protection under the ECT. The claimants sought EUR 74 million in compensation.

The request for arbitration was based on Article 26(4)(c) of the ECT which provides for arbitration before the Stockholm Chamber of Commerce (SCC), and the seat of arbitration was in Stockholm, Sweden. Under Article 26(4) of the ECT the claimants had other available options, such as ICSID or *ad hoc* arbitration under UNCITRAL rules but chose the SCC arbitration instead. As in many other cases against Spain involving issues of subsidies in the solar energy market, the European Commission here also filed a request to participate in the proceedings as *amicus curie* (on 9 November 2018) and that request was granted by the tribunal. This request could have seemed different comparing earlier requests because the groundbreaking *Achmea* decision of the CJEU was adopted earlier that year, on 6 March 2018. In addition, following the request of the European Commission, another investment tribunal in the *Stadwerke* case made certain findings which might have raised the spirits for EU respondent states. The *Stadwerke* tribunal, despite having rejected the relevance of EU law and the *Achmea* decision for jurisdictional purposes, found that EU law could be applicable as part of international law relevant for interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) but that was irrelevant in the absence of conflict between the ECT and Articles 244 and 267 of the TFEU. The outcome

⁸ “In the last 10 years, Spain has been subject to more investment arbitration lawsuits than any other country. It has received a total of 51 claims, of which 27 have already been resolved, 21 of them in favor of the investor. This means that in eight out of ten claims the investors won. According to the Spanish government, the total amount claimed by foreign investors amounts to almost €8 billion. So far, Spain has been ordered to pay more than €1.2 billion in compensation for the cases it has lost, which is equal to the country’s entire spending commitment to fight the climate crisis – or five times what it spent to alleviate energy poverty in 2021.” – Lucía Bárcena, Fabian Flues, *From solar dream to legal nightmare*, Transnational Institute and Power Shift, 31 May 2022, 4, https://www.tni.org/files/publication-downloads/english_from_solar_dream_to_legal_nightmare_online.pdf. This statistic predates the Green Power award.

was eventually favourable for Spain because the tribunal ruled that Spain did not breach the ECT as the measures and reforms of the renewable energy sectors were reasonable.⁹

In the *Green Power* case Spain's principal objection was an objection for lack of jurisdiction *ratione voluntatis* based on the argument that Article 26 of the ECT did not apply due to the primacy of EU law which rendered Spain's offer to arbitrate under this provision inapplicable and prevented dispute from being submitted to arbitration. This was not a novel argument and as such was raised in a number of other investment arbitrations based on both BITs and ECT. While the main foothold was and remained the 2018 CJEU *Achmea* case, here the same argument was reinforced and possibly strengthened by the 2021 CJEU *Komstroy* judgment as the latter dealt specifically with the arbitration offer in Article 26 of the ECT. The CJEU comfortably extended the *Achmea* rationale to the ECT although in a form of *obiter dictum*: "The Court has consistently held that an international agreement cannot affect the allocation of powers laid down by the Treaties and, hence, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties."¹⁰ The EU law as a whole began to generate force and amass arguments against the validity of arbitration offers as between EU Member States.¹¹

The fact that the seat of arbitration was in Sweden turned out to complement the principal objection of Spain given that the law of Sweden as *lex arbitri* was relevant for assessing the arbitrability of matters submitted to the tribunal and the validity of an arbitration agreement.

⁹ *Stadtwerke München GmbH, RWE Innogy GmbH, and Others v. the Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019.

¹⁰ *Komstroy*, para. 42.

¹¹ *Komstroy* case is particularly illustrative of this approach as it looks as a test case used specifically for addressing the compatibility of the ECT with EU law. In *Komstroy* there was a very weak link to EU and EU law. This was the ECT investment dispute between a Ukrainian investor and Moldova with investments based outside the EU. The only link to the EU was the seat of arbitration in Paris (France). Following the award in favour of the Ukrainian investor, Moldova sought to set aside the award before the French courts. After the annulment by the first instance court the court of appeals quashed the judgment and remanded the case. The first instance court referred the preliminary question to the CJEU which ultimately upheld its jurisdiction despite manifest impediments such as the link to the EU and immediate relevance for the EU law. In a bigger picture this could be seen as a perfect opportunity for the CJEU to reconfirm the *Achmea* rationale and its applicability on the ECT. For commentary on jurisdiction of the CJEU to hear *Komstroy* case, see: Jed Odermatt, "Is EU Law International? Case C-741/19 Republic of Moldova v Komstroy LLC and the Autonomy of the EU Legal Order", *European Papers – A Journal on Law and Integration*, 2021 6(3), 1255-1268.

The *Green Power* tribunal first set out to determine *ex officio* whether it has jurisdiction to hear the claims. It further found that its “*compétence de la compétence* includes the power to determine the law applicable to jurisdiction in the light of all the relevant circumstances of the case, particularly the existence of an agreement between the Parties on this issue.”¹² The tribunal found that there was no choice of law provision for jurisdiction in the ECT and SCC Rules. While Article 26(6) of the ECT is a choice of law clause (‘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’) it does not include the agreement on the law applicable to jurisdictional matters but only the agreement on the law applicable to merits of the dispute. The choice of international law, in the opinion of the Tribunal, refers only to ‘issues in dispute’ which, under Article 26(1), concern an alleged breach of an obligation (...) under Part IIP of the ECT.¹³ Likewise, the Swedish Arbitration Act (SAA) provisions provide only choice of law provisions for merits. Therefore, the tribunal found that there was no provision on choice of the law applicable to jurisdiction nor explicit or implicit agreement between the parties regarding the law applicable to jurisdiction. In order to ascertain the applicable law, the tribunal proceeded further taking Article 26 of the ECT as a starting point. For that purpose, the Tribunal found that the claimants’ choice of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and Sweden for the seat of arbitration is simultaneously the claimants’ choice of Swedish arbitration law as the applicable *lex arbitri*.¹⁴ The decision of claimants to choose SCC instead of other arbitration options available under Article 26 was found to be decisive. It was the free choice of claimants which implied “the application of this *lex arbitri* and the control exercised by the Swedish courts was one of the considerations for which the Claimants opted for a SCC arbitration in Stockholm.”¹⁵

Therefore, the choice of law for jurisdiction was found to exist in the election of Sweden as the seat of arbitration which implies the choice of *lex arbitri* and thereby the choice of EU law. This argument was found to have been reaffirmed by Article 48 of the Swedish Arbitration Act but also by the *Achmea* decision which placed particular importance on the fact that the choice of seat of arbitration in Germany implied the choice of law, and *Komstroy* for which the choice of seat in France had the same effect.¹⁶ In a final step, the tribunal found that the application of EU law was ‘inescapable’ regardless of whether EU law is characterized as part of international or as part of domestic law.¹⁷ While the first position is

¹² *Green Power v. Spain*, para. 153.

¹³ *Green Power v. Spain*, para. 157.

¹⁴ *Green Power v. Spain*, paras. 161-166.

¹⁵ *Green Power v. Spain*, para. 163.

¹⁶ *Green Power v. Spain*, paras. 165-166.

¹⁷ *Green Power v. Spain*, para. 170.

supported by several investment tribunals (*Electrabel v. Hungary*)¹⁸ the second is based on Sweden's law as *lex arbitri*.

The next and more demanding question for the tribunal was to find how the EU law will interact with the arbitration clause in Article 26 of the ECT. This was the task against a well-known background, as in none of the earlier investment cases both under BITs and ECT, the argument that EU law makes an arbitration clause in an international investment agreement inapplicable was successful. At the outset the *Green Power* tribunal tried to clear the space for its own interpretation: "the resolution of the Respondent's general jurisdictional objection *ratione voluntatis* must overcome the binary logic of an either 'insider' or 'outsider' perspective with respect to EU law."¹⁹ The attempt to abandon the binary opposition of "rigid categories such as EU law or public international law"²⁰ arguably justified the integrated and "finer-grained" analysis of "combined operation of certain specific norms, whether from international or domestic law."²¹ Such an integrated approach to the law applicable to jurisdiction in relation to objection *ratione voluntatis* naturally led to an analysis under both the ECT and EU law.

For the interpretation of Article 26 of the ECT the *Green Power* tribunal relied heavily on context, instead of a simple textual approach,²² making a significant departure from earlier intra-EU investment cases. The rationale for reaching out to contextual interpretations of certain relevant terms of the ECT the tribunal sets forth as follows: "Even if EU Member States are Contracting Parties (...), it is still necessary to consider whether a unilateral offer to arbitrate under Article 26(3)(a) ECT can be validly given by an EU Member State to the investors of another EU Member State despite the existence of another agreement between these EU Member States which prevents them from making such an offer."²³

Article 31 of the Vienna Convention on the Law of Treaties (VCLT) does provide detailed instructions for contextual interpretation. For the purposes of this case, and in order to interpret Article 26(3)(a) of the ECT, the tribunal relied on all elements comprising context: the entire text of the ECT, agreements in connection with the conclusion of the treaty accepted by the other party; subsequent

¹⁸ *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 4.173-4.191.

¹⁹ *Green Power v. Spain*, para. 332.

²⁰ *Green Power v. Spain*, para. 333.

²¹ *Green Power v. Spain*, para. 333.

²² "Failing to keep specifically in mind the circumstances of the case in its assessment of the ordinary meaning of the wording of Article 26 ECT would not only disregard the extensive and detailed arguments of the Parties but, more generally, it would turn the interpretation effort into an exercise in abstraction, whereas treaty interpretation should be precisely the opposite. The ordinary meaning of the terms must be clear not only on paper but as applied to the relevant facts of the case. This conclusion follows from the requirement of good faith." *Green Power v. Spain*, para. 344

²³ *Green Power v. Spain*, para. 348.

agreements and practice; and rules of international law applicable between the Contracting Parties. The tribunal first determined that the European Union is a “Regional Economic International Organisation” expressly recognized in Article 1 of the ECT in relation to which the limited carve-out clause in Article 25 may apply. While Article 25 reserves the possibility of a special regime under the most favoured nation clause, the tribunal placed emphasis on the fact that REIO exists in the ECT, thereby allowing for a special regime. When this conclusion is read against specific provisions of the EU law (exclusive jurisdiction of EU regarding State aid and Article 344 of the TFEU), the tribunal observed “that the relevance of certain provisions of EU law for matters governed by the ECT is expressly acknowledged and incorporated by the text of the ECT.”²⁴

Regarding the second element of the contextual interpretation, i.e. instruments made in connection with the conclusion of the ECT, on the basis of Article 31(2)(b) of the VCLT, the tribunal relied on both the Declaration of the EC (Final Act of the Energy Charter Conference) and the Statement of the EU submitted at the time of ratification,²⁵ which arguably lend support to an interpretation that the EU did not agree to intra-EU arbitrations due to several reasons, one of them being the shared competences between the EU and Member States. For the *Green Power* tribunal this was an instruction to interpret Article 25 of the ECT as a carve-out clause,²⁶ the interpretation which comes close to qualifying Article 25 as a disconnection clause,²⁷ quite contrary to decisions of other tribunals faced

²⁴ *Green Power v. Spain*, para. 355.

²⁵ Part of this Statement reads as follows: “Given that the Communities’ legal system provides for means of such action [claims brought by an investor], the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation.” *Green Power v. Spain*, para. 360.

²⁶ “Article 25 ECT does introduce a carve-out covering the development of the EU internal market.” – *Green Power v. Spain*, para. 409. This was *inter alia* indication that “that EU Member States and, specifically, Denmark and Spain, intended to organise their *inter se* relations in a special manner.” – *Ibidem*, para. 411.

²⁷ According to Verburg and Lavranos “During the negotiations of the ECT, in the early 1990s, the European Commission tried to include a ‘disconnection clause’ into the current Article 24 of the ECT, which would indeed have precluded the intra-EU applicability of the ECT to the extent that there were EU rules governing a particular subject (The proposal provided for the following: ‘In their mutual relations, Contracting Parties which are members of the EC shall apply Community rules and shall not therefore apply the rules arising from this Agreement except insofar as there is no Community rule governing the particular subject concerned’.) Given the fact that this proposal never made it beyond the negotiating table, the ECT Contracting Parties wanted the ECT to apply within the EU. Indeed, the EU and its Member States signed and ratified the ECT without a disconnection clause.” – Cees Verburg, Nikos Lavranos, “Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the Achmea Judgment for intra-EU ECT Arbitrations”, *European Investment Law and Arbitration Review*, Vol. 3, 1/2018, 197-224, at 218.

Claimants argued on this point but unsuccessfully. See, *Green Power v. Spain*, para. 260.

with identical arguments.²⁸ Article 25 is a clause intended for regional economic integrations which on its face relates to the most favoured nation treatment and according to commentators “Article 25 cannot be interpreted as a disconnection clause of general scope.”²⁹ This is where the *Green Power* tribunal made a significant departure from the earlier understandings of the scope of Article 25 of the ECT.

As for the third element of context consisting of subsequent agreements and subsequent practice, which may serve as the ground for interpretation under Article 31(3)(a)-(b) of the VCLT, the tribunal relied on a substantial material that resulted, *inter alia*, from EU policy regarding intra-EU investment disputes. By resorting to the “subsequent agreements and subsequent practice” the *Green Power* tribunal incorporated two declarations made by EU Member States in January 2019 regarding the effect of the CJEU *Achmea* judgment on intra-EU bilateral investment agreements and Energy Charter Treaty.³⁰ These two declarations denied effect to the dispute settlement clauses in investment agreements between EU member states thus making arbitration offers invalid. The declarations also addressed the question of terminating the pending arbitrations. The *Green Power* tribunal read these declarations on the legal consequences of the CJEU *Achmea* decision into the ECT as “the shared understanding of Spain and Denmark of their legal relationships, including under EU law and the ECT, and of the operation of the arbitration clause in pending arbitration proceedings under the ECT”.³¹ This amounted to a joint authentic interpretation according to which the rationale of the *Achmea* is equally applicable to the ECT, which was subsequently confirmed by the *Komstroy* decision of the CJEU in 2021. When a provision is incompatible with EU law, as is the case with Article 26(3)(a) of the ECT, such provision is “disapplied”, i.e. “this provision cannot serve as a basis for a unilateral offer of

²⁸ *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No. V2013/153, Award (12 July 2016) 639; *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final award, 21 January 2016, para. 437; *Eiser Infrastructure Ltd and Energia Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, paras. 202-207; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016.

²⁹ Gloria Alvarez, “Article 25 Economic Integration Agreements”, in: *Commentary on the Energy Charter Treaty* (ed. Rafael Leal-Arcas), Edward Elgar Publishing, 2018, 335, para. 25.13.

³⁰ *Declaration of the Representatives of the Governments of Member States of 15 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union*, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties-en.pdf; *Declaration of the Representatives of the Governments of the Member States, of 16 January 2019 on the enforcement of the judgment of the Court of Justice in Achmea and on investment protection on the European Union* (made by representatives of Finland, Luxembourg, Malta, Slovenia, Sweden), https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties-en.pdf.

³¹ *Green Power v. Spain*, para. 372.

arbitration that an investor could potentially accept.”³² Given that these events predated the commencement of the arbitral proceedings in the *Green Power* case, the tribunal’s solution to the intertemporal problem was found in EU law³³ and general international law³⁴ according to which these subsequent authentic interpretations relate to the rule at the time of its entry into force. Therefore, resort to “authentic interpretation” as opposed to “subsequent agreements” or “subsequent practice” provided for the solution to intertemporal problem.

The next step was the entertainment of legal context under Article 31(3)(c) of the VCLT referring to “[a]ny relevant rules of international law applicable in the relations between the parties”. The result was the inclusion of EU law as part of international law which is both applicable between the parties and relevant for the issue of validity and applicability of the arbitration clause in the ECT “as a vector of interpretation of a treaty, not of its modification.”³⁵ The same conclusion was reached regarding the “object and purpose” of the ECT – which arguably is not conclusive without further examination of EU law.³⁶ The tribunal was careful with the contextual approach in order to avoid resorting to a modification or an amendment of the treaty but to stress the interpretative methodology as the former was far too slippery a slope despite the fact that the outcome that would be finally reached comes very close to the act of modification. The purpose of this extensive analysis of and heavy reliance on the rules of interpretation envisaged in the VCLT was to create a legal basis for introducing EU law as both relevant and applicable for an interpretation of the ECT. While one prong of the argument relates exclusively to the fact that the seat of arbitration is in Sweden, an EU member state, the other goes further situating itself in general international law.

The practical consequence of opening a door to EU law as a matter of principle was the introduction of the *Achmea* decision as part of the relevant legal framework. According to the CJEU Articles 267 and 344 of The Treaty on the Functioning of the EU must be interpreted as precluding a provision in an international agreement concluded between EU member states, under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, bring proceedings against the latter member state before an arbitral tribunal whose jurisdiction that member state has undertaken to accept. The rule of this decision was confirmed in subsequent CJEU decisions, the declarations of EU member states mentioned above, and in the 2020 Plurilateral Termination Agreement but dismissed in all investment arbitrations.

³² *Green Power v. Spain*, para. 375.

³³ *Green Power v. Spain*, paras. 377-378.

³⁴ *Green Power v. Spain*, paras. 379-383.

³⁵ *Green Power v. Spain*, para. 394.

³⁶ *Green Power v. Spain*, para. 405.

The relevance of *Achmea* for the *Green Power* tribunal was threefold: it confirmed the applicability of EU law to the issue of validity of an arbitration clause; the existence of conflict between Articles 244 and 367 of the TFEU, on one hand, and arbitration clauses in investment agreements, on the other; and, finally, because the CJEU clarified the rationale behind the solution for the conflict which is found to be in the specific characteristics and autonomy of the EU legal order and the need to preserve consistency and uniformity of EU law. Although some or all of these rationales were invariably dismissed by investment tribunals, the *Green Power* tribunal dismissed these dismissals with various argumentative techniques. The fact that *Achmea* dealt with the bilateral investment agreement instead of a multilateral treaty like the ECT, which is the argument often relied upon by other investment tribunals,³⁷ was here found irrelevant due to the fact that the *Achmea* rationale was reaffirmed in the 2021 *Komstroy* decision which addressed specifically the validity of the unilateral offer under Article 26 of the ECT as between EU Member States.³⁸ In *Komstroy* the CJEU ruled that “Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”.³⁹ For the *Green Power* tribunal that was just another confirmation that *Achmea* was “relevant, indeed decisive”⁴⁰ as its position was immediately applicable to the ECT regardless of the fact that *Achmea* did not refer to the ECT and that five EU Members had reservations (including Sweden) regarding the effect of *Achmea* on the ECT. The result was found to be “that Spain’s offer to arbitrate under the ECT is not applicable in intra-EU relations and hence there is no offer of arbitration that the Claimants could accept.”⁴¹

However, in order to address a series of awards which dismissed the relevance of the *Achmea* for the ECT arbitrations, the *Green Power* tribunal opted for the argument that is detrimental to its position that “CJEU’s judgments are to be generally qualified as interpretations of the law”⁴² and arguably applicable to all investment disputes involving two EU member states, the argument being that certain awards are inapposite as they were rendered under the ICSID Convention before the tribunals not having their seat in an EU Member State.⁴³ This paradox-

³⁷ *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 679; *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, para. 163.

³⁸ *Green Power v. Spain*, paras. 430-431.

³⁹ *Komstroy*, para. 66.

⁴⁰ *Green Power v. Spain*, para. 436. Also, paras. 435, 437, 445.

⁴¹ *Green Power v. Spain*, para. 445.

⁴² *Green Power v. Spain*, para. 440. Also, paras. 376-379.

⁴³ *Green Power v. Spain*, paras. 439, 441.

ically mirrors the position of certain ICSID tribunals in refusing the relevance of *Achmea* for jurisdiction of investment tribunals under the ICSID Convention.⁴⁴

In order to resolve the normative conflict between the two sets of rules now found to be equally applicable, and EU law applicable as both national and international law, the *Green Power* tribunal resorted to a specific conflict rule that has never been applied by any other investment tribunal – *lex superior*.⁴⁵ According to *Green Power*, EU law here plays the role of a superior law which overrides other conflicting international legal rules. While the primacy of EU law is found to be a long standing principle among EU member states the issue remained to what extent this very principle can be sustained outside the EU realm. According to the tribunal, these rules on the primacy of EU law are binding as between all states involved in the dispute, all being EU member states. The tribunal finds a special agreement between the parties on the hierarchy of their international obligations: “The ECT is the starting point of the analysis, but the limitations it imposes on the Tribunal with respect to its scope of jurisdiction must not be misunderstood as limitations on the applicable law preventing it from applying rules that are deemed to be overriding by the very States whose relations are at stake in the present arbitration. In an extreme case, such a misunderstanding would require an international tribunal to apply the ECT instead of norms that are unquestionably recognised as *lex superior*.”⁴⁶ Agreement of the Parties on primacy of certain rules is thus equally binding on the tribunal – even if the ECT is arguably a *lex fori* under its Article 16⁴⁷ – is still not the “pivotal conflict norm” as it deals, presumably, with international agreements on the same footing. Conversely, the principle of primacy of EU law escapes the application of Article 16 of the ECT. Consequently, the *Green Power* tribunal upheld the preliminary objection *ratione voluntatis* and declined jurisdiction to hear the claims.⁴⁸

⁴⁴ *UP and C.D Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, paras. 254-259 (ICSID arbitrations are delocalized, the seat of arbitration is irrelevant, ICSID arbitral awards are not subject to review by national courts).

⁴⁵ *Green Power v. Spain*, para. 469.

⁴⁶ *Green Power v. Spain*, para. 470.

⁴⁷ 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) 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

(2) 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.

⁴⁸ *Green Power v. Spain*, para. 478.

III ANALYSIS

This was the first time any international investment arbitral tribunal declined jurisdiction on the ground that investment agreements could not provide a valid arbitration agreement between EU member state and an investor from another EU member state due to their inconsistency with EU law. In other words, it was the first time EU law was granted the status of a superior international law outside the European Union. It was also the first time that the rule of the *Achmea* decision was upheld in an investment arbitration after having failed in dozens of investment cases under both intra-EU BITs and ECT.⁴⁹ The question is how this was made possible this time around and what are the long-term and external effects of this decision on other intra-EU investment cases.

There are several aspects of the *Green Power* case that might be relevant in answering these questions. The first is the timing of the decision against two different backgrounds: the one which exists in abundant international investment case law uniformly denying the EU law effect on arbitration clauses in intra-EU investment agreements, while the other background is played out within the EU itself which steadily has been building up legal and institutional responses to investment arbitration denials. The second aspect of the *Green Power* case is the novelty of the argument engineered by the tribunal, based on the international legal relevance of the principle of the primacy of EU law. Therefore, the *Green Power* tribunal sought to break new ground, to create a space within a heavily burdened intra-EU investment context. An additional argument supporting the concept of *lex superior* is made in relation to Swedish law as *lex arbitri*, which is in line with the UNCITRAL rules, but irrelevant in relation to investment arbitrations falling out of the same category.

3.1. Timing and backgrounds

The European Union, most notably the European Commission, expressed its concern with the existence of international investment agreements between EU member states nearly 20 years ago. The main concern was that these agreements were incompatible with EU law for a variety of reasons, such as the incompatibility of dispute settlement clauses with the exclusive jurisdiction of the European Court

⁴⁹ During 2018-2020 period, following the *Achmea* decision, at least 25 investment tribunals found that the CJEU's findings in *Achmea* did not extend to the ECT dispute resolution clause. See, *LSG v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022, para. 544.

At the time *Achmea* decision was adopted by the CJEU there were 174 intra-EU ISDS cases and by 31 July 2018 83 cases were pending. See, UNCTAD, *Fact Sheet on Intra-European Union Investor-State Arbitration Cases*, IIA Issues Note, December 2018, issue 3. Available at: https://unctad.org/system/files/official-document/diaepcb2018d7_en.pdf (30.11.2022).

of Justice because such clauses potentially provide arbitral tribunals with jurisdiction to interpret and apply EC and EU Treaties which may adversely affect the autonomy, uniformity and supremacy of EU law; and because of the perceived contravention of intra-EU investment agreements with the principle of non-discrimination among EU investors within the single market under EU law. According to the European Commission “the substantive rules of BITs, as applied between Member States (“intra-EU BITs”), became a parallel treaty system overlapping with single market rules, thereby preventing the full application of EU law”⁵⁰ and “the investor-to-State arbitration clauses laid down in intra-EU BITs undermine the system of legal remedies provided for in the EU Treaties and thus jeopardise the autonomy, effectiveness, primacy and direct effect of Union law and the principle of mutual trust between the Member States.”⁵¹ The concern and the roots of the new anti-intra-EU investment agreements policy became visible even before the Lisbon Treaty⁵² when these concerns materialized in the *Eastern Sugar v. Czech Republic* case.⁵³

The Lisbon Treaty further changed the landscape by shifting legislative competence in relation to foreign direct investments to the EU’s exclusive competence in matters of foreign direct investments as part of the common commercial policy (Articles 207(1) and 3(1)(e) TFEU). The roots of the problem were in the pre-accession investment agreements of the new EU member states and the fact that new EU member states provided State aid and subsidies to foreign investors prior to their accession to EU. The concern of the EU allegedly expressed even before the accession, but not addressed thereafter, was that investment policy based on State aid and subsidies would be incompatible with EU law and that in any event pre-accession agreements between EU member states would be ruled by EU law following the accession. All detriments and risks of such EU policy, which placed new EU member states in a difficult position and in an unresolvable conflict between EU and international investment obligations,⁵⁴ was manifested quite quickly in

⁵⁰ *Communication from the Commission to the European Parliament and the Council – Protection of intra-EU investment*, COM(2018) 547 final, 19.7.2018., p. 2, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8>.

⁵¹ *Ibidem*, p. 3.

⁵² According to the European Commission the first time it expressed concern with the potential conflict of intra-EU investment treaties and EU law (in relation to the principle of non-discrimination) was in 1997. See: *Communication of the Commission on certain legal aspects concerning Intra-EU investment (97/C 220/06)*, OJ No C 220/ 15, 19.7.1997.

⁵³ Where the EC letter states that the concern of the incompatibility of the pre-accession BITs with EU were made clear to the Czech Republic back in 1998 and 2000. The concern remained until the date of the letter and at the time of the case (2006). See, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 119.

⁵⁴ See, Sanja Djajić, Maja Stanivuković, “Changed Perspectives and Conflicting Treaty Obligations: What Is the Message of the CJEU Achmea Decision and the 2020 Plurilateral Termination Agreement for Candidate Countries such as Serbia?”, *Central European Journal of Comparative Law*, vol. 2, no. 1, 2021, pp. 53-82, DOI: <https://doi.org/10.47078/2021.1.53-82>.

Micula v. Romania.⁵⁵ Romania was found to be in breach of its obligations under the Romania-Sweden BIT for withdrawing the subsidies, while the withdrawal was the measure it was bound to perform under EU law. The European Commission declared that any payment under the arbitral award would be State aid incompatible with the internal market and ordered its recovery,⁵⁶ the position that was challenged by claimants before the General Court of the EU in the proceedings which remains pending.⁵⁷

Similar arbitration cases followed⁵⁸ while the EU simultaneously worked on shoring up the dam against investment claims arising under EU IIAs. In most of these cases the arguments raised by respondent EU member states were based on the incompatibility of intra-EU investment agreements with EU law.⁵⁹ None of these arguments succeeded, even though the European Commission regularly intervened to support the position of EU respondent states. One of these cases was *Eureko (Achmea) v. Slovakia*⁶⁰ conducted under UNCITRAL arbitration rules with the seat of arbitration in Germany. Following Slovakia's challenge of the *Achmea* arbitral award before the German courts, the Federal Court of Germany made reference for preliminary ruling to the CJEU under Article 267 of the TFEU. As now ubiquitously known, the CJEU found that arbitration clauses in intra-EU BITs were contrary to Articles 267 and 344 of the TFEU. The consequence was the invalidity of the arbitration offer in BITs arbitration clauses, that these clauses should be "disapplied", which should finally lead to the lack of jurisdiction of investment arbitral tribunals.⁶¹ This award was finally set aside by the referring

⁵⁵ Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (I), ICSID Case No. ARB/05/20, Final Award, 11 December 2013; Ioan Micula et al. v. Romania (II), ICSID Case No. ARB/14/29, Award, 5 March 2020.

⁵⁶ Hanno Wehland, "The Enforcement of Intra-EU BIT Awards: *Micula v Romania* and Beyond", *The Journal of World Investment & Trade*, 17(6), 2016, 942-963. doi: <https://doi.org/10.1163/22119000-12340023>.

⁵⁷ The General Court annulled the decision by finding that the Commission lacked competence to adopt this decision. However, on 22 January 2022, following the Commission's appeal, the CJEU set aside the judgment and referred the case back to the General Court. – Case C-638/19 P, *European Commission v. European Food SA and Others*, Judgment of the Court (Grand Chamber) of 25 January 2022.

⁵⁸ During the period 2008-2018 there were 174 known intra-EU investment cases. See, UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, IIA Issues Note, December 2018, issue 3, p. 3. Available at: https://unctad.org/system/files/official-document/diaep-cb2018d7_en.pdf.

⁵⁹ *Ibidem*, pp. 21-36.

⁶⁰ *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

⁶¹ Case C-284/16, *Slowakische Republic (Slovak Republic) v. Achmea BV*, European Court of Justice, Judgment of the Court (Grand Chamber), 6 March 2018.

court⁶² and the EU and its member states intensified their activities in order to remove not only the pending proceedings but to dismiss their mere possibility.

In 2019 the majority of EU member states adopted declarations on the legal consequences of the *Achmea* decision⁶³ in which they unanimously confirmed the inapplicability of intra-EU BITs and the precedence of EU law over intra-EU BITs. On 5 May 2020, 23 EU member states signed the *Agreement for the termination of bilateral investment treaties between the Member States of the European Union* (Termination Agreement),⁶⁴ which entered into force on 29 August 2020.⁶⁵ The main purpose of this agreement was to terminate the remaining intra-EU BITs, to confirm the inapplicability of arbitration clauses contained therein and to clarify that sunset clauses are equally terminated and would produce no legal effects following the termination of intra-EU BITs.⁶⁶

While Declarations and the Termination Agreement were the stamp on the farewell postcard to intra-EU investment agreements and a clear confirmation of the EU policy for intra-EU investment treaties, the practical results were yet to be tested by the outside world of investment arbitration that has traditionally been hostile to EUs maneuvers to outplay investment mechanisms protecting EU investors against EU member states. In the eyes of the investment arbitration world this could have been just another trick pulled from the EU hat, and many had been seen before. For example, the main strategy of the European Commission and EU respondent states was to persuade investment tribunals that pre-accession BITs anomalously survived their accession to the EU so these should be deemed terminated by virtue of accession as contrary to EU law.⁶⁷ However, this and similar

⁶² Federal Court of Germany, Decision on annulment of 31 October 2018 (BGH, 31.10.2018 – I ZB 2/15).

⁶³ *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union* (https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf);

Declaration of the Representatives of the Governments of the Member States on the Enforcement of the Judgement of the Court of Justice in Achmea and on Investment Protection in the European Union, adopted on 16 January 2019 by five EU member states (<https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf>); and, Unilateral Declaration by Hungary.

⁶⁴ Official Journal of the European Union, L 169, 29 May 2020.

⁶⁵ Official Journal of the European Union, L 281, 28 August 2020.

⁶⁶ Articles 2 and 3 of the Termination Agreement.

⁶⁷ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, 27 March 2007; *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, 22 October 2012; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012; *Electrabel S.A. v.*

arguments were rejected, such as the claim that subsequent exchanges of notes between the parties was evidence of termination,⁶⁸ or that the *Achmea* ruling could have any effect on the pending investment arbitrations.⁶⁹ With respect to the latter it became evident that both EU respondent states and the EU stepped up to endorse intra-EU preliminary objections not only in intra-EU BIT arbitration proceedings,⁷⁰ but also in the latest anti-arbitration proceedings before EU courts against claimants in ICSID proceedings.⁷¹

Finally, the problem of intra-EU investment disputes arising under the Energy Charter Treaty might have seemed more difficult to solve, and the arguments used against intra-EU BITs might not seem to work within the ECT context. The ECT was in force prior to the new wave of accessions to the EU; no disconnection clause was agreed upon at the time or later; it was difficult to argue either express or implicit termination of the ECT as such or as between EU member states,⁷² the *Achmea* decision did not mention either ECT or its possible effects on multilater-

Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015; *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017; *Anglia Auto Accessories Ltd v. The Czech Republic*, SCC Case No. 2014/181, Final Award, 10 March 2017; *Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 March 2017; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017; *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 063/2015, Final Award, 15 February 2018; *AIYY LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Award, 29 June 2018.

⁶⁸ *Ioan Micula and others v. Romania II*, ICSID Case No. ARB/14/29, Award, 5 March 2020, paras. 287-288. Similar exchange of Notes Verbales by Poland and Slovakia, following the Declaration of 15 January 2019, was argued to constitute a subsequent agreement on the effect of the *Achmea* judgment. The *Muszynianka v. Slovakia* tribunal rejected the relevance of this exchange of notes as well as the relevance of the Termination Agreement. See *Spoldzielnia Pracy Muszynianka v. Slovak Republic*, UNCITRAL, PCA Case No. 2017-08, Award, 7 October 2020.

⁶⁹ Marek Anderle, Andrej Leontiev. “Here Comes Doomsday ... Or Does It? – Implications of Achmea on Intra-EU Investment Arbitration in Light of Recent Case Law”. *European Investment Law and Arbitration Review Online* 6.1 (2021): 154-168. https://doi.org/10.1163/24689017_0601007 Web; Sanja Djajić, “Post-Achmea Apocalypse for EU Law in International Investment Arbitration”, in: *Challenges in International Business Law and European Union Law – Liber Amicorum in Honour of Radovan D. Vukadinović* (eds. Allan Tatham et al.), Banja Luka – Kragujevac, 2020, pp. 133-158.

⁷⁰ Veronika Korom, “The impact of the Achmea ruling on intra-EU BIT investment arbitration – A Hungarian perspective”, *Hungarian Yearbook of International Law and European Law* 2020 (8) 1, 53-74, at 64. doi: 10.5553/HYIEL/266627012020008001004.

⁷¹ Jack Ballantyne, Uniper asks ICSID panel to enjoin German proceedings, *Global Arbitration Review*, 7 December 2021, <https://globalarbitrationreview-com.peacepalace.idm.oclc.org/article/uniper-asks-icsid-panel-enjoin-german-proceedings>; Cosmo Sanderson, Netherlands asks German court to halt ICSID claims, *Global Arbitration Review*, 18 May 2021, <https://globalarbitrationreview-com.peacepalace.idm.oclc.org/article/netherlands-asks-german-court-halt-icsid-claims>.

⁷² Declarations adopted in 2019 were made separately because EU member states differed precisely on the point of effect of the *Achmea* on the ECT – while 22 EU member states agreed on

al treaty regimes, the Termination Agreement expressly excluded the ECT from its ambit.⁷³ The ECT problem seemed more difficult to crack and arbitrations under the ECT accounted for the majority of intra-EU investment disputes: “The Energy Charter Treaty (ECT) (1994) was the most frequently invoked treaty, accounting for about 45 per cent of known intra-EU cases (76 cases).”⁷⁴

However, as early as July 2018, following the *Achmea* ruling, the European Commission argued that the rationale of the CJEU decision equally applies to the ECT: “The *Achmea* judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in *Achmea* applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU.”⁷⁵ Notably, this was the position that was specifically rejected in the 2020 Termination Treaty. However, in 2021 the CJEU, acting upon a request for a preliminary ruling under Article 267 of the TFEU, delivered a decision in *Komstroy* in which the CJEU addressed the issue of the ECT from the perspective of intra-EU investment disputes albeit as an *obiter dictum*. The CJEU confirmed the incompatibility of an arbitration clause in Article 26 of the ECT with EU law as between EU member states regardless of the fact that the ECT was a multilateral treaty comprising both EU and non-EU states.⁷⁶

Even before the *Komstroy*, Italy withdrew from the ECT,⁷⁷ while others, together with the EU, voiced their misgivings about the ECT requesting its modernization so that it could adapt to new environmental policies and obligations arising under the 2015 Paris Climate Agreement.⁷⁸ Requests for the major overhaul

the application of the *Achmea* rule on the ECT, five maintained that *Achmea* is silent on the ECT, and Hungary’s unilateral declaration stated that the *Achmea* is not applicable to the ECT.

⁷³ “CONSIDERING that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage.” – Preamble of the Termination Agreement, *op. cit.*

⁷⁴ UNCTAD, *Fact Sheet on Intra-European Union Investor-State Arbitration Cases*, *op. cit.*, p. 3.

⁷⁵ *Communication of the Commission on certain legal aspects concerning Intra-EU investment* (97/C 220/06), OJ No C 220/ 15, 19.7.1997, pp. 3-4.

⁷⁶ *Komstroy*, paras. 59-66.

⁷⁷ Italy notified the Depository of its withdrawal on 31 December 2014. The withdrawal took effect on 1 January 2016.

⁷⁸ A modernisation process was initiated in November 2018 and continued within the Energy Charter Conference through 15 rounds between July 2019 and June 2022. See, *Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting*

of the ECT included, *inter alia*, the change of dispute settlement clause in Article 26 of the ECT.

Therefore, the legal framework within which the *Green Power* tribunal operated was substantially different compared to the first investment cases in which EU member states and the European Commission began to argue the lack of jurisdiction based on intra-EU preliminary objections. On one hand, there was a heavy investment case law consistently dismissing the intra-EU preliminary objections, while on the other the EU continued to build up its legal position on the basis of international law in order to remove the legal effects of arbitration clauses as between EU member states. For the first time in international investment arbitration these efforts bore the fruits in the *Green Power* case.

3.2. Breaking new ground: EU law as *lex superior* under international law

In *Green Power* the tribunal devoted considerable time and effort to the nature and characteristics of EU law and EU legal order. It has come to combine their national and international character. In the words of the *Electrabel v. Hungary* tribunal EU law has a multiple nature.⁷⁹ This feature would come to prove pivotal for the *Green Power* tribunal as both the international and national character of EU law would turn out to be significant in upholding the autonomy and primacy of EU law.

The international legal character of EU law comes from its founding international agreements and justifies the application of international law rules on interpretation, most notably Articles 31-33 of the Vienna Convention on the Law of Treaties. EU law as such mandates its primacy over other international engagements of its member states but also autonomy and exclusive jurisdiction of the CJEU over matters which could involve interpretation of EU law. Is this rule on superiority a rule of international law that has an effect outside the realm of EU law and the jurisdiction of the CJEU? In the opinion of the *Green Power* tribunal this is precisely the case. The long analysis based on the rules of interpretation serves to point out that such agreement is both possible and valid under international law. States are allowed under international law to agree on the hierarchy of

of the Energy Charter Conference, COM(2022) 521 final, 5.10.2022, p. 2. In the latest twist, which came after the *Green Power* award, several EU member states decided to withdraw from the ECT instead of waiting for the end of the modernisation process. These withdrawals came a few days before the scheduled conference which prompted the European Commission to request the postponement of the vote on the amendments of the ECT. See, Damien Charlotin, *European Commission seeks postponement of tomorrow's vote on modernised ECT, as EU member states disagree on proper approach*, IAREporter, 21 November 2022.

⁷⁹ *Electrabel S.A. v. Republic of Hungary*, ICSID case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.118.

international legal rules, and both the VCLT and ECT allow for interpretation and application of other international rules as applicable between the parties.⁸⁰ While Article 31(3)c of the VCLT permits interpretation of other international legal rules as applicable between the parties for systematic integration purposes,⁸¹ Article 26 of the ECT provides that the tribunal is to decide the dispute not only in accordance with the ECT but also in accordance with applicable rules and principles of international law. EU law thus becomes applicable, including its rules for resolving normative conflicts.

Once the conflict of legal obligations arises, a conflict rule becomes relevant. One of these rules is based on the hierarchy of legal norms, which is the rule adopted by the CJEU in the *Achmea* case and its progenies.⁸² Unlike a majority of other investment tribunals which denied the existence of conflict and thereby rejected any need to resort to a conflict rule, here the *Green Power* tribunal ruled that conflict indeed existed. With a new rule for resolving normative conflicts, the conflict was solved in favour of EU law: “The Tribunal deems important to note that the primacy of EU law in the relations between EU Member States, such as Denmark and Spain, 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.”⁸³

The *Green Power* tribunal rejected the approach based on Articles 30 and 59 of the VCLT⁸⁴ that was argued by Spain, an argument heavily relied upon by EU member states and the European Commission in disputes under pre-accession intra-EU BITs. In these cases, such an argument might have seemed attractive and possibly plausible: pre-accession international agreements were incompatible with EU law so once new states joined the EU these agreements must have been deemed tacitly terminated. However, this argument failed in all investment proceedings where it was raised and was ultimately abandoned by the EU when it decided to pursue a different strategy of termination of intra-EU BITs by an abrogation agreement. Also, this was a difficult path to follow given the multilateral and non-EU character of the Energy Charter Treaty. Instead of relying on Articles 30 and 59 of the VCLT, the *Green Power* tribunal relied on rules of interpretation

⁸⁰ *Green Power v. Spain*, para. 394.

⁸¹ *Green Power v. Spain*, para. 398.

⁸² Schill and Tams argue that the hierarchy approach is fundamentally wrong in resolving the conflict epitomized in the *Achmea* case. – Stephen Schill, Christian Tams, “International investment protection and constitutional law: Between conflict and complementarity”, in: *International Investment Protection and Constitutional Law* (eds. S. Schill, C. Tams), Edgar Elgar Publishing 2022, 2-38, at 19.

⁸³ *Green Power v. Spain*, para. 469.

⁸⁴ *Green Power v. Spain*, para. 469.

leaving the validity of both the ECT and consents of EU member states to be bound by the ECT intact. This avenue also enabled the circumvention of the thorny issue of a sunset clause in Article 47(3) of the ECT.

The *Green Power* tribunal placed much relevance on general international law in order to give supremacy to EU law it needed to trump an arbitration clause in another treaty. It defined both the conflict, and the conflict rule within the realm of international investment law. This argument could potentially have an effect in ICSID arbitration cases if viewed from this perspective. For example, in the *Electrabel v. Hungary* case, on which the *Green Power* tribunal relied heavily, the tribunal conceded that EU law is international law that would have taken precedence had there been any conflict between the ECT and EU.⁸⁵ As the conflict was not found to exist, the ECT was applied.⁸⁶

As the rule on primacy and autonomy of EU law precedes the accession of EU member states and EU to the ECT, the question remains why no reservation or declaration to that effect was submitted at the time, or why the EU and its members did not procure any carve-out or disconnection clause in the treaty. However, investment tribunals were not inclined to give effect even to clauses which *prima facie* give precedence to obligations under EU law, such as Article 11(2) of the Austria-Croatia BIT, which provides: “The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.” Even following the *Achmea*, investment tribunals refused to read the rationale of *Achmea* into Article 11 and decline jurisdiction on this ground.⁸⁷

In addition to the approach that the *lex superior* status of EU law is a matter of international law as applicable between Denmark and Spain, the *Green Power* tribunal also relied on the fact that the seat of an UNCITRAL arbitration tribunal was in Sweden. This was relevant but not entirely clear in how decisive a role that played in upholding the supremacy of EU law. EU law is part of the law of Sweden and thereby applicable as *lex arbitri*, and secondly, the award is subject to the

⁸⁵ *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras. 4.173-4.191.

⁸⁶ In *REEEF v. Spain* the tribunal also approached the problem from the hierarchy perspective but only to find that it is the ECT which is the “constitution for the tribunal” and has supremacy over EU law. – *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paras. 74-75.

⁸⁷ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39, Award, 26 July 2018; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia* (I), ICSID Case No. ARB/17/34, Decision on Respondent’s Jurisdictional Objections, 30 September 2020; *Addiko Bank AG and Addiko Bank d.d. v. Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020.

jurisdiction of national courts for possible annulment proceedings that loomed as inevitable had the investment tribunal decided in favour of the claimants. The outcome of such annulment proceedings would be more than certain given the CJEU *Achmea*, *PL Holding* and *Komstroy* rulings. Within such a context and against the background of the 2019 Declarations, 2020 Termination Agreement and the massive withdrawals of EU member states from the ECT, it would have been self-destructive to make an award that would not stand a chance within the EU. On the other, the question is how this feature is to be understood by tribunals not having their seat in the EU or being beyond the reach of national jurisdictions such as ICSID. In at least two ICSID cases decided after the *Green Power* on the basis of the ECT, the arguments of EU law supremacy over the ECT did not succeed, although arguably they were rendered too soon after *Green Power*.⁸⁸ Nevertheless, the *Green Power* decision could still be construed as more relevant for arbitrations conducted under UNCITRAL rules with a seat in an EU member states given that both lines of argument, based on EU law as part of international law and on EU law as law of the seat of arbitration, served for the final outcome of EU supremacy in relation to the ECT.

IV CONCLUSION

The EU and ISDS have been embroiled in an exhausting feud which may still not reach its climax despite several dramatic and radical moves by the European Union and its member states. Although the *Green Power* decision might have less relevance than the EU could hope for, in many respects it is a meticulous decision with instructive arguments how to situate supremacy of EU law within the law of treaties while navigating the rough waters of enduring conflicts amid different international agreements and between various levels of governance.

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⁸⁸ *LSG Building Solutions GmbH et al. v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11 July 2022; *Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Award, 23 August 2022 (Decision on the intra-EU jurisdictional objections was adopted on 29 June 2019).

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**Историјска победа или кула у ваздуху?
Значај арбитражне одлуке у предмету *Green Power v. Spain*
у сукобу Европске уније и међународног система
решавања инвестиционих спорова**

Сажетак: Евројска унија и међународни систем за арбитражно решавање инвестиционих спорова између инвеститора и држава већ су скоро двадесет година у спору поводом политике Евројске уније да из надлежности међународних инвестиционих арбитражни судова искључи спорове између инвеститора из Евројске уније и држава чланица Евројске уније. Различите мере на нивоу Евројске уније и покушаји држава чланица ЕУ и Евројске комисије да у самим процесима оспоре надлежност међународних арбитражних судова били су безуспешни све до недавно. У јуну 2022. године први пут је један међународни инвестициони арбитражни суд, у предмету *Green Power v. Spain*, донео одлуку о ненадлежности због приговора државе чланице Евројске уније (Шпаније) да је арбитражна клаузула у двостраном инвестиционом споразуму између Данске и Шпаније неважећа јер је суверена прва Евројске уније како је то утврђено у пресуди Суда правде у предмету *Ахмеа 2018*. У раду је даје приказ арбитражне одлуке у предмету *Green Power v. Spain*, као и анализа ове одлуке у сложеном контексту који обухвата велики број међународних арбитражних одлука којима су приговори засновани на приоритету права ЕУ у односу на обавезе из међународних инвестиционих споразума држава чланица одбијени, али који обухвата и низ леислаивних мера Евројске уније и држава чланица које су усмерене на ограничење ови обавеза. Циљ овог рада је да испита могуће дејство одлуке у предмету *Green Power v. Spain* на друге арбитражне процесуе и у којој мери ће различити аргуменати који су довели до одлуке, засновани на међународном праву али и на праву државе у којој је седнице арбитраже, имати значај у другим предметима. Арбитражна одлука је врло дејална и доноси новину са тезом да право Евројске уније може да ужива приоритет као *lex superior* и то управо захваљујући правилима међународног уговорног права. У том делу је ова одлука значајна и оригинална јер проблему процесуа са другачије позиције. Из овог се закључује да би одлука у предмету *Green Power v. Spain*

могла да има утицаја на будуће одлуке чак и ако ово нису једини разлози који су руководили арбитражни суд приликом доношења одлука, јер се међу њима налазе и они који су засновани на праву државе у којој је седиште, а што је ипак право Европске уније.

Кључне речи: инвестициони спорови унутар Европске уније, *Achmea, Green Power v. Spain*, сукоб међународних обавеза.

Датум пријема рада: 10.12.2022.

Датум прихватања рада: 25.01.2023.