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Citation for published version (APA):

Ortino, F., & Mavroidis, P. (2023). Intra-EU Investment Disputes and the Monopoly Over the Interpretation of EU Law. *The American Review of International Arbitration*, 33(4).

Citing this paper

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**Intra-EU Investment Disputes and
the Monopoly of Interpretation of EU Law**

by

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JEL Classification: K40

Key Words: Achmea; Komstroy; Green Power; EU law; BIT; ECT; ISDS; Jurisdiction;
Opinion 1/17

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Abstract

It appears that the fate of intra-EU investment disputes, when adjudicated in *fora* other than the Luxembourg courts, is finally all but sealed following a recent European Charter Treaty (“ECT”) decision. In *Green Power*, an arbitration tribunal confirmed prior decisions in different jurisdictions that there is no room for adjudicating intra-EU investment disputes away from Luxembourg. Thus, this decision sided with the approach already developed by the Court of Justice of the European Union (“CJEU”) in three decisions, namely, *Achmea*, *Komstroy*, and *PL Holdings*. This has led to legislative action by the Energy Charter Treaty aiming to put an end to such an occurrence. This initiative is in line with the often-expressed volition of the Luxembourg courts to preserve their monopoly of interpretation of EU laws. While, from a strict legal perspective, the position of the Luxembourg courts is not entirely persuasive, and we advance in what follows arguments to this effect. At the end of the day, it appears that the discussion of the issue will soon be water under the bridge and the CJEU will preserve its monopoly of adjudicating intra-EU investment disputes in the foreseeable future. While thus, EU member states can participate as individual entities in *fora* like the ECT, they (and their investors) can submit disputes arising from their participation therein only to Luxembourg.

I. The Monopoly of Interpretation of EU Law

Article 344 of the Treaty on the Functioning of the European Union (“TFEU”) reads: “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 therein.”¹

This provision is cited as the statutory basis for conferring a monopoly of jurisdiction to the Luxembourg courts for all matters regarding interpretation and application of EU treaties.² But the key element here is the term “interpretation or application of the Treaties,” and more precisely its scope. What should come under this term? Only the Treaty of European Union (“TEU”), and the TFEU? Is the secondary law covered as well? One would assume so, but how should we understand then the term “secondary law”? Does it cover international agreements signed as well? Does it matter if agreements are an expression of the EU’s exclusive competence, or do mixed agreements as well, come under the scope of Article 344?

We are still some way before having the full picture painted. Furthermore, in this paper, we do not pay heed to the attitude of the Court of Justice of the European Union (“CJEU”) towards international adjudication. Indeed, this question has arisen in various contexts from submitting disputes to the World Trade Organization (“WTO”), to doing the same before the European Convention on Human Rights (“ECHR”). In this paper, we are not concerned with the horizontal issue, largely because it is unclear whether a horizontal response is warranted to the question posed. In this paper, we pay careful attention to intra-EU disputes, e.g., disputes between two EU member states, and ask under what conditions they can be submitted to a court/tribunal other than the Luxembourg courts, or, conversely, whether they must observe Article 344 of the TFEU. The theme of this paper is clear and focuses on the resolution of intra-EU investment disputes.

The CJEU, the interested party envisaged in Article 344 of the TFEU, has taken a clear and unequivocal position towards expanding the scope of the term “interpretation or application of

¹ Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2012 O.J. C 326/47, at 194 [hereinafter TFEU].

² See Francisco de Abreu Duarte, *But the Last Word is Ours: the Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System*, 30 EUR. J. INT’L L. 1187, 1189 (2019).

the Treaties” in the intra-EU investment-dispute context, when called to adjudicate three intra-EU disputes, *Achmea*, *Komstroy*, and *PL Holdings*, that we will be discussing later on.

Different opinions have been expressed regarding the attitude of the CJEU on this issue. It is hard to be exhaustive on this score, but a wide percentage of the full spectrum has been covered in the contributions of Wessel and Hillion³ (2017), De Witte (2017),⁴ and Lenk (2017).⁵ The latter author has claimed the arguably more pro-CJEU position, arguing in favour of the Luxembourg courts protecting their own jurisdictional prerogatives, while signalling the risk when investment courts step in to adjudicate intra-EU disputes.⁶ Fearing that an (extra-EU) investment court might ultimately engage in the interpretation of EU law, and the ensuing risk for non-uniform evolution and/or understanding of EU law, the author concludes that investment disputes should not be submitted to investment courts.⁷ This view corresponds to the brass tracks of the view of the CJEU as well.

Recently, an arbitral tribunal adjudicating a dispute under the Energy Charter Treaty (“ECT”),⁸ followed, for the first time, a similar path⁹. It is not clear whether other arbitral tribunals will soon follow suit, but the EU legislator is clearly aiming at making it impossible to adjudicate intra-EU investment disputes before ECT-based tribunals.¹⁰

³ Ramses Wessel & Christopher Hillion, *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, in *THE EUROPEAN UNION AND INTERNATIONAL DISPUTE SETTLEMENT* 7-30 (Marise Cremona, Anne Thies & Ramses A. Wessel eds., 2017).

⁴ Bruno De Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement*, in *THE EUROPEAN UNION AND INTERNATIONAL DISPUTE SETTLEMENT* 33-46 (Marise Cremona, Anne Thies & Ramses A. Wessel eds., 2017).

⁵ Hannes Lenk, *Investment Arbitration Under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?*, 28 *EUR. BUS. L. REV.* 135 (2017).

⁶ *Id.* at 160.

⁷ *Id.*

⁸ The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter ECT].

⁹ *Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Award (June 16, 2022).

¹⁰ See Energy Charter Secretariat, *Public Communication Explaining the Main Changes Contained in the Agreement in Principle on the Modernisation of the Energy Charter Treaty*, CCDEC 2022 10 GEN (June 24, 2022), <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>.

We argue that, from a strict legal perspective, the position of the Luxembourg courts is questionable. But the ship has now sailed, and we are slowly moving into a world where intra-EU investment disputes will be adjudicated only in Luxembourg. This might be a harbinger for things to come in other areas of international relations as well. The rest of the paper is as follows. In Section 2, we discuss the case law of the CJEU, the trifecta *Achmea-Komstroy-PL Holdings*. In Section 3, we discuss the recent ECT decision in *Green Power*, and explain why it overlaps (almost totally) with the attitude of the Luxembourg courts. In Section 4, we provide our assessment and evaluation of the now prevailing view in jurisprudence, while Section 5 re-caps our main points.

II. Intra-EU Disputes Before the Luxembourg Courts

The CJEU has been quite busy in recent times dealing with cases where the legal significance of rulings by international courts for the European Union (“EU”) legal order, has been at stake. The question has been raised whether individuals, companies, member states, or even the EU itself can, and, if so, under what conditions, submit to foreign jurisdictions. The CJEU is unwilling to share its monopoly of interpretation of EU law, and one can hardly fault it for that. Indeed, transaction costs would increase and probably become unpredictable as well if various jurisdictions were to declare themselves competent to pronounce on the interpretation of EU law, as long as the CJEU would not be able to intervene in/correct such interpretation. But what is EU law? Is it simply the primary and secondary law enacted to govern intra-EU relations? Or does it extend any further?

A. *Achmea*

The *Achmea*¹¹ decision by the CJEU held for the proposition that the monopoly that CJEU enjoys in interpreting EU law should be understood extensively. The CJEU dispute originated in an award rendered in December 7, 2012 by an arbitration tribunal established under the Bilateral Investment Treaty (“BIT”) between the Slovak Republic and the Kingdom of the Netherlands.¹² The BIT had actually been negotiated between Czechoslovakia and the Netherlands. It was

¹¹ CJEU, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Mar. 6, 2018, ECLI:EU:C:2018:158.

¹² *Id.* ¶ 2.

concluded in 1991, and entered into force in 1992.¹³ The Slovak Republic succeeded to the rights and obligations of Czechoslovakia under the aforementioned BIT in 1993, after the so-called “velvet revolution,” a few years before its accession to the EU (2004).¹⁴

Achmea was/is a Dutch supplier of insurance services.¹⁵ When the Slovak Republic reformed its health system in 2004 and opened up its private sickness insurance market, Achmea obtained the necessary authorizations to operate a subsidiary in that country.¹⁶ In 2006 and 2007, the Slovak Republic partially modified the pre-existing regime, and prohibited the redistribution of profits generated by private providers in the health insurance market.¹⁷ Achmea challenged the legislative measures in arbitration proceedings against the government of the Slovak Republic.¹⁸ The arbitral tribunal chose Frankfurt as its seat, as per the applicable United Nations Commission on International Trade Law (UNCITRAL) rules.¹⁹ As a result, German law applied to the proceedings,²⁰ including the possibility to submit the arbitral award to judicial review under a specific set of circumstances.

In December 2012, the arbitral tribunal found in favour of Achmea, and ordered the Slovak Republic to pay damages for over 22 million euros.²¹ The Government of the Slovak Republic brought an action to set aside the arbitral award before local courts in Germany.²² Whilst the Higher Regional Court in Frankfurt dismissed the action, the Federal Court of Justice, on appeal, filed a request for preliminary ruling before the CJEU.²³ Germany’s Federal Court of Justice referred questions concerning the compatibility of the arbitration clause contained in Article 8 of

¹³ *Id.*

¹⁴ *Id.* ¶ 6.

¹⁵ *Id.* ¶ 7.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 8.

¹⁸ *Id.* ¶ 9.

¹⁹ *Id.* ¶¶ 5, 6, and 10.

²⁰ *Id.* ¶ 10.

²¹ *Id.* ¶ 12.

²² *Id.*

²³ *Id.*

the Dutch-Slovak BIT with Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).²⁴ Put simply, the matter before the CJEU was whether a provision in an international agreement between two member states, whereby an investor originating in one of them had the right to bring proceedings against the host member state before an ISDS (investor state dispute settlement) arbitration tribunal (rather than a domestic court), is consistent with EU law.²⁵

The CJEU started its analysis recalling its settled case law whereby an international agreement cannot affect the allocation of powers as determined by the EU treaties and the “autonomy” of the EU legal system.²⁶ In order to preserve that autonomy, Article 344 of the TFEU prevents EU Member States from submitting any dispute involving the application or interpretation of the Treaties to methods of settlement that are not specifically envisaged by the Treaties themselves. The gist of the argument is the following. The treaties constitute the primary law of the EU legal order. They have primacy over the domestic law of the Member States, which are under the duty to cooperate in order to ensure that EU law is faithfully implemented. To prevent divergent interpretations of the same provisions of EU law by local courts of law, Article 267 of the TFEU allows the courts of Member States to submit requests for preliminary rulings to the CJEU concerning the interpretation of the Treaties or the validity of acts of the EU institutions.²⁷ When such courts or tribunals are of last instance, they are obliged to do so. In the view of the CJEU, whenever the interpretation or the application of EU law is relevant in the context of a dispute, the judge evaluating the matter can (or must, if it is a last instance judge) seek the views of the CJEU through a request for a preliminary ruling.²⁸ Through this procedure, EU law will be interpreted in a harmonious/consistent manner, assuming of course that the CJEU observes this function.

²⁴ *Id.*

²⁵ *Id.* ¶ 17.

²⁶ *Id.* ¶ 32; *see also* CJEU, Opinion 1/91, 14 December 1991, ECLI:EU:C:1991:490; Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454.

²⁷ CJEU, Case C-284/16, *Slovakische Republik (Slovak Republic) v. Achmea BV*, Mar. 6, 2018, ECLI:EU:C:2018:158, ¶ 37.

²⁸ *Id.* ¶¶ 37-39.

Against this background, the CJEU examined the content of the BIT at the origin of the dispute.²⁹ Article 8 thereof included an arbitration clause, whereby arbitral tribunals could be established to rule on cases concerning the alleged infringement of the BIT.³⁰ Article 8(6) of the BIT, in particular, provided that arbitrators must take into account the law in force of the parties as well as any other relevant agreements between them.³¹ On the one hand, thus, Article 8 specified that arbitrators would evaluate whether an infringement of the BIT had occurred. On the other hand, the contextual reference to agreements between the states concerned might imply that the arbitral tribunal could interpret or apply EU law in order to solve a matter before it. In fact, EU law qualified both as part of the domestic law of the Slovak Republic and the Netherlands as well as an agreement between the two states. The CJEU found that the tribunal envisaged in the BIT was not part of the judicial system of the two member states concerned and, therefore, could not be considered to be a court or tribunal of a member state for purposes of Article 267 TFEU.³² The CJEU concluded that, in absence of review of the arbitral awards from domestic courts, the arbitral tribunal envisaged in the Dutch-Slovak BIT was not consistent with the EU treaties.³³

The CJEU concluded its decision with a caveat, and affirmed that, in principle, an international agreement establishing a court tasked with the application and interpretation of the rules set forth therein is not in principle incompatible with EU law, provided that it respects the autonomy of the EU legal order.³⁴ In a subsequent case, in Opinion 1/17,³⁵ the CJEU found in principle nothing wrong with the EU establishing an ISDS mechanism through its CETA (the Canada-European Union Comprehensive Economic and Trade Agreement), although it did set certain conditions.³⁶

²⁹ *Id.* ¶ 40.

³⁰ *Id.* ¶ 45.

³¹ *Id.* ¶ 4.

³² *Id.* ¶ 49.

³³ *Id.* ¶¶ 57-59.

³⁴ *Id.* ¶¶ 57-58.

³⁵ CJEU, Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:341.

³⁶ Cécile Rapoport, *Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)*, 57 COMMON MKT. L. REV. 1725, 1725-26 (2020).

The original fear that *Achmea* could lead to a disregard of international adjudication was thus, quashed through Opinion 1/17.³⁷ There is still some uncertainty regarding the conditions under which the EU can embed courts in international agreements signed with third countries and submit its international disputes to them, but uncertainty is endemic in investment law.³⁸

Notwithstanding the ruling in *Achmea*, investment treaty tribunals have since continued to assert jurisdiction based on intra-EU BITs as well as the ECT (an agreement signed in 1994 by 53 Members including the then European Communities and its Member States). For example, in dozens of arbitrations brought by EU investors against several EU Member States (in particular, Spain, Italy, and the Czech Republic) following changes in the incentives provided to clean energy producers, arbitral tribunals have consistently rejected respondents' jurisdictional objection based on the incompatibility of investor-State dispute settlement in intra-EU treaties with EU law.³⁹ Well, that is until *Green Power v. Spain*,⁴⁰ which is the last episode in this saga, and which we discuss in Section III.

B. *Komstroy*

Analysts might have been tempted to call *Achmea* a surprise, initially at least. Not anymore. In its recent *Komstroy* decision,⁴¹ the CJEU extended its *Achmea* findings to intra-EU arbitration based on the ECT.

It should also be noted, and we will return to it later, that following *Achmea* (and before *Komstroy*) the EU member states took action to terminate all BITs between them, but they could hardly have done the same with respect to *inter-se* disputes arising in the realm of multilateral

³⁷ Carlo M. Cantore & Petros C. Mavroidis, *Another One BITes the Dust, The Distance Between Luxembourg and the World is Growing After Achmea* (EUI Working Paper Series, RSCAS 2018/47, 2018).

³⁸ See Julian Arato et al., *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336, 345 (2021).

³⁹ See, e.g., CEF Energia v. Italy, Award, 16 January 2019; Cube Infrastructure and others v. Spain, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019; Voltaic Network v. Czechia, Award, 15 May 2019; Rockhopper v. Italy, Decision on the Intra-EU Jurisdictional Objection, 26 June 2019; OperaFund and Schwab v. Spain, Award, 6 September 2019; Stadtwerke München and others v. Spain, Award, 2 December 2019.

⁴⁰ Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain, SCC Case No. V2016/135, Award (June 16, 2022).

⁴¹ CJEU, Case C-741/19, Republic of Moldova v. Komstroy LLC, Sept. 2 2021, ECLI:EU:C:2021:655.

investment treaties where they participate.⁴² They did underscore in a document they co-authored (Declaration II) their willingness to avoid inconsistencies between international obligations and EU law, and envisaged to discuss with the Commission “whether any additional steps are necessary to draw all the consequences from the *Achmea* judgment in relation to the intra-EU application of the Energy Charter Treaty.”⁴³ But that was as much as they achieved. And then ... well, then came *Green Power*. A few authors anticipated that a dispute under the ECT was the new frontier.⁴⁴ No one can accuse similar voices for lack of prescience.

C. PL Holdings

Then came *PL Holdings*.⁴⁵ In this case, the CJEU in its concluding ruling held that *ad hoc* arbitration agreements between an EU Member State and an investor from another Member State which arise through a provision of national law, and which replicate the content of an otherwise invalid arbitration agreement in a BIT, are incompatible with EU law. While the Swedish Court of Appeal had not extended *Achmea* to *ad hoc* arbitration agreements between a Member State and an investor of another EU Member State (relying on a distinction advanced by the CJEU in *Achmea*⁴⁶ and confirmed in *Komstroy*⁴⁷ between investment treaty arbitration and commercial arbitration), the CJEU, pursuant to a referral by the Swedish Supreme Court, reversed the decision of the Swedish Court of Appeal on this point. The CJEU held that to allow a Member State to enter into an *ad hoc* arbitration with an EU-based investor with “the same content as that [BIT] clause” would result in “a circumvention of the obligations arising for that Member State under the Treaties [of the European Union].”⁴⁸ In other words, the CJEU found that the TFEU must be read “as precluding national legislation which allows a Member State to conclude an *ad hoc* arbitration agreement with an investor from another Member State that makes it possible to

⁴² Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 15, 2019) [hereinafter Declaration II], https://finance.ec.europa.eu/document/download/901c4f5e-9c4e-4559-92a1-dc946e174ac5_en?filename=190117-bilateral-investment-treaties_en.pdf.

⁴³ Declaration II, *supra* note 42, at 4.

⁴⁴ See, e.g., Sze H. Ng, *The Future of the Energy Charter Treaty in the Post-Achmea Era*, 10 OXFORD UNIV. UNDERGRADUATE L. J. 111-136 (2021).

⁴⁵ CJEU, Case C-109/20, *Republiken Polen v. PL Holdings Sàrl*, Oct. 26 2021, ECLI:EU:C:2021:875.

⁴⁶ CJEU, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Mar. 6, 2018, ECLI:EU:C:2018:158, ¶ 54.

⁴⁷ CJEU, Case C-741/19, *Republic of Moldova v. Komstroy LLC*, Sept. 2 2021, ECLI:EU:C:2021:655, ¶ 58.

⁴⁸ CJEU, Case C-109/20, *Republiken Polen v. PL Holdings Sàrl*, Oct. 26 2021, ECLI:EU:C:2021:875 ¶ 47.

continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement.”⁴⁹

Interestingly, while the *ad hoc* arbitration agreement in PL Holdings stem from the operation of the Swedish Arbitration Act, the CJEU seems to extend its findings to the situation where a Member State and an EU-based investor expressly entered into an *ad hoc* arbitration agreement to resolve an investment dispute, at least if the aim of that arbitration agreement is to remedy the invalidity of a similar arbitration clause in an investment treaty. The CJEU stated: “Any attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter to the first Member State’s obligation to challenge the validity of the arbitration clause and would thus be liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order [...]”⁵⁰.

D. The Position of the Luxembourg Courts in a Nutshell

The Luxembourg courts have adopted a rather expansionist view of the terms appearing in Article 244 of the TFEU, in their effort to minimize the risk that EU law is interpreted in an incoherent manner. Of course, the working assumption is that the CJEU itself avoids incoherent interpretations, but this is a question that evades the purposes of our analysis in this paper.

One final note is warranted here. National courts can put questions (through a request for a preliminary ruling) before the CJEU through Article 267 of the TFEU,⁵¹ which reads:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

⁴⁹ *Id.* ¶ 56.

⁵⁰ *Id.* ¶ 54.

⁵¹ TFEU art. 267, *supra* note 1.

Where such a question is raised before *any court or tribunal of a Member State*, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. *(emphasis added)*

Depending on how the emphasized terms are understood, the problem of uniformity of interpretation of EU law can be solved through this provision. But the CJEU has not opened the door to requests for preliminary rulings by ECT arbitral tribunals. In fact, even though case law regarding what bodies qualify as “court or tribunal of a Member State” is incoherent,⁵² the door to ECT arbitral tribunals remains closed post-*Achmea*.

Consequently, this avenue is not available to ECT investment tribunals.

III. Intra-EU Disputes Before ECT Tribunals

*Green Power v. Spain*⁵³ is the plat de résistance of this paper. The complainants are Danish companies that had invested in photovoltaic plants in the Spanish solar energy market.⁵⁴

Following the original investment, Spain had modified the regulatory framework in place when the investment occurred.⁵⁵ The complainants claimed that the change was in violation of Spain’s

⁵² See Nils Wahl & Luca Prete, *The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings*, 55 COMMON MKT. L. REV. 511, 522 & 529 (2018) (first concluding that the differences between the legal systems of twenty-eight member states are too significant to render a clear-cut definition of “court or tribunal; then demonstrating that the CJEU has held international courts, like the Benelux court, meet the criteria of Article 267 of the TFEU).

⁵³ *Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Award (June 16, 2022).

⁵⁴ *Id.* ¶ 1.

⁵⁵ *Id.* ¶ 5.

obligations under the ECT, the relevant framework under which the investment had taken place.⁵⁶

A. The Facts of the Case

The claimant decided to lodge its complaint before a tribunal constituted under the Rules of the Stockholm Chamber of Commerce (the “SCC tribunal”),⁵⁷ and based its choice of jurisdiction on Article 26 ECT.⁵⁸ The respondent objected to the jurisdiction of the SCC tribunal, *inter alia*, claiming that Article 26 ECT was not germane to disputes arising between two EU member states, which had also adhered to the ECT.⁵⁹ It was thus for the SCC arbitral tribunal to decide whether it was competent to proceed, and discuss the dispute on its merits only after it had established its competence to adjudicate this dispute.

B. The Investment Tribunal Decision

The Tribunal unanimously agreed with the arguments advanced by Spain and refused to adjudicate the present dispute for lack of competence to do so.⁶⁰ Effectively, this is the first decision by an investment treaty tribunal to decline its jurisdiction based on the incompatibility of an investor-State arbitration clause with EU law pursuant to the *Achmea* and *Komstroy* decisions by the CJEU. Interestingly, *Green Power* involved the ECT rather than an intra-EU BIT.

The starting point of the arbitrators’ analysis was the objection to jurisdiction voiced by Spain. Spain advanced various arguments contesting the jurisdiction of the SCC arbitral tribunal. We will focus on the winning argument: Article 26 ECT does not contain a valid standing offer to

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 6.

⁵⁸ ECT, *supra* note 8, art. 26.

⁵⁹ Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain, SCC Case No. V2016/135, Award, ¶ 120 (June 16, 2022).

⁶⁰ Nikos Lavranos, *ECT Arbitral Tribunal Declines Jurisdiction by Accepting Achmea Objection Raised by Spain for First Time*, PRACTICAL LAW UK (June 24, 2022), [https://uk.practicallaw.thomsonreuters.com/Document/I25a0cbfaf3c311ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/Document/I25a0cbfaf3c311ec9f24ec7b211d8087/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true).

arbitrate investment disputes between EU investors and EU Member States (or the tribunal lacks jurisdiction *ratione voluntatis*).⁶¹

The quintessential disagreement between the parties concerned the relevance of EU law under Article 26 ECT, the jurisdictional clause.⁶² The SCC tribunal seems to rely on two distinct but connected grounds. First, it found that EU law applies to jurisdictional issues based on the fact that the seat of arbitration was in an EU Member State (Stockholm, Sweden), and also the fact that the applicable Swedish Arbitration Act provides that, absent a relevant agreement of the parties, the arbitration agreement shall be governed by the law of the seat of arbitration (Swedish law, which also incorporates EU law). Interestingly, the SCC tribunal stressed in any event, that “international and domestic law, and also EU law, whether seen as part of one or the other, apply to the extent relevant to determine the issue arising in a case”.⁶³

Second, the SCC tribunal concluded that a contextual interpretation of Article 26 ECT provides a “clearer indication that EU Member States . . . intended to organise their *inter-se* relations in a special manner,”⁶⁴ one precluding an EU Member State’s offer to arbitrate in Article 26 to apply to a dispute with investors of another EU Member State.⁶⁵ In its examination of the context, while the tribunal highlighted certain ECT provisions and certain instruments made in connection with the conclusion of the ECT acknowledging the special legal relations among EU Member States,⁶⁶ the Tribunal’s decision appears to rely heavily on “subsequent agreement and subsequent practice.”⁶⁷ In particular, following *Achmea*, the EU member states, through their behaviour, have shown that they have endorsed the spirit of this decision. The SCC tribunal paid particular attention to Declaration II, the document epitomizing the member states’ attitude⁶⁸.

Here is how.

⁶¹ Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain, SCC Case No. V2016/135, Award, ¶ 412 (June 16, 2022).

⁶² *Id.* ¶ 155.

⁶³ *Id.* ¶ 167.

⁶⁴ *Id.* ¶ 411.

⁶⁵ *Id.* ¶ 477.

⁶⁶ *Id.* ¶¶ 350-363.

⁶⁷ *Id.* subtitle before ¶ 364.

⁶⁸ *Id.* ¶ 371.

C. Declaration II and Why It Matters

On January 15, 2019, following the issuance of the *Achmea* award, twenty-one EU member states endorsed a proposal put together by six of them, aiming to leave no doubt as to their adherence to the logic underlying *Achmea*. Declaration II,⁶⁹ as the document is referred to in *Green Power*, is quite clear when revealing their common understanding that EU law takes primacy over any other law when EU member states transact in the realm of international relations.

In a passage which is dedicated to discussing the ECT head on, we read:

Furthermore, international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.⁷⁰

This statement comes close to stating that the twenty-one member states would be unwilling to submit to a foreign jurisdiction in similar cases, in cases that is, where ECT disputes between member states would not have been submitted to the CJEU for adjudication. But this position did not make unanimity across EU member states. In a third declaration, on 16 January 2019,⁷¹ Finland, Luxembourg, Malta, Slovenia, and Sweden took the view that it would be premature at least to conclude that the *Achmea* ruling would have an impact on intra-EU disputes under the ECT, as there was no specific mention of the ECT in the body of the *Achmea* decision. Thus, the

⁶⁹ Declaration II, *supra* note 42.

⁷⁰ *Id.* at 2.

⁷¹ Declaration of the Representatives of the Governments of the Member States of, 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 16, 2019) [hereinafter Declaration III], https://finance.ec.europa.eu/document/download/901c4f5e-9c4e-4559-92a1-dc946e174ac5_en?filename=190117-bilateral-investment-treaties_en.pdf.

position of the five member states overlapped with that of the twenty-one member states, except for whatever concerned disputes under the ECT.⁷² But the minority position noting “the absence of a specific judgment on this matter” by the CJEU, did not take sides.⁷³ However, by the time *Green Power*⁷⁴ was about to be decided, the CJEU had, in *Komstroy*,⁷⁵ expressly extended *Achmea*⁷⁶ to intra-EU ECT disputes and thus the previously uncommitted position of the minority could now be read as supporting the majority position. As already stated, the SCC tribunal by accepting that EU law is part of international law, and its primacy as far as intra-EU relations are concerned, sided with the majority view, and that of the Commission of the EU. The Commission, we should add, had submitted a very elaborate amicus brief to the SCC tribunal supporting and expanding on the view of the twenty-one member states.

IV. Is the CJEU Monopoly Threatened by the ECT Investment Tribunals?

The rationale for the CJEU decisions cited above is the protection of its monopoly to interpret EU law. The SCC tribunal alluded to that, and ended up concluding that it was not competent to decide the case submitted to it. In what follows, we first provide the basic finding of the SCC tribunal, before explaining our concerns with it.

A. The Key Points of the Decision by the SCC Tribunal

The decision, we recall briefly stands for the following proposition:

- Intra-EU investor-State disputes cannot be submitted to SCC arbitration pursuant to Article 26 ECT if the arbitration is seated in an EU Member State;
- Primacy and autonomy of EU law in intra-EU relations would dictate that a submission to this effect is impossible;

⁷² Hungary as well eventually sided with the position of the five member states, basing (as well) its conclusion on the absence of any mention to ECT in the body of the *Achmea* decision.

⁷³ Declaration III, *supra* note 71, at 3.

⁷⁴ *Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain*, SCC Case No. V2016/135, Award (June 16, 2022).

⁷⁵ CJEU, Case C-741/19, *Republic of Moldova v. Komstroy LLC*, Sept. 2 2021, ECLI:EU:C:2021:655.

⁷⁶ CJEU, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Mar. 6, 2018, ECLI:EU:C:2018:158.

- EU law is relevant for jurisdictional issues either because it is part of general international law (which is explicitly referenced in Article 26 ECT) or because it is part of domestic law, as the *lex arbitri*;

On its strict terms, it is thus, not that all EU investors are deprived of an adjudication forum under the ECT. It is that they cannot use SCC arbitration seated in the EU.

What is clear though is that Spain and the EU Commission scored a big victory in *Green Power* but is this the end of *Achmea* extensions? Or just the beginning? Would, for example, this decision provide a template of intra-EU disputes under ICSID as well? Is Opinion 1/17 the only way for EU member states to participate in ISDS?

While we acknowledge the difficulty in predicting the future pattern (indeed, how many had predicted *Achmea*, or Opinion 1/17 following *Achmea*?), there are some findings which deserve a few words, and a discussion around them could help shape future case law trends in coherent manner.

B. What Is “Interpretation or Application of the Treaties”?

The SCC tribunal does not defend the monopoly of interpretation of EU law by the CJEU *expressis verbis*, but it does *de facto*. Indeed, it is the monopoly of interpretation that guides the attitude of the EU institutions throughout all these disputes from *Achmea* onwards. As many authors have underscored before, the CJEU wants to remain the gatekeeper of EU legality.⁷⁷ This is indeed a quintessential element of the autonomy of the EU legal order, as we will see in what follows. But is this a valid concern?

When an ECT forum is called to interpret a provision of the ECT, this is what it will interpret. In Cantore and Mavroidis (2018),⁷⁸ we had argued that it is simply immaterial that *x* provision of ECT is identical to *y* provision of the TFEU. The ECT forum will be interpreting *x*, and just *x*. It

⁷⁷ See e.g., ALLAN ROSAS & LORNA AMATI, EU CONSTITUTIONAL LAW (2012); Francis Snyder, *The Gatekeepers: The European Courts and WTO Law*, 40 COMMON MKT. LAW REV. 313 (2003); Wahl & Prete, *supra* note 52.

⁷⁸ Cantore & Mavroidis, *supra* note 37.

does not have to look even into the manner in which the CJEU has interpreted *y*. It can, but it does not have to. Furthermore, to the extent that we are not in the realm of *jus cogens*, nothing stops a state from adopting differentiated obligations with different contracting partners. In fact, they can do that much even with the same partner: is not situations like that, what *lex posterior* and the other conflict rules aim to resolve? Since the ECT forum is not interpreting EU law, the monopoly of interpretation of the CJEU is not threatened at all by judicial activity of a different forum.

There must hence, be something else, something more basic that explains the attitude of EU institutions like the Commission and the CJEU, and their reticence to see foreign courts adjudicate intra-EU disputes. We turn to this issue in what comes next.

C. Distinguishing Between Participation and Adjudication

The SCC tribunal held that Denmark and Spain can continue to act individually and separately as ECT members, but cannot see their disputes adjudicated before an EU-seated SCC arbitration.⁷⁹

But then their dispute originates in the ECT. Two questions arise:

- Why did not the SCC tribunal interpret their dispute in accordance with EU law?
- If the dispute were to find its way before the CJEU, would the CJEU not be effectively asked to interpret ECT law? Is this what the ECT members agreed to?

The first question is the extension of the discussion above. The SCC tribunal by accepting the primacy of EU law, accepted also the monopoly of interpretation of the CJEU. It refused to apply EU law itself. The second question raises a concern. What in the ECT can be construed as conferring the CJEU competence to adjudicate disputes under the ECT? And what if the case law of the CJEU and that of the *fora* established under Article 26 ECT diverge? EU member states risk being asked to serve one sauce to the goose (another EU member state), and a different to

⁷⁹ Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain, SCC Case No. V2016/135, Award (June 16, 2022), ¶¶ 474-77.

the gander (a non-EU member state that is an ECT signatory). Transaction costs would suffer as a result.

D. Understanding EU- as International Law

It is this monopoly-position of the CJEU that best captures the idea of autonomy of the EU legal order, that is, that EU law will not be shaped through interpretative exercises by courts other than the CJEU. In Opinion 2/13, the CJEU had stated:

Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order.⁸⁰

In *Achmea*, the CJEU observed that: "... by concluding the BIT, the member states parties to it established a mechanism . . . which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law, even though they might concern the interpretation or application of that law."⁸¹ Based on this observation, the CJEU then found that the mechanism established constituted a violation of EU law.

The terms used in the above-quoted passage leave ample discretion to the CJEU, and quite frankly, it is impossible to predict *ex ante* how it will be exercised in future practice. What is the "essential character" of the EU legal order? What is its "full effectiveness"? It seems that the monopoly of interpretation should not be understood in self-contained manner: it is the means to ensure something bigger, namely the autonomy of EU law (which, *alas*, the SCC tribunal saw as part of general international law). In this vein, assuming we are proved right in future practice, what the EU institutions are after is some sort of a priori insulation from international relations:

⁸⁰ CJEU, Opinion 1/91, 14 December 1991, ECLI:EU:C:1991:490; CJEU, Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, ¶ 183 (citation omitted).

⁸¹ CJEU, Case C-284/16, *Slovakische Republik (Slovak Republic) v. Achmea BV*, Mar. 6, 2018, ECLI:EU:C:2018:158, ¶ 56.

the CJEU will be the gatekeeper deciding on the green light that will permit some of international law to come in, while keeping the rest outside the four corners of the EU domestic legal order.

V. Concluding Remarks

One might legitimately wonder whether an amendment of Article 26 of the ECT, stating that it covers disputes between all but not between EU members, might not be the most appropriate way forward?

Well, this appears to be the solution envisaged in the context of current negotiations for the modernisation of the ECT. Just days after the *Green Power* award, the ECT Secretariat announced that an agreement in principle had been reached on the modernization of the ECT in ways that would significantly restrict its scope.⁸² More specifically, the ECT, when amended, will specify that certain provisions, including ISDS “shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations.”⁸³ Until such agreement is signed (and at the time of writing it is difficult to predict whether the ECT Contracting Parties will actually approve the modernisation agreement),⁸⁴ this saga will continue.

In the meantime, the decision in *Green Power* risks having an immediate effect. While an interested party could not logically enforce an award originating in an intra-EU investment dispute in an EU member state, it could do so before a US court. US courts did not care much about what the EU authorities had to say on this score, and were readily enforcing those decisions in the US, as the survey of Yanos and Mrosovsky (2021)⁸⁵ shows. The *Green Power*

⁸² Energy Charter Secretariat, *Decision of the Energy Charter Conference: Public Communication Explaining the Main Changes Contained in the Agreement in Principle*, CCDEC 2022 10 GEN (June 24 2022), <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>.

⁸³ See Energy Charter Secretariat, *supra* note 10.

⁸⁴ See European Commission, ‘Non-Paper from the European Commission: Next Steps as Regards the EU, Euratom and Member States’ Membership in the Energy Charter Treaty’ (Euractiv, 8 February 2023), https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf.

⁸⁵ Alexander A. Yanos & Carlos Ramos-Mrosovsky, *Intra-EU Investment Treaty Disputes in US Courts: Achmea, Macula and Beyond*, GLOBAL ARB. REV. (Oct. 13 2020), <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/intra-eu-investment-treaty-disputes-in-us-courts-achmea-macula-and-beyond#:~:text=US%20courts%20will%20be%20consideri.ng.if%20not%20quite%20assuredly%20so.>

decision, and its aftermath as explained above, will likely signal the beginning of a trend, where the US tribunal itself will reject jurisdiction (and cut the road of enforcement in the US). This door is slowly closing too.

The CJEU has defended its position arguing that it is necessary to protect the uniformity in the interpretation and application of EU law. But should EU law be understood to encompass international agreements where the EU participates (a real risk)? The CJEU, to be fair, has so far adopted this position only with respect to intra-EU disputes. It is *de facto* closing the relevance of international law as understood by international courts and tribunals only with respect to intra-EU relations. It is thus, *de facto* making a point which has more to do with intra-EU distribution of competences, rather than the interpretation or application of the Treaties. One might legitimately wonder, why not say so?