

but also the jurisdiction of competent courts at the seat of the arbitration to determine the validity, operability and scope of an arbitration agreement in accordance with the applicable *lex arbitri*. The application of § 1032(2) ZPO to ICSID arbitrations presents a number of additional challenges for German courts. A § 1032(2) ZPO application against an ICSID arbitration is likely incompatible with the ICSID Convention as a matter of international law and could be inadmissible as a matter of German law. Whether EU law compels a German court to apply § 1032(2) ZPO nonetheless, is unclear. It would be useful for these reasons

if the German legislator as part of its ongoing review of German arbitration law were to revisit its decision to extend § 1032(2) ZPO to arbitrations that are not seated in Germany. If § 1032(2) ZPO's exorbitant scope is maintained, German courts could well be inundated with tactical requests to declare arbitrations inadmissible and be forced to interfere globally in international arbitration proceedings.⁵⁷ ■

57 EU Member States may indeed feel compelled to make use of this remedy in order to comply with their duties under EU law, see *Rusche* IPRax 2021, 494-502.

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The Meltdown of the Energy Charter Treaty (ECT): How the ECT was ruined by the EU and its Member States

This article provides an overview of how the organs of the EU, in particular the European Commission (EC) and the Court of Justice of the EU (CJEU) together with the Member States, have ruined the Energy Charter Treaty (ECT) in a time span of only a few years. The analysis tracks the efforts of the EC as *amicus curiae* intervenor in multiple international arbitral proceedings and the CJEU's jurisprudence, which expanded its *Achmea* judgment and applied it to the ECT. On top of that, the recently announced intention by several Member States to withdraw from the ECT and to refuse to sign up to the revised ECT text, has resulted in a meltdown of the ECT. The consequences of these concerted efforts are that intra-EU treaty arbitration has been effectively banned and that the domestic courts of the Member States remain as the only available remedy. However, given the serious rule of law deficits in many EU Member States, this remedy seems rather useless. Thus, after having exhausted all domestic remedies, the European Court of Human Rights (ECtHR) is the only international court available to deal with investment related disputes. Again, given the significant backlog of cases at the ECtHR, it is very questionable if this option is of any relevance. For all these reasons, the authors conclude that effectively dropping the ECT and making the ECtHR the only international remedy available for European investors is a very disappointing outcome.

Dieser Beitrag gibt einen Überblick darüber, wie die Organe der EU, insbes. die Europäische Kommission (EK) und der Europäische Gerichtshof der EU (EuGH), zusammen mit den Mitgliedstaaten den Energiecharta-Vertrag in einer Zeitspanne von nur wenigen Jahren ruiniert haben. Die Analyse verfolgt die Bemühungen der EK als *amicus-curiae*-Intervenientin in mehreren internationalen Schiedsverfahren und die Rechtsprechung des EuGH, in der er sein *Achmea*-Urteil erweitert und auf den Energiecharta-Vertrag angewendet hat. Darüber hinaus hat die kürzlich angekündigte Absicht mehrerer Mitgliedstaaten, sich aus dem Energiecharta-Vertrag zurückzuziehen und die Unterzeichnung des erst kürzlich überarbeiteten Energiecharta-Vertrags zu verweigern, zu einem faktischen Ende des Energiecharta-Vertrags geführt. Die Folgen dieser konzertierten Bemühungen sind, dass Schiedsverfahren innerhalb der EU faktisch verboten wurden und dass die innerstaatlichen Gerichte der Mitgliedstaaten als einzig verfügbarer Rechtsbehelf übrig blei-

ben. Angesichts der gravierenden Rechtsstaatsdefizite in vielen EU-Mitgliedstaaten erscheint dieses Mittel jedoch eher nutzlos. Somit ist der Europäische Gerichtshof für Menschenrechte (EGMR) nach Ausschöpfung aller innerstaatlichen Rechtsbehelfe das einzige internationale Gericht, das für investitionsbezogene Streitigkeiten zur Verfügung steht. Auch hier ist es angesichts des erheblichen Rückstaus an Fällen beim EGMR sehr fraglich, ob diese Option überhaupt relevant ist. Aus all diesen Gründen kommen die Autoren zu dem Schluss, dass es ein sehr enttäuschendes Ergebnis ist, den Energiecharta-Vertrag faktisch aufzugeben und den EGMR zum einzigen internationalen Rechtsmittel zu machen, welches europäischen Investoren zur Verfügung steht.

I. Introduction

This article provides an overview of how the EU and its Member States have deliberately ruined the Energy Charter Treaty (ECT). After the introduction, we will zoom into the particular role of the European Commission (EC) acting as *amicus curiae* in practically all intra-EU investment disputes (II.). Subsequently, we will discuss the role of the Court of Justice of the EU (CJEU) and its jurisprudence, which has played a central role in the meltdown of the ECT (III.). Finally, we will wrap up this article with an outlook (IV.).

As we discussed a few years ago in the SchiedsVZ,¹ the *Achmea*² judgment of the CJEU has had significant implications for Investor-State Dispute Settlement (ISDS) clauses contained in bilateral investment treaties (BITs). In the meantime, the consequences of the *Achmea* judgment have spilled over into the ECT, which have, ultimately, led to its meltdown.

Following up on the *Achmea* judgment, 23 EU Member States have signed and ratified the Termination Agreement,

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1 *Lavranos/Singla*, *Achmea*: Groundbreaking or Overrated?, *SchiedsVZ* 2018, 348-358.

2 *Slowakische Republik v. Achmea BV*, CJEU Case C-284/16.

which not only formally terminates the BITs but also bans any future intra-EU BITs cases.³ Soon after the ban on ISDS and the termination of the intra-EU BITs was implemented, the question arose whether this ban would also apply to intra-EU ISDS disputes based on the ECT. The answer to this question was provided by the CJEU in its *Komstroy*⁴ judgment. Despite the fact that in contrast to intra-EU BITs, the ECT is a multilateral investment protection agreement with more than 50 Contracting Parties, including the EU and its Member States, the CJEU determined that the *Achmea* conclusions fully apply to the ECT.

The ban on intra-EU ECT disputes was recently formalized by the EU and its Member States in the context of the renegotiation of the ECT (so-called “ECT modernization process”), which was concluded in June 2022 with an “agreement in principle” by all ECT Contracting Parties.⁵ In the revised ECT,⁶ the EU and its Member States agreed on a “disconnection clause”, meaning that the ISDS provision of the ECT (Art. 26) is not applicable to intra-EU disputes any longer.

More recently, the European Commission published a proposal for a “subsequent Agreement on the interpretation of the ECT”⁷ that is to be signed and ratified by the EU and its Member States. This Agreement states in Art. 2:

“1. For greater certainty, the Contracting Parties confirm that the ECT does not apply, and has never applied to intra-EU relations.

2. For greater certainty, the Contracting Parties confirm, in particular, that, in accordance with paragraph 1, Article 47(3) ECT does not apply, and has never applied, to intra-EU relations. Accordingly, that provision cannot have produced any intra-EU legal effects when a Member State withdrew from the ECT prior to this agreement, nor shall it produce any intra-EU legal effects if a Member State withdraws from the ECT subsequently.”

Moreover, Art. 3 states that:

“For greater certainty, the Contracting Parties hereby confirm, in particular, that, in accordance with Article 2, Article 26 ECT does not apply, and has never applied, to intra-EU relations. Therefore, Article 26 ECT cannot serve and has never been capable of serving as legal basis for Arbitration Proceedings relating to intra-EU relations.”

While all seemed set and done for the formal adoption of the revised ECT text at the meeting of the ECT Contracting Parties, which was scheduled for 22.11.2022 in Mongolia, rather suddenly a chain of withdrawal announcements unfolded, starting with Poland, followed by Spain, France, the Netherlands, Germany, Belgium, Slovenia and Luxembourg.⁸ Eventually, the EU requested the ECT Secretariat to remove the adoption of the revised ECT text from the agenda and postpone it to April 2023.⁹ Two days later, the European Parliament adopted a Resolution calling for a “coordinated withdrawal” from the ECT by all EU Member States and the EU.¹⁰ The Resolution also urges the EU Member States to sign and ratify the subsequent agreement, which denies the application of the ECT and the sunset clause in intra-EU ECT disputes for the past and the future.¹¹

Whereas Poland used as justification for its withdrawal from the ECT the incompatibility of the ISDS provision contained in the ECT with EU law as per the *Achmea* and *Komstroy* judgments, the other EU Member States argued that the revised ECT text is not “green” enough and thus

presents an obstacle to the Paris Agreement and to the energy transition.

However, these arguments are equally surprising and unconvincing. As regards the incompatibility of the ISDS provision of the ECT with EU law, the revised ECT text makes very clear that no investment arbitration disputes between European investors and EU Member States will be possible any longer. This would be further backed up by the proposed subsequent agreement which arguably constitutes an “authentic interpretation of the ECT” by the EU and its Member States.

As regards the level of greening of the revised ECT, it should be noted that – as in CETA and other recent EU investment agreements – the ECT now contains an explicit provision on the “right to regulate” of States, to achieve legitimate policy objectives, such as the protection of the environment, including climate change mitigation and adaptation, protection of public health, safety or public morals. This is further backed up by the introduction of several specific provisions reaffirming the States’ obligations to implement the Paris Agreement regarding climate change and labor rights under International Labour Organisation conventions. Moreover, the revised ECT introduces a new level of flexibility by allowing Contracting Parties to selectively exempt themselves from certain important provisions of the ECT. The EU, its Member States and – interestingly – the United Kingdom have opted to carve-out fossil fuel-related investments from investment protection under the revised ECT. This applies to existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15.8.2023.

In short, the revised ECT text contains the strongest language of any trade or investment agreement as regards the right to regulate and has strong language on the need to meet the Paris Agreement targets. This is coupled with the flexibility to go further than other ECT members, a gradual carve out of fossil fuels from the treaty’s coverage and protection, and the banning of intra-EU ISDS claims. It is for this reason that the revised ECT text was “in principle” agreed upon by the EU and its Member States. Thus, it remains a mystery why only a few months later the very same countries suddenly considered the revised ECT text not to be “green” enough and announced their intention to withdraw from it.

3 Termination Agreement on intra-EU BITs, OJEU 2020 L 169/1.

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

5 ECT Secretariat, Public Communication explaining the main changes contained in the agreement in principle, 24.6.2022.

6 The leaked revised ECT text, dated 27.6.2022, is available at https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (last accessed on 7.12.2022).

7 Annex to the Communication from the Commission to the European Parliament and the Council, as well as to the Member States on an agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty, Brussels, 5.10.2022, COM(2022) 523 final.

8 See *Tietje*, Der Energiecharta-Vertrag im Kreuzfeuer der Kritik: Ist der Rücktritt vom Energiecharta-Vertrag wirklich ein großer Wurf der Ampelkoalition?, *Verfassungsblog*, 15.11.2022; *Tropper*, Withdrawal from the Energy Charter Treaty: The End is (not) Near, *Kluwer Arbitration Blog*, 4.11.2022.

9 ECT Press release, The 33rd Meeting of the Energy Charter Conference held under the Chairmanship of Mongolia, 22.11.2022.

10 EP, Joint Resolution on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934(RSP), 23.11.2022, paras. 17 ff.

11 EP, Joint Resolution on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934(RSP), 23.11.2022, para. 16.

It is noteworthy that other non-EU ECT Contracting Parties, such as Switzerland, have announced that they would sign and ratify the revised ECT.¹²

II. The EC intervening as *amicus curiae* in investment treaty disputes

1. EC appearing as an *amicus curiae* before ISDS arbitral tribunals

According to Art. 17 TEU, the EC – acting in its capacity as the “guardian of the EU Treaties” – has the task of enforcing EU law by monitoring the application of EU primary and secondary law, and ensuring its uniform application throughout the EU. In this capacity the EC has applied to intervene before numerous intra-EU arbitral tribunals (both based on intra-EU BITs and the ECT) and domestic courts as a non-disputing party or an *amicus curiae* to address the impact of the *Achmea* decision.¹³ In line with the *Achmea* judgment, the EC has been proactively attempting to convince arbitral tribunals that intra-EU investor-State arbitration is incompatible with EU law.¹⁴

Until very recently, all tribunals – with only one recent exception – before which the EC has appeared as a non-disputing party, have categorically rejected the EU’s argument that the *Achmea* judgment prevents them from exercising their jurisdiction.¹⁵

In this context, it is important to note that the *Achmea* judgment does not refer anywhere to the ECT.¹⁶ Nonetheless, several EU Member States have been attempting to use it as an argument to annul or set aside intra-EU awards rendered against them under the ECT. In particular, Spain (but also Germany, Italy, Romania, Netherlands, and the Czech and Slovak Republics), which is facing more than 50 intra-EU ECT claims,¹⁷ has been trying to use the *Achmea* judgment to vacate awards that have been rendered against it.¹⁸ Even after the CJEU expanded the ban on investor-State arbitration to intra-EU ECT disputes in its *Komstroy* judgment, arbitral tribunals have continued to reject the *Achmea* jurisdictional objection.¹⁹

These EU law objections essentially boil down to arguments such as that the primacy and autonomy of EU law supersede any dispute settlement provisions in intra-EU BITs or the ECT, and that the CJEU case-law of *Achmea*, *Komstroy* and *PL Holdings*²⁰ are relevant to, and binding on arbitral tribunals, and thus make intra-EU arbitrations incompatible with EU law. The fundamental argument of the EC is that intra-EU BITs are incompatible with EU law as they offer additional protection to investors having another EU nationality as compared to domestic investors who cannot rely on the ECT.²¹ The EC argues that such additional protection awarded from BITs is not only discriminatory, but also redundant since EU law itself offers sufficient legal remedies for investors to bring their claims before the domestic courts of EU Member States.

2. The position of ECT tribunals vis-à-vis the EC’s *amicus curiae* interventions

So far, barring the *Green Power*²² case (which we discuss in more detail below) none of the arguments made by the EC or the Member States ever convinced any of the ECT arbitral tribunals.²³ Nonetheless, so far, tribunals have granted the EC leave to intervene as *amicus curiae* in 35 petitions, while 13 petitions have been rejected.²⁴

While it goes beyond this article to analyse all the arguments used by the various ECT tribunals to reject the EC’s position, it suffices to summarize the *Vattenfall* tribunal’s “Decision on the *Achmea* Issue”²⁵ since this 70 pages long Decision is arguably the most extensive analysis of the various EU law objections raised by the EC.

a) The Decision on the *Achmea* Issue of the *Vattenfall* Tribunal

The *Vattenfall AB and others v. Federal Republic of Germany* case was initiated in 2012. The dispute was prompted by Germany’s decision to phase out nuclear power by 2022, in the aftermath of the disastrous events of Fukushima in 2011.²⁶ Subsequently, the *Vattenfall* group (which operated two of the nuclear plants) initiated ICSID arbitration proceedings against Germany for breaching its obligations under the ECT, claiming compensation for expropriation and breach of legitimate expectations.²⁷ The case was eventually settled by Germany, which reportedly agreed to pay 2,4 bln. EUR in compensation in total, of which *Vattenfall* received 1,6 bln. EUR.²⁸

In 2015, the EC filed an Application for Leave to intervene as a Non-Disputing Party before the Arbitral Tribunal under Art. 37(2) ICSID Convention. In light of the *Achmea* judgment, the Tribunal invited submissions from both the parties and the EC on the implications of *Achmea*.²⁹ On

12 Pressemittelug: Energie: Bundesrat genehmigt den modernisierten Energiecharta-Vertrag, 9.11.2022.

13 See *Simões*, A guardian and a friend? The European Commission’s participation in investment arbitration, Mich. State Int. Law Rev. 2017 Vol. 25/2, 234-303.

14 *Leventhal et al.*, The European Commission: *Ami Fidèle* or *Faux Ami*? Exploring the Commission’s Role as *Amicus Curiae* in ICSID Proceedings, EILA Rev. 2020/5, 70-91; *Lavranos*, Black Tuesday: the end of intra-EU BITs, Practical Law Arbitration Blog, 7.3.2018.

15 *Lavranos*, Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence to Permanent Conflict, Kluwer Arbitration Blog, 1.1.2022; *Leikin/Magnarelli*, The Future of Intra-EU ECT Claims in the Face of EC Opposition: Boom or Bust?, Kluwer Arbitration Blog, 15.9.2018.

16 *Lavranos*, Finishing the *Achmea*-job: how the European court gradually suffocates the ECT, Practical Law Arbitration Blog, 7.4.2021.

17 For a detailed analysis, see *Lavranos*, International Law Compliance Index (first edition), Report on Compliance with Investment Treaty Arbitration Awards 2022.

18 *Lavranos*, The Impact of EU Law on ISDS, Intra-EU BITs and the ECT (Chapter 3), Investor-State Arbitration 2022, ICLG.

19 See, e.g. *Cavalum v. Spain*, ICSID Case No. ARB/15/34, Award 29.9.2022; *Mathias Kruck and others v. Spain*, ICSID Case No. ARB/15/23, Award, 14.9.2022; *RREEF Infrastructure v. Spain*, ICSID Case No. ARB/13/30, Decision on Annulment, 10.6.2022.

20 *Republic of Poland v. PL Holdings Sàrl*, CJEU Case C-109/20, ECLI: EU:C:2021:875.

21 *Argyropoulou*, *Vattenfall* in the Aftermath of *Achmea*: Between a Rock and a Hard Place?, EILA Rev. 2019/4, 203-224.

22 *Green Power Partners K/S, SCE Solar Don Benito aps v. Kingdom of Spain*, SCC Case No. V2016/135, Award.

23 *Lavranos*, The Impact of EU Law on ISDS, Intra-EU BITs and the ECT (Chapter 3), Investor-State Arbitration 2022, ICLG.

24 For a detailed analysis, see *Ludwig et al.*, *Amici curiae* in Investment Arbitration, Jus Mundi Wiki Notes.

25 *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31.8.2018 (Decision on the *Achmea* Issue).

26 *Bernasconi-Osterwalder et al.*, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute *Vattenfall v. Germany (II)*, International Institute for Sustainable Development, 5.6.2012, Briefing Note.

27 *Bernasconi-Osterwalder et al.*, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute *Vattenfall v. Germany (II)*, International Institute for Sustainable Development, 5.6.2012, Briefing Note.

28 *Sanderson*, Germany settles with *Vattenfall*, GAR, 5.3.2021.

29 According to the Commission, *Achmea* also invalidates Art. 26 ECT; see Communication from the Commission to the European Parliament and the Council, Protection of Intra-EU Investment, COM(2018) 547/2.

31.8.2018, the *Vattenfall* Tribunal issued its detailed decision addressing the parties' submissions on the *Achmea* judgment.³⁰

For there to be direct implications of the *Achmea* judgment on the jurisdiction of the Tribunal, it was necessary for the Tribunal to consider whether EU law would apply.³¹ In order to do so, the Tribunal first examined Art. 26(6) ECT to decide whether the *Achmea* ruling (and EU law) was applicable in determining the jurisdiction of the Tribunal.

According to Art. 26(6) ECT, a tribunal shall decide the issues in dispute in accordance with the ECT and applicable rules and principles of international law. In its submissions, Germany contended that "international law" mentioned in Art. 26(6) ECT also includes EU law, and as a corollary, the *Achmea* judgment.³² Likewise, the EC argued that EU law was applicable to the Tribunal's jurisdiction on the grounds of Art. 31(3)(c) VCLT,³³ which states that treaty interpretation involves any relevant rules of international law applicable in the relations between the parties.³⁴

However, the Tribunal observed that Art. 26(6) ECT was only applicable to the merits of the case and not the jurisdiction of the Tribunal, and was, therefore, irrelevant.³⁵

Subsequently, Germany contended that even if Art. 26 ECT does not preclude intra-EU disputes, EU law prevails over the ECT owing to rules of conflict under public international law. The Tribunal rejected this contention on the premise that the subject matter of the *Achmea* decision and the ECT were markedly different. The Tribunal noted that the *Achmea* ruling made no mention of the ECT and the Tribunal was not tasked with presuming so.³⁶

Finally, the *Vattenfall* Tribunal explicitly underlined the point that any potential risk of non-enforceability of its award due to a possible incompatibility with EU law in the future is irrelevant for accepting its jurisdiction over the case.³⁷

For all these reasons, the Tribunal concluded that the *Achmea* judgment did not apply to an intra-EU investor-State arbitration under the ECT. Indeed, multiple ECT arbitral tribunals have followed this line, even after the CJEU's *Komstroy* decision (discussed below), which explicitly stated that also the arbitration clause within the ECT is incompatible with EU law.³⁸ In short, until very recently, there has been a universal, systematic and categorical rejection of all the EU law jurisdictional objections raised by the EC as *amicus curiae* intervenor.

b) The decision in *Green Power v. Spain*

However, this changed with the *Green Power v. Kingdom of Spain*³⁹ award issued in June 2022, in which a tribunal for the first time accepted the EU law arguments and declined its jurisdiction.⁴⁰

Before this award, a dissenting opinion by Prof. Marcelo Kohén in *Adamakopoulos et al. v. Cyprus*,⁴¹ presented the first publicly-known support of the intra-EU jurisdictional objection. In his opinion, Prof. Marcelo Kohén disagreed with his fellow co-arbitrators' analysis of the intra-EU jurisdictional objection⁴² which concluded that the Tribunal has jurisdiction.⁴³ Instead, he stated that he must show

"[...] due respect to the existence of other international courts and tribunals, bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions".

In other words, he advocated the acceptance of CJEU's exclusive jurisdiction over intra-EU BIT disputes.⁴⁴

In *Green Power*, as in all the other intra-EU disputes, the Tribunal had to consider whether its jurisdiction as per Art. 26 ECT would be foreclosed by the impact of EU law, in particular the CJEU's line of *Achmea* case-law.

In contrast to the overwhelming majority of arbitral tribunals, which have analysed jurisdictional matters from the perspective of public international law, which is logical considering the fact that their jurisdiction is rooted in international agreements, i.e., the BITs and the ECT, the *Green Power* Tribunal decided to approach this question differently by analysing its jurisdiction from the perspective of EU law. The conclusion of the Tribunal summarized the EU law perspective perfectly when it stated:

"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. Which specific norms can display this overriding character can be ascertained by reference to the case law of the CJEU. [...]"

The CJEU has consistently held this [primacy] principle to be applicable to the relations between the EU Treaties and other treaties concluded by EU Member States in their inter se relations. If any doubt could remain about the primacy of EU law, particularly Articles 267 and 344 TFEU, over Article 26 ECT in the relations among EU Member States, it has now been dispelled by the Komstroy Judgment."⁴⁵ [emphasis added]

From the outset, it is interesting to note that the Tribunal did not define what *lex superior* actually means. The full Latin phrase, which it does not use, is: *lex superior derogat legi inferiori*, which means the hierarchically superior rule

30 Decision on the *Achmea* Issue.

31 Decision on the *Achmea* Issue, para. 110.

32 Decision on the *Achmea* Issue, para. 110.

33 *Argyropoulou*, *Vattenfall* in the Aftermath of *Achmea*: Between a Rock and a Hard Place?, *EILA Rev.* 2019/4, 203-224.

34 Decision on the *Achmea* Issue, para. 110.

35 Decision on the *Achmea* Issue, para. 111.

36 Decision on the *Achmea* Issue, para. 213.

37 In para. 230 of the Decision on the *Achmea* Issue, the Tribunal simply concluded that: "The enforceability of this decision is a separate matter which does not impinge upon the Tribunal's jurisdiction."

38 See, e.g., *Mathias Kruck and others v. Spain*, ICSID Case No. ARB/15/23, Award, 14.9.2022; *Cavalum v. Spain*, ICSID Case No. ARB/15/34, Award, 29.9.2022; *RREEF Infrastructure v. Spain*, ICSID Case No. ARB/13/30, *ad hoc* Annulment Committee Decision, 10.6.2022.

39 *Green Power Partners K/S, SCE Solar Don Benito aps v. Kingdom of Spain*, Award, SCC Case No. V2016/135, 16.6.2022 (*Green Power Award*).

40 *Lavranos*, *Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain*: How EU Law Allegedly Trumps International Investment Law, *EILA Rev.* 2022/7, 166-199.

41 *Adamakopoulos et al. v. Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Prof. Kohén, 3.2.2020.

42 *Bohmer*, For The First Time, An Arbitrator Declines Jurisdiction Under An Intra-EU BIT – But Majority Disagrees, *IA Reporter*, 1.2.2020.

43 For a detailed analysis, see *McDonnell*, *Theodoros Adamakopoulos and Others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7.2.2020, *EILA Rev.* 2020/5, 315.

44 *Adamakopoulos et al. v. Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Prof. Kohén, 3.2.2020, para. 82.

45 *Green Power Award*, para. 469.

trumps the hierarchically inferior one.⁴⁶ However, it is questionable whether from the perspective of public international law, which ought to be the perspective of an international arbitral tribunal established on the basis of an international treaty (such as the ECT), a legal hierarchy between the ECT and EU Treaties actually exists. In other words, can it really be argued that EU law is hierarchically superior to the ECT?

The *Green Power* Tribunal worked around this problem by arguing that EU Member States are “part of a network of legal relations, including the ECT” and that in these relations the primacy of EU law applies, also regarding international agreements, such as the ECT.⁴⁷ Adopting this EU law perspective, the Tribunal had no difficulties to accept the CJEU’s *Komstroy* judgment as effectively binding on it. Indeed, the Tribunal stated rather sweepingly that:

“For this reason, there cannot be any doubt that the rationale of the *Achmea* judgment is relevant, indeed, decisive, for the analysis of investor-state arbitration clauses in general, whether these are included in intra-EU BITs or in a multilateral treaty such as the ECT.”⁴⁸ [emphasis added]

Such a statement would probably be more expected from a domestic court of a Member State rather than an international arbitral tribunal, unless of course, this tribunal considered itself in a similar position as a domestic court, which could have addressed a preliminary question to the CJEU and probably would have received the same *lex superior* answer.⁴⁹

As novel as the adoption of this EU law perspective seems to be at first sight, it must be noted that the seeds of this approach seem to have already been planted by the *Electrabel*⁵⁰ arbitral tribunal a decade ago, which stated that “EU law would prevail over the ECT in case of any material inconsistency”, although, ultimately, it concluded that there was no inconsistency between the ECT and EU law.⁵¹

It should be noted that so far the *Green Power* approach remains unique and has not been followed by other tribunals. Indeed, in several subsequent decisions arbitral tribunals continue to reject the EU law jurisdictional objections.⁵² It thus remains to be seen whether the *Green Power* approach remains an outlier. In any event, the efforts of the EC to successfully challenge the jurisdiction of international arbitral tribunals have – with one exception – failed. Indeed, for the *Green Power* Tribunal the fact that the seat of arbitration was in Stockholm, i. e., within the EU, and the dispute was arbitrated under the UNCITRAL Arbitration Rules and thus the Swedish Arbitration Act applied, was very important for arguing that it could not act in breach of EU law. *A contrario*, arbitral tribunals seated outside the EU and arbitrating disputes under the ICSID Convention are unlikely to consider themselves to be bound by EU law and CJEU jurisprudence. Indeed, this point was exactly the reason why the ICSID Annulment Committee in the *9REN Holding* case recently rejected Spain’s EU law jurisdictional objections.⁵³

III. CJEU’s jurisprudence and its application by EU domestic courts

Having discussed the efforts of the EC to eliminate intra-EU treaty arbitration, we now turn to the CJEU’s jurisprudence and its subsequent application by the domestic courts of EU Member States.

1. CJEU’s *ultra vires* decision in *Komstroy*

The *Komstroy* judgment, which extended the effects of *Achmea* to the ECT, came as the final nail in the coffin for intra-EU ECT arbitrations. The judgment generously lent a hand to the EC, Council, and several Member States – all aligned against the ECT for its inability to set modernization standards in compliance with the Union’s ambitious climate change policies.⁵⁴ True as this may be, one would be negligent to ignore that the CJEU greatly overstepped its mandate in *Komstroy*.⁵⁵

In short, *Komstroy* originated with a contractual dispute between Ukrainian energy producer *Ukrenergo* and Moldavian public company *Moldtranselectro*. In 2013, a Paris seated tribunal delivered an award in favor of *Ukrenergo*, which Moldova then sought to set aside by challenging the tribunal’s jurisdiction due to lack of a “protected investment”. In 2019, the Paris Court of Appeal stayed the setting aside proceedings and referred the dispute to the CJEU for a preliminary ruling on the definition of “investment” under the ECT. In parallel, the EC and some Member States called on the CJEU to rule on the (in)compatibility of intra-EU ECT arbitration with EU law – which, it is worth noting – was not remotely mentioned by the referring Paris Court.

The resulting preliminary ruling was nothing short of an *ultra vires* decision by the CJEU, which held, among other things, that (i) it had jurisdiction to interpret the ECT, even in a non-EU dispute; and that (ii) intra-EU ECT arbitration was incompatible with EU law as it undermined mutual trust within the EU legal order.⁵⁶ Effectively, with the *Komstroy* judgment, the CJEU explicitly extended its prior *Achmea* judgment to also ban intra-EU ECT arbitration.

With this decision, not only did the CJEU assess a dispute that was unconnected to EU law, but it also superimposed itself on the ECT – a multilateral investment agreement. It should be recalled that the ECT does not grant the CJEU with jurisdiction to impose its own interpretation of any provision upon the Contracting Parties.⁵⁷ By ruling on the incompatibility of the ISDS clause under Art. 26(1) ECT with EU law, the CJEU triggered a distinction in the interpretation of this provision for intra-EU and non-intra-EU disputes, which is in no way supported by the text of the ECT. There is nothing to suggest, for example, that a tri-

46 Lavranos, *Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain: How EU Law Allegedly Trumps International Investment Law*, EILA Rev. 2022/7, 166-199.

47 *Green Power* Award, para. 469.

48 *Green Power* Award, para. 436.

49 Lavranos, *Lex superior: How EU Law Trumps Investment Law*, Practical Law Arbitration Blog, 28.6.2022.

50 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30.11.2012, para. 4.191.

51 Lavranos, *Green Power K/S and SCE Solar Don Benito APS v Kingdom of Spain: How EU Law Allegedly Trumps International Investment Law*, EILA Rev. 2022/7, 166-199.

52 *LSG et. al. v. Romania*, ICSID Case No. ARB/18/19, Decision on Jurisdiction, Liability and Principles of Reparation, 11.7.2022; *Rockhopper v. Italy*, ICSID Case No. ARB/17/14, Award, 23.8.2022; *Mathias Kruck and others v. Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, 14.9.2022.

53 *9REN Holding S.à.r.l v. Spain*, ICSID Case No. ARB/15/15, Decision on Annulment, 17.11.2022.

54 Lavranos, *Finishing the Achmea-job: how the European court gradually suffocates the ECT*, Practical Law Arbitration Blog, 7.4.2021.

55 Lavranos, *The new Micula judgment and the overreach of the ECJ*, Practical Law Blog, 10.3.2022.

56 *Republic of Moldova v. Komstroy LLC.*, 2.9.2021, CJEU Case C-741/19.

57 Lavranos, *Is the Court of Justice the Ultimate Interpreter of the ECT?*, Kluwer Arbitration Blog, 9.4.2021.

bunal is authorized to decline jurisdiction based on competing obligations of a Contracting Party under a different legal order.⁵⁸

The CJEU also engaged in substantive discussion on the definition of “investment” under the ECT, which translates to a complete disregard for the powers of ECT tribunals to otherwise render (potentially) uniform definitions of its provisions.⁵⁹ The CJEU had no role here, and issuing a binding judgement for a non-EU matter on the premise that it may be relevant in intra-EU disputes was uncalled for.⁶⁰

In short, the CJEU sweepingly used the *Komstroy* proceeding to pre-emptively decide that intra-EU ECT arbitration is prohibited within the EU.⁶¹

2. Decentralized application of the intra-EU ISDS ban by national courts

Having established a EU-wide ban on intra-EU ECT arbitration, the focus has now turned to the domestic courts of EU Member States, which are legally bound to follow the CJEU’s jurisprudence. The following section provides a non-exhaustive list of recent examples, which illustrate how domestic courts in several EU Member States have – by and large – implemented the intra-EU ISDS ban.

a) *Raiffeisen Bank et. al. v. Croatia (II)*

The *Raiffeisen Bank et. al. v. Croatia (II)* case was initiated under the UNCITRAL Arbitration Rules in 2020 in response to a change in Croatian bankruptcy law and the alleged systematic refusal of the Croatian courts to provide legal protection. Claimants alleged a breach of the Austria-Croatia BIT.⁶² Although, Croatia had disputed the jurisdiction of the Tribunal, it accepted the Claimants’ offer to arbitrate and agreed to select Frankfurt am Main, Germany, as the seat of arbitration.

However, in line with the CJEU’s *Achmea* judgment, Croatia started proceedings before the Higher Regional Court of Frankfurt (OLG Frankfurt) arguing that the arbitral proceedings were inadmissible.⁶³ Under § 1032(2) of the German Code of Civil Procedure (ZPO), German courts can unilaterally review the admissibility of arbitral proceedings at the initial stages of arbitration.⁶⁴

The OLG Frankfurt upheld Croatia’s admissibility objection, which was in turn appealed by *Raiffeisen Bank* before the German Federal Court of Justice (BGH).⁶⁵ With reference to the CJEU’s three key judgements – *Achmea*, *Komstroy*, and *PL Holdings* – the BGH rejected the appeal in November 2021 and reaffirmed the applicability of the intra-EU ISDS ban within Germany. It held that even severe deficiencies within judicial systems of Member States in upholding the effectiveness of EU law do not warrant a departure from this finding.⁶⁶

b) *RWE/Uniper v. Netherlands*

The Netherlands, in responding to its first ever ICSID claim, similarly resorted to the unique scope of § 1032(2) ZPO to declare the two intra-EU ECT-based arbitrations inadmissible.⁶⁷ The arbitrations were initiated by two German companies, *RWE* and *Uniper*, over the phase-out of coal-fired power plants due to the Netherlands’ modification of its climate change legislation.⁶⁸

The Higher Regional Court of Cologne (OLG Köln) delivered its judgment in September 2022 and also ruled in favor of the intra-EU ISDS ban.⁶⁹ However, the difference

with the *Raiffeisen* case was that it concerned ICSID arbitral proceedings, thereby directly interfering in the self-contained regime of the ICSID Convention.

More specifically, the OLG Köln extended the application of the CJEU’s three key judgments, along with the *Micula*⁷⁰ judgment (which is discussed below in more detail), to invalidate Art. 26(1) ECT as a legal basis for any intra-EU arbitration. Most importantly, it held that (i) in case of conflict, EU law prevails over Germany’s international law obligations; (ii) the ICSID framework does not preclude the application of § 1032(2) ZPO; and (iii) ICSID tribunals cannot guarantee the autonomy of the EU legal order, over which the CJEU holds judicial monopoly.⁷¹ Accordingly, the OLG Köln decided that the Netherlands’ application was admissible, and that, due to the intra-EU nature of the dispute, no valid arbitration agreement existed between the parties. However, it should be noted that this decision has been appealed before the BGH and is currently pending, although it seems unlikely that the BGH will decide differently.

Finally, it must be mentioned that as part of the rescue package and subsequent nationalization of *Uniper* by the German Government, *Uniper* has withdrawn its case against the Netherlands.⁷² Thus, the *RWE* and *Uniper* disputes against the Netherlands have become effectively moot.

c) *Mainstream v. Germany*

A few months before, in April 2022, the Higher Regional Court of Berlin (KG Berlin) issued a contrasting decision from the OLG Köln, favoring a public international law perspective when faced with similar facts in the *Mainstream v. Germany*⁷³ dispute. The Dublin-based wind power invest-

58 *Lui*, *Komstroy* and its impact on intra-EU arbitration under the ECT, Practical Law Blog, 1.3.2022.

59 *Lavranos*, Is the Court of Justice the Ultimate Interpreter of the ECT?, Kluwer Arbitration Blog, 9.4.2021.

60 *Lavranos*, Is the Court of Justice the Ultimate Interpreter of the ECT?, Kluwer Arbitration Blog, 9.4.2021.

61 *Lenk*, CJEU jurisdiction over the Energy Charter Treaty and its compatibility with the Treaties: Opinion of AG Szpunar in Case C-741/19, EU Law Analysis Blog, 4.3.2021.

62 *Raiffeisen Bank International AG and Raiffeisenbank Austria d. d. v. Republic of Croatia (II)*, PCA Case No. 2020-15.

63 OLG Frankfurt 11.2.2021 – 26 SchH 2/20.

64 See for a critical analysis on the application of this provision in ISDS cases *Seelmann-Eggebert*, Too much of a good thing? – The exorbitant scope of § 1032(2) of the German Code of Civil Procedure, SchiedsVZ 2023, 32.

65 OLG Frankfurt 11.2.2021 – 26 SchH 2/20. See for a detailed analysis *Stompfe*, The Higher Regional Court of Frankfurt am Main is the first European Court to declare the *Achmea* Case a Landmark Decision with significance for all Intra-EU BITs, EILA Rev. 2021/6, 270-281.

66 BGH 17.11.2011 – I ZB 16/21; *Webland*, German Supreme Court confirms intra-EU BIT does not give access to investor-State arbitration in light of CJEU’s *Achmea* decision, Kluwer Arbitration Blog, 9.2.2022.

67 *Ballantyne*, Netherlands faces first ICSID claim over coal plant ban, GAR, 3.2.2021.

68 *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding B. V. and Uniper Benelux N. V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.

69 OLG Köln 1.2.2022 – 19 SchH 14/21.

70 *Micula v. Romania*, CJEU Grand Chamber 25.1.2022 – Case C-638/19 P.

71 OLG Köln 1.2.2022 – 19 SchH 14/21; *Markert, Doerneberg*, *RWE* and *Uniper*: (German) Courts rule on the admissibility of ECT-based ICSID arbitrations in intra-EU investor-State disputes, Kluwer Arbitration Blog, 3.11.2022.

72 *Bohmer*, UNIPER required to withdraw its intra-EU ECT claim against the Netherlands as part of German bailout package, IA Reporter, 22.7.2022.

73 *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26.

tor *Mainstream Renewable Power* had challenged Germany's changing renewable energy legislation by initiating ICSID arbitral proceedings based on the ECT against Germany.

The KG Berlin – in our view correctly – ruled, in light of the self-contained nature of the ICSID regime (to which Germany is a Contracting Party), that § 1032(2) ZPO cannot extend to it. It further ruled that since the *Achmea* and *Komstroy* judgments did not concern ICSID arbitrations, they cannot extend to it either.⁷⁴

However, the judgment of the KG Berlin has been appealed to the BGH by Germany, and a decision is expected in 2023.⁷⁵ Whatever the outcome of the BGH's decision, it is evident that the ISDS ban has created an even greater divide between EU law and international investment law.⁷⁶

d) *Veolia v. Lithuania*

An alleged breach of the France-Lithuania BIT led to initiation of an ICSID arbitration against Lithuania by French investor *Veolia* in February 2016.⁷⁷ The case made its way to the Lithuanian Supreme Court, which yet again upheld the CJEU's intra-EU ISDS ban.⁷⁸

In particular, it clarified the temporal validity of the *Achmea* judgment as being applicable from the time of its "entry into force". That is, since Lithuania's accession to the EU on 1.5.2004, the *Achmea* judgment applied to it. Accordingly, from this date onwards, Lithuania's intra-EU BITs must be considered to contain an invalid offer to arbitrate, which could not have been perfected by an investor.⁷⁹

e) *Slot Group and Strabag v. Poland*

A similar reasoning was adopted by the Paris Court of Appeal in setting aside proceedings regarding two arbitral awards – *Strabag* and *Slot Group*, against Poland in April 2022.⁸⁰ In *Strabag*, claimants alleged an infringement of the Austria-Poland BIT regarding their foreign investment in Warsaw hotels and initiated ICSID arbitral proceedings against Poland. The Paris Court set aside the partial arbitral award by concluding that the arbitral tribunal had wrongly upheld its jurisdiction in breach of the *Achmea* ruling.⁸¹

In *Slot Group*, Polish regulatory changes on gambling were alleged to have infringed the Czech Republic-Poland BIT. *Slot Group* had brought the arbitral proceedings against Poland based on the UNCITRAL Arbitration Rules. Not only did the Paris Court reject the tribunal's jurisdiction based on *Achmea*, but it also highlighted that Respondent States in intra-EU disputes are "obliged" to contest investment claims filed against them under intra-EU arbitral tribunals.⁸²

It is interesting to note that the Paris Court did not make any material distinction between the two cases and the fact that the *Strabag* arbitration concerned an ICSID case, and thus it clearly interfered with the self-contained regime created by the ICSID Convention.

f) *PL Holdings v. Poland*

In a judgement delivered on 14.12.2022, the Swedish Supreme Court set aside the award in *PL Holdings v. Poland* case following upon the answer given by the CJEU to its request for a preliminary ruling.⁸³

In the underlying award, a SCC tribunal had found Poland liable for breaching the Belgium/Luxemburg-Poland BIT in the context of dealing with the investor's assets in a troubled

Polish bank. *PL Holdings* was awarded approximately 208 mln. USD in damages.⁸⁴

Although this dispute was resolved on the basis of an *ad hoc* agreement to arbitrate, the CJEU extended its *Achmea* case-law to this situation and concluded that such *ad hoc* arbitration agreements were incompatible with EU law, since they would circumvent the prohibition against intra-EU BIT ISDS arbitral proceedings.⁸⁵

The Swedish Court concluded that the preliminary ruling of the CJEU was binding and that there was no ground to depart from the CJEU's assessment – opining that setting the award aside would not lead to a situation where the investor's human rights would be threatened. The Court further found that the validity of the arbitration agreement under EU law was a matter relevant to Swedish public policy, and it therefore opted to review the award under that ground. The judge ultimately concluded that the arbitration agreement in the respective BIT was incompatible with EU law, thus the award had been set aside.

3. Key takeaway

In sum, as they have done since *Achmea* (and now *Komstroy*), the EC and Member States have continued to advance *Achmea*-based objections to jurisdiction seized by arbitral tribunals under both intra-EU BITs and the ECT, and under both the ICSID Convention and the UNCITRAL Arbitration Rules. The examples of national court judgments above illustrate how the wider, decentralized ISDS ban within the EU is now increasingly having an impact in practice.⁸⁶ Eventually, since the domestic courts are bound by the jurisprudence of the CJEU, all domestic courts will implement the ISDS ban for all intra-EU BITs/ECT disputes.

The result of this is that there is a clear conflict between on the one hand the CJEU and domestic courts of the EU Member States, which impose a complete prohibition on intra-EU BITs/ECT arbitrations, whereas on the other hand

74 *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26; *Halonon*, Berlin Court finds that ICSID arbitrations are immune from *Achmea* and *Komstroy* – at least while they are ongoing, Kluwer Arbitration Blog, 21.7.2022.

75 *Halonon*, Berlin Court finds that ICSID arbitrations are immune from *Achmea* and *Komstroy* – at least while they are ongoing, Kluwer Arbitration Blog, 21.7.2022.

76 *Halonon*, Berlin Court finds that ICSID arbitrations are immune from *Achmea* and *Komstroy* – at least while they are ongoing, Kluwer Arbitration Blog, 21.7.2022.

77 *Veolia Environnement S.A. and others v. Republic of Lithuania*, ICSID Case No. ARB/16/3.

78 Supreme Court of Lithuania 18.1.2022 – e3K-3-121-916/2022; *Martinkute*, Never-ending *Achmea* saga: A new episode from Lithuanian courts confirms that intra-EU BITs are really over, Kluwer Arbitration Blog, 24.6.2022.

79 *Martinkute*, Never-ending *Achmea* saga: A new episode from Lithuanian courts confirms that intra-EU BITs are really over, Kluwer Arbitration Blog, 24.6.2022; see also, *Lavranos*, The decentralised implementation of the ISDS ban by EU domestic courts, Practical Law Blog, 26.9.2022.

80 *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1; *Slot Group a.s. v. Republic of Poland*, PCA Case No. 2017-10.

81 *Poland v. Strabag, Raiffeisen, Syrena Immobilien*, Annulment Action Paris Court of Appeal Decision No. 48, 19.4.2022.

82 *Poland v. Slot Group, Raiffeisen, Syrena Immobilien*, Annulment Action Paris Court of Appeal Decision No. 49, 19.4.2022.

83 *Charlotin*, Swedish Supreme Court sets aside *PL Holdings v. Poland* intra-EU award, IA Reporter, 14.12.2022.

84 *PL Holdings v. Poland*, Case No. V 2014/163, SCC Final Award, 28.9.2017.

85 *Polen v. PL Holdings*, CJEU Case C-109/20.

86 *Lavranos*, The decentralised implementation of the ISDS ban by EU domestic courts, Practical Law Blog, 26.9.2022.

arbitral tribunals still continue to reject the *Achmea*- and *Komstroy*-based EU law objections to their jurisdiction.

IV. CJEU's decision in *Micula*: The ban on recognition and enforcement of intra-EU awards

So far, we have focused on the ban of intra-EU BITs/ECT arbitrations based on denying the jurisdiction of arbitral tribunals. However, the CJEU and the Member States have gone one step further and have also imposed a ban on the recognition and enforcement of intra-EU awards within the EU, which is usually done by domestic courts.

The CJEU's *Micula* judgment provided the opportunity for the CJEU to effectively ban the recognition and enforcement of intra-EU ISDS awards within the EU. The *Micula* dispute began in the context of negotiations for accession of Romania to the Union, as a result of which Romania revoked tax incentives granted to the *Micula* brothers as these tax incentives were considered by the EC to be incompatible with EU law. The *Miculas* subsequently obtained a 178 mln. EUR ICSID award in 2013 against Romania for its breach of the FET obligations under the Romania-Sweden BIT.⁸⁷ When Romania began compensating the *Miculas*, thereby fulfilling its international legal obligations under the ICSID Convention, the EC issued Decision 2015/1470⁸⁸ stating that:

*“The payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Center for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 Micula a.o. v Romania [...] constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.”*⁸⁹

More importantly, the Decision prohibited Romania from fulfilling its international obligations under the ICSID Convention by ordering that:

*“Romania shall not pay out any incompatible aid referred to in Article 1 and shall recover any incompatible aid referred to in Article 1 which has already been paid out to any one of the entities constituting the single economic unit benefiting from that aid in partial implementation or execution of the arbitral award of 11 December 2013, as well as any aid paid out to any one of the entities constituting the single economic unit benefiting from that aid in further implementation of the arbitral award of 11 December 2013 that the Commission has not been made aware of or that is paid out after the date of this Decision.”*⁹⁰

The *Miculas* appealed against this Decision before the General Court of the EU, which agreed with the *Miculas* and set aside the Decision of the EC.⁹¹

However, the EC appealed against that judgment before the CJEU, which indeed overturned that judgment and fully concurred with the EC.⁹² The CJEU held that Romania is retroactively bound by the *Achmea* judgment, which in principle prevents it from enforcing the *Micula* award, even though its tax incentive scheme was applied and revoked prior to its accession to the EU. Furthermore, the CJEU held that accession to the EU has the effect of “replacing” remedies such as the ISDS clause provided under intra-EU BITs with the remedies available under EU law.

In this context, it must be recalled that the *Micula* dispute concerned an ICSID award, which means that the CJEU is essentially forcing Romania to violate its obligations under

the ICSID Convention by prohibiting it to pay the ICSID award. Consequently, the CJEU is negating Romania's international treaty obligations by putting EU law first.

Clearly, the Court once again delivered an *ultra vires* decision in *Micula* by replacing an ICSID tribunal's jurisdiction and extending its own, thus imposing itself on a self-contained regime to which the EU is not even a Contracting Party.⁹³ Moreover, this is outright inconsistent with Art. 351 TFEU,⁹⁴ which requires Member States to “take steps to eliminate” incompatibilities between pre-accession international treaties and EU law.⁹⁵ Accordingly, under Art. 351 TFEU Member States are required – as they have done by concluding the 2020 Termination Agreement for their intra-EU BITs – to suspend, renegotiate, or terminate EU-incompatible international treaties, but this is not the task of the CJEU.⁹⁶

At the same time, it must be noted that CJEU's *Micula* judgment essentially replicates the duty of the Member States contained in the Termination Agreement to “ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it”.⁹⁷

Whereas the *Micula* judgment did not concern an ECT dispute, it is safe to assume that the CJEU, the EC and the Member States consider it applicable to intra-EU ECT disputes too. However, there is an important difference between the ECT and intra-EU BITs, and that is the fact that the ECT is a multilateral investment treaty with more than 25 non-EU Contracting Parties. Accordingly, it would seem *ultra vires* if the EU could impose the supremacy of EU law to the other non-EU ECT Contracting Parties. Similarly, the ICSID Convention has been signed and ratified by more than 150 States around the world. Again, it would seem objectionable why an American or Australian court would be bound by the CJEU's jurisprudence. Indeed, US courts have started to enforce the *Micula* award, and more recently in 2021, the Federal Court of Australia enforced the *Eiser* ECT award against Spain.⁹⁸

Nonetheless, the CJEU continues to ignore the fact that both – the ECT and the ICSID Convention – are international treaties, which are part of the Member States' external obligations and relations, and a manifestation of their willing-

87 *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11.12.2013.

88 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania, Arbitral award *Micula v Romania* of 11.12.2013, OJEU L 232, 4.9.2015, 43-70.

89 Commission Decision (EU) 2015/1470, Art. 1.

90 Commission Decision (EU) 2015/1470, Art. 2(1).

91 *Micula v. Romania*, General Court 18.5.2019 – Cases T-624/15, T-694/15 and T-704/15.

92 *Micula v. Romania*, CJEU Grand Chamber 25.1.2022 – Case C-638/19 P.

93 *Woopen*, Why *Komstroy* Cannot be the Last Word: more investment into greening the economy requires to bury *Achmea*, *Komstroy*, *Micula* and others (Part I and II), EFILA Blog, 16.11.2022; *Lavranos*, The new *Micula* judgment and the overreach of the ECJ, Practical Law Blog, 10.3.2022.

94 *Lavranos*, Art. 351 AEUV, in von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, Kommentar, 7. Aufl. 2015, Rn. 9, 10.

95 *Lavranos*, The new *Micula* judgment and the overreach of the ECJ, Practical Law Blog, 10.3.2022.

96 See *Reuter*, Taking Investors' Rights Seriously: The *Achmea* and *CETA* Rulings of the European Court of Justice Do Not Bar Intra-EU Investment Arbitration, *ZaöRV* 2020/80, 379-427.

97 Termination Agreement, Art. 7 (b).

98 *Ioan Micula et al. v. Government of Romania*, US D.C. District of Columbia 11.9.2019 – Case No. 17-cv-02332; *Eiser Infrastructure Ltd v. Kingdom of Spain*, Federal Court of Australia 24.2.2019 – FCA 157.

ness to be legally bound by them.⁹⁹ The CJEU disregards this and as always continues to seek refuge for all of its findings under the nebulous umbrella of “autonomy” and “primacy” of EU law – which, in practice, have no standing at the public international law level.¹⁰⁰

V. Outlook

In a joint effort, the CJEU, the EC and the Member States have effectively ruined the ECT in a short time span of a few years.

In addition to the alleged incompatibility of its ISDS provision with EU law, more recently, the incompatibility with the Paris Agreement has been added as another argument for withdrawing from the ECT. Whether or not the ECT is promoting and protecting “dirty” fossil fuel energy production as is often claimed cannot be discussed here in detail. It suffices to note that the overwhelming majority of ECT disputes concern renewable energy disputes and thus have been used to protect climate friendly energy producers from being expropriated.¹⁰¹

In any event, the process of the meltdown of the ECT has been set in motion by the multiple announcement of several important Member States, such as Germany, France, Spain, Poland and the Netherlands, to withdraw from the ECT as well as by the Resolution of the European Parliament. It remains to be seen what is going to happen until April 2023, in particular, whether a common position for a “*coordinated withdrawal*” by all EU Member States and the EU will be agreed upon.

This means that the ECT remains in limbo for the time being, as there is no decision on the revised ECT but also no decision for a complete withdrawal of all EU Member States and the EU itself yet. Consequently, the less climate friendly current ECT text remains in force, which is hardly the result that the EU and the Member States wanted in the first place. However, looking at the developments regarding intra-EU BITs, it can be expected that sooner rather than later all EU Member States and the EU will withdraw from the ECT, and all intra-EU ECT arbitrations will be prohibited as well as the recognition and enforcement of any such awards.

Accordingly, as the CJEU and the EC always repeat, the only remedy for investors is the domestic courts of the EU Member States. However, as has been acknowledged by the CJEU and the EC themselves there are serious rule of law deficits in several EU Member States, in particular as regards the lack of independence and impartiality of domestic courts.¹⁰² Therefore, this remedy does not seem very attractive. Hence, after having exhausted all domestic remedies the only available option is the European Court of Human Rights (ECtHR) in Strasbourg.¹⁰³ Again, it falls outside the scope of this article to discuss the question whether the ECtHR would be capable of effectively dealing with investment related disputes, especially in light of the backlog of thousands of cases. Nonetheless, for European investors it is the only international court available, and it has indeed decided a few investment related cases in the past.¹⁰⁴ Hence, it is worth examining the pros and cons of the ECtHR in more detail.

In any event, the EU and its Member States have pushed themselves to the sidelines rather than being the motor of the ECT reform, in particular regarding the energy transition and the de-coupling from Russian oil and gas. That is making non-EU States such as the UK and Switzerland¹⁰⁵ very interesting “safe havens” for energy investors who look for continuous ECT protection.

From the perspective of the EU and its Member States, this can only be a rather disappointing outcome. ■

⁹⁹ With the notable exceptions of Italy which has withdrawn from the ECT in 2016 and Poland which never ratified the ICSID Convention.

¹⁰⁰ *Gáspár-Szilágyi*, Does the Court of Justice of the EU misunderstand investment law and investment treaty arbitration?, *International Economic Law and Policy Blog*, 3.2.2022.

¹⁰¹ *Lavranos*, *International Law Compliance Index* (first edition), Report on Compliance with Investment Treaty Arbitration Awards 2022.

¹⁰² *Kochenov/Lavranos*, Achmea versus the Rule of Law: CJEU’s Dogmatic Dismissal of Investors’ Rights in Backsliding Member States of the European Union, *HJRL* 2021/14, 195-219.

¹⁰³ *Nardell/Rees-Evans*, The agreement terminating intra-EU BITs: are its provisions on ‘New’ and ‘Pending’ Arbitration Proceedings compatible with investors’ fundamental rights?, *Arb. Int.* 2021, 197-237.

¹⁰⁴ *Fanou/Tzevelekos*, The Shared Territory of the ECHR and International Investment Law, in Radi (ed.), *Research Handbook on Human Rights and Investment*, 2018, 93-136.

¹⁰⁵ It should be noted that the Swiss Government reportedly decided to sign the revised ECT text, see *Pressemitteilung, Energie: Bundesrat genehmigt den modernisierten Energiechartavertrag*, 9.11.2022.

Veranstungsbericht

By Tanja Stoß, Stuttgart*

DIS40 Autumn Conference and DIS Autumn Conference 2022

I. DIS40 Conference “ESG – Dawn of A New Era of Disputes in International Arbitration?”

The DIS40 Autumn Conference on 14.9.2022 commenced with welcoming remarks from DIS40 Co-Chairs *Johanna Büstgens* (*Hanefeld Legal*) and *Alessandro Covi* (*Herbert Smith Freehills*). In their introduction to the agenda, they termed ESG a “buzzword” whose meaning – in particular for the field of international arbitration – the various panels would explore in the course of the conference day.

1. Keynote Speech “ESG – Three letters and a big question mark”

Katrine R. Tvede (*Morgan, Lewis & Bockius*) and *Marc Jacob* (*DLA Piper*) introduced the audience to the “E”nvironmental, “S”ocial and “G”overnance aspects generally referred to under the umbrella-term “ESG”. They began by

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