

# European Investment Law and Arbitration Review

*Published under the auspices of Queen  
Mary University of London and EFILA*

VOLUME 6 (2021)

*Edited by*

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LEIDEN | BOSTON

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# The ECT, *Achmea* and Intra-EU Arbitration – Swedish Court Requests Preliminary Ruling from the CJEU

*Anina Liebkind\**, *Fredrik Norburg\*\**, *Ossian Dittmer Hvarfner\*\*\**

## Abstract

The Intra-EU Energy Charter Treaty (ECT) saga moves closer to the precipice in Sweden. In March 2021, the Svea Court of Appeal requested a preliminary ruling from the Court of Justice of the European Union (CJEU) in a pending challenge proceeding relating to the ECT, and stayed the proceedings in three similar cases, although it had twice previously denied seeking a request for a preliminary ruling. In all of the cases, *Achmea* has been raised as a basis for the action. This case note will set out the key issues in the pending ECT cases before the Svea Court of Appeal and detail the specific case in which a preliminary ruling from the CJEU has been requested as well as the questions the preliminary ruling will address.

## 1 Introduction

The ECT is a frequently used investment treaty for claims by European investors against European Union Member States. Several Member States are facing dozens of claims under the ECT because of the retroactive withdrawal of guaranteed feed-in tariffs for renewable energy. Under the ECT, an investor may choose between different dispute resolution mechanisms, and one possible choice is arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules). Consequently, a number of investor-state awards under the ECT have been rendered in Sweden under the SCC Rules.

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As of December 2020, five challenge cases were pending before Swedish courts in which *Achmea*<sup>1</sup> has been raised as a basis for the action. All five cases concern intra-EU investment disputes, one under a bilateral investment treaty (BIT) and four under the ECT.

The challenge proceedings under the BIT were rejected by the Svea Court of Appeal in February 2019.<sup>2</sup> The Svea Court of Appeal held, *inter alia*, that the arbitration clause in the BIT was invalid, referring to *Achmea*. However, since the Member State in question (Poland) had, according to the Svea Court of Appeal, not objected to the tribunal's jurisdiction in due time, Poland's action was rejected. The judgment has been appealed to the Supreme Court where it is currently pending.<sup>3</sup> In December 2019, the Swedish Supreme Court decided to make a request for a preliminary ruling from the CJEU.<sup>4</sup> The preliminary ruling requested in the intra-EU BIT case concerns whether Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU), as interpreted in *Achmea*, mean that an arbitration agreement is invalid between a Member State and an investor from another Member State, despite the fact that the Member State has refrained from raising a timely jurisdictional objection in the arbitration proceedings.<sup>5</sup>

The four cases concerning the ECT are still pending before the Svea Court of Appeal. Though the Svea Court of Appeal initially did not consider it necessary to request a preliminary ruling from the CJEU in an ECT-related challenge proceedings where Spain is the claimant, the Svea Court of Appeal in March 2021 requested a preliminary ruling in an ECT case where Italy is the claimant, and stayed the proceedings in the other three pending cases, including the case where it initially denied a request for a preliminary ruling.

This case note will set out the key issues in the pending ECT cases before the Svea Court of Appeal and describe in further detail the case in which a preliminary ruling from the CJEU has been requested, and the questions that the preliminary ruling concerns in more particular.<sup>6</sup>

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1 CJEU Case C-284/16 *Slovak Republic v Achmea BV*, EU:C:2018:158.

2 Decision of the Svea Court of Appeal, 22 February 2019, Case No T 8538-17 and T 12033-17.

3 Swedish Supreme Court Case No T 1569-19.

4 CJEU Case C-109/20, Request for a preliminary ruling from the Högsta domstolen (Sweden) lodged on 27 February 2020 – *Republic of Poland v PL Holdings Sàrl*, OJ C 161, 11 May 2020, p 40.

5 *ibid.*

6 At the time this article was authored (15 April 2021) the request for a preliminary ruling by the Svea Court of Appeal had recently been submitted. Meanwhile, on 26 October 2021, the CJEU Grand Chamber ruled that: "Articles 267 and 344 TFEU must be interpreted 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 continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international

## 2 Overview of the Pending ECT-Related Set-Aside Proceedings before the Svea Court of Appeal

### 2.1 *Spain v Investors I and II*

In May 2018, Spain challenged an arbitral award<sup>7</sup> against Novenergia II – Energy & Environment (SCA), SICAR, a Luxembourg company (*Spain v Investors I*).<sup>8</sup> The SCC award granted EUR 53.3 million in damages to the Luxembourg company on the grounds that Spain had, as an effect of Spain's reform to its renewable energy subsidy regime, violated standards of fair and equitable treatment under the ECT. The arbitral award was issued less than a month before the *Achmea* ruling.<sup>9</sup> In the challenge proceedings, Spain has on two occasions requested that the Svea Court of Appeal submit a request for a preliminary ruling to the CJEU, and on both occasions the court denied the request on the ground that it was currently not necessary to obtain a preliminary ruling.<sup>10</sup>

In February 2019, Spain challenged another SCC award<sup>11</sup> against the Luxembourg companies Foresight Luxembourg Solar 1 S.à.r.l., Foresight Luxembourg Solar 2 S.à.r.l., the Italian companies GWM Renewable Energy I S.p.A. and GWM Renewable Energy II S.p.A., and the Danish company Athena Investments A/S (*Spain v Investors II*).<sup>12</sup> The fact patterns in the Spanish cases are largely the same. Spain based its claim on section 34 of the Swedish Arbitration Act claiming that the arbitral tribunal lacked jurisdiction, for the following reasons.

First, there was no valid arbitration agreement between the parties as Article 26 ECT does not cover intra-EU disputes. Second, there is no valid arbitration agreement between the parties as Article 26 ECT contradicts EU law and is not applicable in intra-EU disputes. Third, the arbitral award includes examination of issues that under Swedish law may not be determined by an arbitral

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agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles." CJEU Case C-109/20 *Republic of Poland v PL Holdings Sàrl*, ECLI:EU:C:2021:875.

7 *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No 2015/063, Award, 15 February 2018, <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf> accessed on 14 April 2021.

8 Svea Court of Appeal Case No T 4658-18.

9 *Achmea* (n 1) paras 55–60.

10 Decisions of the Svea Court of Appeal, 25 April 2019 and 27 May 2020, Case No T 4658-18.

11 *Foresight Luxembourg Solar 1 S.à.r.l., et al. v Kingdom of Spain*, SCC Case No 2015/150, Award, 14 November 2018, <https://www.italaw.com/sites/default/files/case-documents/italaw10142.pdf> accessed on 14 April 2021.

12 Svea Court of Appeal Case No T 1626-19.

tribunal. Fourth, the arbitral award contradicts the fundamental principles of the Swedish legal system.

The underlying dispute between the parties concerned a favourable regime that Spain enacted in 2007 for renewable energy to attract foreign investors, and that Spain subsequently began to overhaul in 2010 and replaced in 2013. The Investors claimed that the measures taken by Spain in 2010–2014 were in breach of the ECT, namely Article 10(1) (fair and equitable treatment) and Article 13 (illegal expropriation). The Investors claimed that they had legitimate expectations that the tariffs set out in the 2007 regime would not be changed. Spain disputed the claims on the basis that they had the right to amend their laws, invoking a decision from the European Commission (Commission) that had accepted the 2014 decree as acceptable state aid,<sup>13</sup> and noted that the 2007 decree had never been notified to the Commission. As the decree had not been notified the Commission, the Commission considered that Investors should not have any legitimate expectations to receive state aid thereunder. Based on the Commission's view, the measures taken could not be considered in breach of fair and equitable treatment.<sup>14</sup>

The arbitral tribunal considered the Commission's findings and considered that it did not include an examination of the 2007 regime. The arbitral tribunal therefore found that the Commission's decision did not consider the question of whether the Investors were entitled to have legitimate expectations on whether the 2007 regime could change or not. One of the arbitrators dissented, stating that international law should be applied to the dispute according to Article 26(6) ECT, that EU Law is a part of the rules and principles of international law, and EU Law should be applied to the merits of the dispute. Moreover, the dissenting opinion stated that the Commission's decision was a manifestation of public policy binding on all Member States, and on all other subjects subordinated to the EU treaty system. The dissent also stated that the application of EU law would entail respecting the Commission's decision, that the new state aid system was legal, and that the arbitral tribunal cannot award damages based on the new system being illegal. Furthermore, the Spanish courts had reached the same conclusion as the Commission concerning the legality of the new system.

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13 Commission Decision, SA.40348 (2015/NN), OJEU 2017/C 442/01 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:442:FULL&from=EN> accessed on 14 April 2021.

14 Communication from the European Commission, Letter to the Member State, C(2017) 7384 final, 10 November 2017, EUT C 442, 22 December 2017, 1, [https://ec.europa.eu/competition/state\\_aid/cases/258770/258770\\_1945237\\_333\\_2.pdf](https://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf) accessed on 14 April 2021.



## 2.2 *Italy v Investors I and II*

In March 2019, Italy challenged an SCC award<sup>15</sup> against Athena Investments A/S, NovEnergia II – Energy & Environment (SCA), SICAR, and the Italian company NovEnergia II Italian Portfolio SA (*Italy v Investors I*).<sup>16</sup> In April 2019, Italy challenged another SCC award<sup>17</sup> against the Italian company CEF Energia B.V. (*Italy v Investors II*).<sup>18</sup> The fact patterns and legal issues in the two cases are largely the same. Below we will focus on the former, as this is the case in which the Svea Court of Appeal ultimately decided to request a preliminary ruling from the CJEU.

The underlying dispute concerned a series of regulatory measures enacted and subsequently retracted by Italy. Between 2005 and 2012, Italy had adopted a series of decrees as part of an effort to harmonize its legislation regarding renewable energy with the rest of the EU, and to encourage investment in that sector. One of the measures adopted by Italy was a series of decrees governing an incentive payment or subsidy structure aimed at operators of solar plants. Italy also enacted a regulation according to which smaller solar plants were entitled to sell electricity to a state-owned enterprise for a guaranteed minimum price. Against this background, the Investors carried out investments between 2008 and 2013 in several Italian companies with ownership interests in Italian solar plants.

Subsequently, between 2013 and 2014, Italy enacted changes to the regulations in several respects through the so-called “Spalma-incentivi Decree”,<sup>19</sup> which in many ways altered the conditions for receiving subsidies and the manner in which payments were calculated. Companies receiving subsidies were also charged an annual administrative fee. Moreover, legislation affecting the applicable tax rates for some energy producers, including the Investors’ Italian subsidiaries, was also enacted.

Following these legislative developments, on 7 July 2015 the Investors launched an arbitration where they argued that the measures adopted by Italy through *inter alia* the Spalma-incentivi Decree had constituted a breach of Article 10(1) of the ECT concerning fair and equitable treatment. The Investors

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15 *Greentech Energy Systems A/S, et al v Italian Republic*, SCC Case No v 2015/095, Award, 23 December 2018, <https://www.italaw.com/sites/default/files/case-documents/italaw10291.pdf> accessed on 14 April 2021.

16 Svea Court of Appeal Case No. T 3229-19.

17 *CEF Energia BV v Italian Republic*, SCC Case No 158/2015, Award, 16 January 2019, [https://www.italaw.com/sites/default/files/case-documents/italaw10557\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw10557_0.pdf) accessed on 14 April 2021.

18 Svea Court of Appeal Case No T 4236-19.

19 Law Decree No 91/2014 of 24 June 2014, Italian Official Gazette No 144 of 24 June 2014.

had made their investments under the reasonable expectation that the subsidiaries would have remained unaltered for the foreseeable future. By promising, and then revoking or limiting these economic incentives, Italy had violated its obligations pursuant to the ECT.

With respect to the grounds for the arbitral tribunal's jurisdiction, the claimant invoked Article 26 ECT, claiming that Italy had consented to arbitration in accordance with Article 26(3)(a) ECT by signing and ratifying the ECT and had granted Investors the right to submit disputes to arbitration in Article 26(4)(c). Notwithstanding the objections raised by Italy under *Achmea*, the arbitral tribunal found that it had jurisdiction to hear the case.<sup>20</sup> In its award, the arbitral tribunal determined that Italy had breached Article 10(1) ECT and awarded the Investors damages of EUR 11,9 million plus interest.<sup>21</sup>

On 25 March 2019, Italy challenged the arbitral award before the Svea Court of Appeal, arguing that the arbitral tribunal lacked jurisdiction under the ECT, and requested the Svea Court of Appeal to seek a preliminary ruling from the CJEU regarding the compatibility with EU law of intra-EU arbitration under the ECT. Reversing its position in *Spain v Investors I*, in which the Svea Court of Appeal had twice denied a petition to request a preliminary ruling, the Svea Court of Appeal requested a preliminary ruling on 1 March 2021 from the CJEU.

### 3 The Proceedings before the Svea Court of Appeal that Resulted in a Request for a Preliminary Ruling in *Italy v Investors I*

#### 3.1 *Italy's Position*

In the Svea Court of Appeal proceedings, Italy claimed the following. First, that the award should be set aside because Article 26 of the ECT does not contain a valid offer to arbitrate, and therefore, no valid arbitration agreement has been concluded between the parties. Second, if Article 26 of the ECT should be applied to intra-EU disputes, the provision is nevertheless contrary to EU law. Italy asserted that Article 267 and 344 TFEU prohibited an intra-EU application of Article 26 of the ECT. Third, Italy also claimed that the award was invalid according to Swedish law, due to mainly the same factors since the arbitral tribunal had tried issues not within its jurisdiction. Fourth, Italy argued that the award was invalid since the award and the manner in which it had been rendered were contrary to fundamental principles of the Swedish legal system.

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<sup>20</sup> *Greentech Energy Systems v Italy*, Award (n 15) paras 335–403.

<sup>21</sup> *ibid* para 594.

In the following, we will examine the two first of these arguments in more detail as they are the central questions for the request for a preliminary ruling.

Italy argued that the ECT should be interpreted in a manner that entailed that intra-EU investment arbitration was incompatible with the ECT *ab initio*. Italy's arguments relied on both the Vienna Convention on the Law of Treaties of 1969 (VCLT) and EU law, since Italy asserted that in intra-EU disputes, the ECT had to be interpreted in accordance with EU law. This followed from the fact that the EU was a party to the ECT and, according to established case-law of the CJEU in, for example, *Western Sahara Campaign*,<sup>22</sup> that international agreements concluded by the EU are regarded as integral parts of the EU legal order. The provisions of those agreements must therefore be compatible with EU law. This in turn meant that the ECT had to be interpreted in accordance with EU law within the union. Italy asserted that it was apparent already from the wording of Article 26(1) ECT that it was inapplicable in intra-EU disputes. Article 26(1) ECT states that:

Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

According to Italy, this provision could not be relied upon in intra-EU disputes since an investment by an Investor from one EU Member State in another EU Member State could not be regarded as having been made in another contracting party's area. Article 1(2) ECT defines "Contracting Party" as "a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force". A "Regional Economic Integration Organisation" is defined in Article 1(3) ECT as:

an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.

As a signatory to the ECT, the EU constitutes such a Regional Economic Integration Organisation, and thus also a Contracting Party. Italy maintained

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<sup>22</sup> CJEU Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, EU:C:2018:118, paras 45–46.

that it was the EU's territory, or "Area", and not that of the individual Member State involved which was relevant when interpreting the ECT. Member States could not be regarded as different Contracting Parties pursuant to the ECT with respect to areas of law where the EU is afforded legislative competence. Since investment protection, competition law and energy regulations are subject to full or partial harmonization, and such legal issues could arise in any investor-state dispute pursuant to the ECT, an intra-EU dispute would not be a dispute "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former". Instead, it would be a dispute where the Investor, the Investment as well as the respondent Member State are located in the same Area, i.e. that of the EU.

Italy also invoked Article 16 ECT, according to which, if two or more Contracting Parties had entered into an international agreement prior to joining the ECT which related to dispute resolution, the international agreement with the most favourable provision to the Investor or Investment would have priority. Italy claimed that the protection afforded under EU law should be regarded as more favourable than that of the ECT, which would thus rule out an application of the ECT to intra-EU investment disputes.

Italy put forward several other arguments in favour of its interpretation of the ECT. It referred to the purpose of the ECT and contended that the aim of the ECT had been neither to offer protection for investments already protected under EU law, nor to enact a dispute settlement mechanism for disputes covered by EU law. Italy maintained that the background to the treaty had been a desire to regulate the relationship between the energy sector of the east, i.e., the former Soviet and Warsaw-pact states, and the energy sector of the west, i.e., the EU. The object of the ECT had not been to regulate the internal energy market of the EU.

Furthermore, Italy argued that the CJEU had determined that arbitration under Article 8(2) of the BIT in *Achmea* was contrary to Article 267 and 344 TFEU, and that this included intra-EU investment arbitration under Article 26 ECT.

Italy argued that in an arbitration under the ECT, an arbitral tribunal might have to interpret and apply EU law, in the same manner as in an arbitration under a BIT as was done in the *Achmea* case. In disputes relating to the ECT, several issues of law are subject to some degree of harmonization between the Member States, such as the inner market for energy and subsidies for renewable sources of energy might arise. Moreover, EU provisions relating to some of the basic freedoms of the EU, such as the free movement of capital and services, in addition to issues relating to the freedom of establishment, non-discrimination and so on could also become applicable.

The underlying dispute between Italy and the Investors which concerned the Spalma-incentivi Decree could also include interpreting and applying EU law. In fact, in another case before an Italian regional administrative court in Lazio relating to the Spalma-incentivi Decree the Italian court had requested a preliminary ruling from the CJEU on 20 November 2018 regarding the relationship between the ECT and EU law.<sup>23</sup>

Italy argued that it followed from the choice-of-law clause in Article 26(6) ECT, that EU law constitutes part of the applicable law of the dispute. Article 26(6) states that “[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”. Since EU law forms part of international law in the meaning of the ECT, an arbitral tribunal deriving its jurisdiction from the ECT would have to apply EU law.

Moreover, Italy argued that EU law constitutes international law as apparent from, *inter alia*, *Achmea*, where the CJEU noted that EU law constituted a legal system derived from an international agreement between the Member States.<sup>24</sup> Several arbitral tribunals have expressed support of this conclusion. In the case of *Electrabel v Hungary*,<sup>25</sup> the arbitral tribunal accounted for three distinct manners in which EU law applied in its Member States: EU law is international law because it is rooted in international treaties between the Member States; EU law as a whole constitutes a regional system part of the international legal order; and, finally, EU law is also applied as national law of the Member States, which does not deprive it of its international legal nature.<sup>26</sup>

Italy then turned to discussing the nature of an arbitral tribunal composed in accordance with Article 26 of the ECT and stated that it could not be regarded as a court within a Member State in the meaning of Article 267 TFEU, and it could not request preliminary rulings. The limited judicial review possible through a set-aside procedure of such an arbitral tribunal’s award was also not sufficient according to *Achmea*. According to Italy, the fact that the EU itself is

23 CJEU Case C-798/18 Request for a preliminary ruling from the Tribunale Amministrativo Regionale per il Lazio (Italy) lodged on 17 December 2018 – *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others v Ministero dello Sviluppo Economico, Gestore dei servizi energetici (GSE) SpA*, [2019] OJEU C 122, 1.4.2019, 6–7. The case is currently pending before the CJEU. However, it does not concern an intra-EU dispute but a domestic case.

24 *Achmea* (n 1) para 41.

25 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No ARB/07/19, Award 25 November 2015, <https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf> accessed on 14 April 2021.

26 *ibid* paras 4.120, 4.122, 4.124.

a party to the ECT does not change this conclusion since an arbitral tribunal constituted in accordance with the ECT may still have to interpret EU law.

### 3.2 *The Investors' Position*

According to the Investors, international treaties such as the ECT must as a starting point be interpreted in accordance with the “ordinary meaning” of the wording of the treaty, as set out in Article 31 of the VCLT. In the Investors' view, the wording of Article 26 ECT was clear in that it contained no exception for intra-EU disputes, and thus in principle, the correct interpretation was clear based on the wording.

Article 1(3) of the ECT could not, in the Investors' view, be interpreted as prohibiting intra-EU arbitrations. The Investors cited the award on jurisdiction in *Vattenfall v Germany*,<sup>27</sup> where the arbitral tribunal found that “[t]he mere mention in Article 1(3) that EU Member States have ‘transferred competence over certain matters’ to the EU does not convey that there is no application of the provisions of the ECT between EU Member States.”<sup>28</sup>

Further, the Investors asserted that Italy's argument ignored the fact that each Member State is an independent Contracting Party to the ECT. The “Area” of the party referred to in Article 26 ECT must therefore be determined in respect of the Contracting Party to which a dispute is related, i.e., the Contracting Party which has taken the action or measures alleged to constitute a breach of the ECT. Where an Investor makes a claim against Italy, Article 26 of the ECT must be interpreted as referring to Italy's “Area”. Only if a claim were to be made against the EU would the relevant area be that of the entire union.

Regarding Article 16 of the ECT and Italy's claim that the protection for investments afforded under EU law must be considered more favourable, the Investors stated that Article 16 of the ECT did not refer to the protection afforded by the ECT as a whole. Instead, it meant that the most favourable individual provision according to applicable EU law or the ECT would have precedence. In this regard the most favourable dispute settlement provision was undoubtably the option of referring disputes to arbitration under Article 26 of the ECT. The Investors cited the arbitral award *Eskosol v Italy*,<sup>29</sup> where the

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27 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue, 31 August 2020, <https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf> accessed on 14 April 2021.

28 *ibid* para 180.

29 *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Award, 4 September 2020, <https://www.italaw.com/sites/default/files/case-documents/italaw1779.pdf> accessed on 14 April 2021.

arbitral tribunal remarked that the favourability of a dispute settlement mechanism can only be determined by the Investor's preference.<sup>30</sup> The Investors also referred to *Vattenfall v Germany*, where the arbitral tribunal found that Article 16 ECT constituted "an insurmountable obstacle" to the argument that EU law would take precedence over ECT:

Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT. The application of Article 16 confirms the effectiveness of Article 26 and the Investor's right to dispute resolution, notwithstanding any less favourable terms under the EU Treaties.<sup>31</sup>

Thus, the Investors concluded that Article 16 ECT and Article 30(2) VCLT, ruled out the application of Article 30(4) VCLT, even if the EU treaties were to be considered as later treaties.

The Investors argued that, unlike the arbitral tribunal in *Achmea*, an arbitral tribunal constituted in accordance with the ECT would not apply or interpret EU law. In *Achmea*, the CJEU referred to the choice-of-law clause in Article 8(6) of the BIT, which stipulated that an arbitral tribunal would consider "the law in force of the Contracting Party concerned" and "other relevant Agreements between the Contracting Parties".<sup>32</sup>

The ECT does not refer to the national law of the contracting parties, or to other agreements in force between the contracting parties. Under Article 26(6) ECT, disputes were to be determined in accordance with the ECT and "applicable rules and principles of international law". According to the Investors, this did not include EU law but only general international norms and principles. The Investors claimed that such principles could supplement the ECT but not alter the substantive provisions of the ECT that an arbitral tribunal may have to apply, an interpretation which has been supported in other awards rendered under the ECT.<sup>33</sup>

The fact that the EU itself is a party to the ECT is also significant. In *Achmea* the CJEU stated that it was not incompatible with EU law for the EU to enter into an international agreement which established a court for the interpretation of that agreement and whose judgments were binding on the EU and its institutions, including the CJEU itself. The CJEU noted, however, that the relevant BIT was not concluded by the EU but by its Member States.<sup>34</sup> The

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30 *Eskosol* (n 29) para 102.

31 *Vattenfall* (n 27) para 229.

32 *Achmea* (n 1) para 40.

33 *Novenergia* (n 7) para 437.

34 *Achmea* (n 1) para 58.

distinction between the BIT as a treaty between two Member States, and the ECT as a treaty to which the EU itself was a party has also been noted in the Advocate General's opinion in the *Achmea* case.<sup>35</sup>

The mere reference to “applicable rules and principles of international law” in a treaty does not mean that EU law applies, and this was also supported by the recent Opinion 1/17<sup>36</sup> of the CJEU on the CETA Free Trade Agreement between the EU and Canada,<sup>37</sup> where the CJEU had confirmed that CETA's investment court system was compatible with EU law. In its opinion, the CJEU noted that the choice-of-law clause in CETA which referred to the VCLT and “other rules and principles of international law applicable between the parties”,<sup>38</sup> did not mean CETA conferred on the envisaged tribunals any jurisdiction to interpret or apply EU law other than that relating to the provisions of CETA.<sup>39</sup> Therefore, the Investors argued that Article 26(6) ECT should be interpreted in the same manner as the choice-of-law clause in CETA.

#### 4 The Request for a Preliminary Ruling in *Italy v Investors I*

On 1 March 2021, the Svea Court of Appeal requested a preliminary ruling from the CJEU. In its decision, the Svea Court of Appeal stated that a preliminary ruling was needed because the case before it related to EU law in several respects.

The questions that the Svea Court of Appeal requested a preliminary ruling on concerned the following:

- (1) Should the ECT be interpreted in a manner that the arbitration clause in Article 26, covers a dispute between an EU Member State and an Investor from another EU Member State?
- (2) Provided that the answer to question 1 is in the affirmative:
- (3) Should Articles 19 and 4.3 FEU and 267 and 344 TFEU be interpreted to constitute an obstacle to Article 26 ECT, or to the application of Article 26 ECT when an Investor from an EU Member State initiates arbitration against another EU Member State under Article 26 and

35 *Achmea*, EU:2017:699, Opinion of AG Wathelet.

36 Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, EU:C:2019:341.

37 EU-Canada Comprehensive and Economic Trade Agreement (CETA), Council of the European Union Interinstitutional file 2016/0206 (nle), 14 September 2016, [https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) accessed on 14 April 2021.

38 CETA, Article 8.31.

39 Opinion 1/17 (n 36) para 136.



this EU Member State is obliged to comply with the ruling of the arbitral tribunal in the arbitration?

- (4) Provided that also question 2 is answered affirmatively:
- (5) Should EU law, and especially the principles of primacy and effectiveness of EU law, be interpreted in a manner that hinders the application of a national provision concerning preclusion, such as section 34, second paragraph, of the Swedish Arbitration Act, if the application of such national law entails that a party in challenge proceedings may not dispute that there is a valid arbitration agreement on the ground that the arbitration agreement, or the offer in it to arbitrate, according to Article 26 ECT is invalid or inapplicable as it contradicts EU law?

The first question goes to the heart of the argument raised by Italy regarding the impermissibility of intra-EU arbitration under the ECT, whether this follows *ab initio* from the ECT or if the conclusion of the Treaty of Lisbon has entailed a change in this regard. The question takes aim at how the wording “Contracting Party” and “Area” in Article 26 ECT should be interpreted, and how the respective definitions in Articles 1(2) and 1(3) ECT should be understood.

The second question takes aim at largely the issues dealt with in *Achmea*, and whether the arbitration agreement contradicts EU law. The first and second questions have been addressed by the CJEU’s judgment in *Moldova v Komstroy*,<sup>40</sup> which had not been rendered at the time when the Svea Court of Appeal requested its preliminary ruling. In *Moldova v Komstroy*, the CJEU found intra-EU investor-state arbitration agreements under the ECT incompatible with EU law.

The third question concerns whether Italy, which failed to make the objection that the arbitration clause in Article 26 ECT is invalid during the arbitration proceedings, lost its right under the Swedish Arbitration Act to make that objection in the challenge proceedings considering the principles of primacy and effectiveness of EU law. A similar question was referred to the CJEU in the intra-EU BIT case *PL Holdings*,<sup>41</sup> which was also still pending at the time when the Svea Court of Appeal requested its preliminary ruling. In its judgment on 26 October 2021, the CJEU found that such a restriction would in fact entail limiting the effects of the *Achmea* ruling. While *PL Holdings* concerns a bilateral investment treaty, the *PL Holdings* ruling is a strong indication as to how

<sup>40</sup> CJEU Case C-741/19 *Republic of Moldova v Komstroy*, ECLI:EU:C:2021:655.

<sup>41</sup> *PL Holdings* (n 6).

the CJEU is likely to rule on the third question in *Italy v Investors I*, given that the CJEU has in its recent ruling in *Moldova v Komstroy* set out that it applies largely the same reasoning for ECT related questions as it does for BITs related questions. The ruling on this particular issue may lead to a reversal of numerous ECT awards from recent years since several parties in similar challenge proceedings pertaining to awards rendered before *Achmea* did not claim that the arbitration clause was invalid, but only that it was inapplicable.

The questions now raised by the Svea Court of Appeal in its request for a preliminary ruling have been reoccurring issues before it since May 2018. Yet the court has repeatedly rejected the requests for a referral to the CJEU until February 2021. The court's reversal of its position may relate to the Swedish Supreme Court's referral of a question in the intra-EU BIT case concerning Poland to the CJEU. The reason the court chose to request a preliminary ruling in *Italy v Investors I* instead of in *Spain v Investors I* may be that the latter case also concerned complex issues of state aid. In any event, the request was very timely considering the CJEU's Advocate General's opinion rendered 3 March 2021 in *Moldova v Komstroy*<sup>42</sup> where the Advocate General concluded that the ISDS mechanism in Article 26 of the ECT is incompatible with EU law, insofar as it permits arbitration between EU investors and Member States, and that the investors' debt claim under an electricity supply contract in the underlying arbitration would not constitute a protected "investment" under the ECT.

These issues have now been settled by the CJEU. In its judgment of 2 September 2021 in *Moldova v Komstroy*, the Grand Chamber of the CJEU followed the Advocate General's opinion by ruling that intra-EU investor-state arbitration agreements under the ECT are incompatible with EU law. Regarding the term "investment", the CJEU concluded that:

Article 1(6) and Article 26(1) of the Energy Charter Treaty [...] must be interpreted as meaning that the acquisition, by an undertaking of a Contracting Party to that treaty, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State against a public undertaking of another Contracting Party to that treaty, does not constitute an 'investment' within the meaning of those provisions.<sup>43</sup>

42 CJEU Case C-741/19 *Republic of Moldova v Komstroy*, EU:C:2021:164, Opinion of AG Szpunar.

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

## 5 Outlook

The CJEU's preliminary ruling in the matter is expected within the next year or two. At the time when the Svea Court of Appeal requested a preliminary ruling, as well as when this article was originally authored (15 April 2021), the CJEU had not yet rendered its judgments in *Moldova v Komstroy* or in *PL Holdings*. In view of the clear position adopted by the CJEU in these two judgments, it is likely that the CJEU will follow the same line of reasoning in the preliminary ruling now before it and find Article 26 ECT to be invalid in intra-EU context, and an application thereof to contradict EU law.

Nevertheless, what remains to be seen is how the Svea Court of Appeal will interpret and implement the CJEU's findings into its national system. Will an award rendered based on the invalid arbitration clause contradicting fundamental EU law be considered invalid based on Swedish public policy grounds or because it includes a determination of an issue which under Swedish law may not be determined by arbitrators under section 33 of the Swedish Arbitration Act?

Alternatively, will the award simply be set aside because it is not covered by a valid arbitration agreement under section 34 of the Swedish Arbitration Act, while the requirement of having to have raised the said objection during the arbitration proceedings, set out in paragraph 2 of section 34 of the Swedish Arbitration Act, is waived?

To reach a decision on these issues, the Svea Court of Appeal will either have to take a stand on some profound questions relating to how fundamental EU law principles and procedural rules are seen and upheld in Sweden, or it can take an indirect stand and not deal with those questions by applying a modified version of section 34 of the Swedish Arbitration Act, simply setting out that intra-EU ECT awards are not covered by valid arbitration agreements.