Case C-155/21

Request for a preliminary ruling

Date lodged:

10 March 2021

Referring court:

Svea hovrätt (Sweden)

Date of the decision to refer:

1 March 2021

Appellant:

Republiken Italien

Respondent:

Athena Investments A/S (formerly Greentech Energy Systems A/S)

NovEnergia II Energy dantes Environment (SCA) SICAR

NovEnergia II Italian Portfolio SA

[...]

REQUEST FOR A PRELIMINARY RULING

[...]

Parties to the main proceedings

Appellant: Republiken Italien
[...]

[...]:

[Or. 2]

WORKING DOCUMENT

Respondent:

1. Athena Investments A/S (formerly Greentech Energy Systems A/S)
[...]
Denmark

2. NovEnergia II Energy & Environment (SCA) SICAR
[...] g
Luxembourg

3. NovEnergia II Italian Portfolio SA
[...]
Luxembourg

[...]

[Or. 3] Subject-matter of the proceedings and facts of the case in the main proceedings

Background

1. Between 2005 and 2012, Republiken Italien (the Italian Republic; Italy) adopted legislation with the aim of encouraging investment in renewable energy. By certain subsequent legislative acts, the financial incentives were withdrawn or restricted. That was accomplished, first, by Law 91/2014 of 24 June 2014 (known as the [spalma incentivi decree]).

2. The Danish investment company Athena Investments A/S, the Luxembourg investment fund NovEnergia II Energy Environment (SCA) SICAR and the Luxembourg limited company NovEnergia II Italian Portfolio SA (below, together, 'the investors') made investments in Italy between 2008 and 2013. The investors were granted incentives by the Italian State company, GSE, by written confirmations and agreements between GSE and the solar energy operators in which the investors invested. The investors were of the view that Italy, by first promising and agreeing to financial incentives and then withdrawing or restricting them, had failed to fulfil its obligations under the Energy Charter Treaty (ECT) (OJ L 69, 9.3.1998, p. 1). The investors therefore initiated arbitration proceedings against Italy before the Stockholms Handelskammares Skiljedomsinstitut (Arbitration Institute of the Stockholm Chamber of Commerce; 'SCC'). The proceedings took place in accordance with SCC's arbitration rules of 1 January 2010. The arbitration award was issued on 23 December 2018 (SCC Arbitration V (2015/095)).

3. Following the arbitration award, Italy brought an action for annulment and invalidity of that award before the Svea hovrätt (Svea Court of Appeal).

WORKING DOCUMENT

Arbitration proceedings

4. In July 2015, the investors initiated arbitration proceedings against Italy under the dispute settlement mechanism provided for in Article 26 ECT. The investors claimed that Italy had failed to fulfil its obligations under Article 10(1) ECT by reducing the tariff rates through, inter alia, the adoption of the [spalma incentivi decree]. They claimed compensation totalling EUR 26.3 million.

5. The investors' claim in the arbitration proceedings was lodged on 1 April 2016. Italy lodged its response on 15 September 2016. In the response, Italy made certain submissions regarding the competence of the arbitral tribunal to determine the parties' so-called intra-EU dispute, that is to say, a dispute between, of **[Or. 4]** the one part, an investor from an EU Member State and, of the other, an EU Member State other than that of the investor[s].

6. On 21 December 2016, the European Commission sought leave to intervene in the arbitration proceedings. That request was granted and the Commission's *amicus curiae* letter was lodged on 28 April 2017.

7. In the arbitration award, the arbitral tribunal held that it was competent to hear the dispute (paragraphs 335 to 403 of the arbitration award). The arbitral tribunal took the view that the ECT did not provide for an express exception for intra-EU disputes. In addition, the arbitral tribunal noted that, if the European Union and its Member States had intended to exclude such disputes, that would have been done expressly. The Treaty of Lisbon was regarded by the arbitral tribunal as not having amended the application of the ECT as between the EU Member States. Nor, in the view of the arbitral tribunal, was there any conflict between the ECT and Article 344 of the Treaty on the Functioning of the European Union (TFEU) and, therefore, any conflict between the ECT and EU law. The arbitral tribunal found that the dispute did not concern an interpretation or application of the EU Treaties, but the rights and obligations arising from the ECT.

8. As regards the judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158; 'the judgment in *Achmea*'), the arbitral tribunal held that that judgment did not exclude the competence of the arbitral tribunal to hear the dispute, in particular because the ECT was not a bilateral investment agreement between two EU Member States. In the view of the arbitral tribunal, the choice-of-law clause laid down in Article 26(6) ECT, which referred to international law, could not be regarded as including EU law. Consequently, the arbitral tribunal took the view that it was not interpreting or applying EU law in the context of the present dispute. In addition, the arbitral tribunal considered that the fact that the European Union has signed the ECT means that the ECT cannot be regarded as an 'agreement between Member States' and that, therefore, the judgment in *Achmea* could not be applied to the ECT. As to the substance, the arbitral tribunal found that Italy had failed to fulfil its obligations under the ECT and awarded the investors EUR 11.9 million, together with interest and payment of their costs.

WORKING DOCUMENT

[Or. 5] ***The action for a declaration of invalidity and annulment before the Svea hovrätt***

The form of order sought by Italy and the grounds of appeal and certain legal arguments

9. Italy claims that the hovrätten (Court of Appeal) should annul the arbitration award or declare the arbitration award invalid. Italy has argued principally as follows in support of its action. It is necessary to annul the arbitration award since it is not covered by a valid arbitration agreement between the parties. It was not possible for the investors and Italy to conclude a valid arbitration agreement on the basis of Article 26 ECT, since that provision cannot be interpreted as relating to an intra-EU dispute. If, on interpretation, the ECT were to be regarded as meaning that Article 26 covers intra-EU disputes, the arbitration clause in Article 26 ECT is, in any event, incompatible with EU law. Articles 4(3) and 19 of the Treaty on European Union (TEU) and Articles 267 and 344 TFEU preclude the arbitration clause laid down in Article 26 ECT as between Member States. It is therefore not applicable or valid in intra-EU disputes. There is therefore no valid proposal that could serve as a basis for a valid arbitration agreement. The fact that the European Union is a party to the ECT does not alter that assessment. No valid arbitration agreement was therefore concluded between Italy and the investors.

10. Italy alleges that the arbitration award is invalid in so far as it involves the examination of questions which, under Swedish law, cannot be decided by arbitrators. The Court of Justice has held that intra-EU investment disputes may not be brought before arbitrators, either in advance or at the time when they arose. There is therefore a legal limitation — in the present case, in Articles 267 and 344 TFEU and Articles 4(3) and 19 TEU. There is thus a mandatory procedural obstacle. Those disputes are not capable of arbitration and an arbitration award made in such a dispute is invalid. Intra-EU investment disputes fall outside the sphere of arbitration also by reason of the fact that they affect public interests to a significant extent. The preservation of the specific characteristics of EU law and of its autonomy is a public interest of such a kind as to remove the dispute from the scope of arbitration.

11. The arbitration award or the manner in which it came into being is manifestly incompatible with Swedish public policy. The rules of EU law at issue in the present case are fundamental rules and principles which form the basis of the EU legal order. The arbitration award is based on an arbitration agreement allegedly concluded pursuant to an arbitration clause which, pursuant to the fundamental provisions of EU law, is invalid. The arbitral tribunal nevertheless found that it was competent to **[Or. 6]** hear the dispute. The arbitration award is therefore manifestly incompatible with Swedish public policy both in itself and as a result of the manner in which it came into being.

12. Italy has not lost the right to claim the absence of a valid arbitration agreement on the ground that the arbitration clause laid down in Article 26 ECT

WORKING DOCUMENT

runs counter to EU law and thus is not applicable or, in the alternative, is invalid. In its response in the arbitration proceedings, Italy had already raised the lack of competence of the arbitral tribunal on account, inter alia, of the fact that the arbitration clause laid down in Article 26 ECT runs counter to EU law (if it is deemed to cover intra-EU disputes). Subsequently, Italy has maintained and clarified the present complaint in the course of the arbitration proceedings (referring, inter alia, to the judgment in *Achmea* and to the issue that the arbitration proposal in Article 26 ECT is neither applicable nor valid). At no time during the arbitration proceedings did the investors raise any objection that the complaint was made out of time but, on the contrary, responded to the substance of that complaint and agreed that it should be examined.

13. The annulment or declaration of invalidity of the arbitration award would not infringe the EU law principle of proportionality.

The investors' claim, the ground of opposition and certain legal arguments

14. The investors have contested Italy's claims. In support of their challenge, they have argued as follows. Article 26 ECT contains a valid and binding proposal of arbitration from all ECT States to investors from all the other ECT States. There is no support in either the wording of Article 26 ECT or its context for the exclusion of intra-EU disputes from the ECT dispute settlement mechanism. The proposal set out in Article 26 ECT is valid. The ground for annulment raised by Italy is unfounded, since the applicability of Article 26 ECT, including the arbitration proposal, is governed by public international law and not by EU law. Even if EU law were applicable, Article 26 ECT does not run counter to EU law, including the judgment in *Achmea*. The ECT is a multilateral treaty concluded by the EU Member States, third countries and the European Union itself. EU law is not the applicable substantive law in proceedings conducted under the ECT. In the event of conflict between the Treaty of Lisbon and the ECT, the ECT has primacy in accordance with Article 16 thereof.

15. The arbitration award does not include an examination of a question which, under Swedish law, cannot be examined by arbitrators. The parties could have settled their dispute, namely the question of compensation for Italy's breach of contract, by an amicable settlement. The questions may therefore be heard in arbitration **[Or. 7]**. An arbitral tribunal called upon to settle a dispute under the ECT cannot apply EU law.

16. In the event that the substantive content of an arbitration award or the arbitration proceedings resulting in the arbitration award run counter to Swedish public policy, which covers certain fundamental provisions of EU law, the arbitration award may be set aside as manifestly contrary to Swedish public policy. Neither the arbitration award nor the manner in which it came into being is manifestly contrary to Swedish public policy.

WORKING DOCUMENT

17. Italy has lost the right to claim that the proposal made in Article 26 ECT is invalid. During the arbitration proceedings, Italy claimed only that Article 26 ECT should be interpreted as precluding an arbitration proposal made by an EU Member State to an investor from another EU Member State. Italy's present submission— the absence of a valid arbitration agreement on the ground that the proposal under Article 26 ECT must be regarded as invalid as it infringes EU law — was not raised by Italy during the arbitration proceedings.

18. The annulment or declaration of invalidity of the arbitration award on the basis of EU law would be contrary to the principle of proportionality. If the arbitration award were to be annulled on the basis of EU law, the investors would suffer serious damage and Italy would be rewarded for having concluded an international treaty (also concluded by the European Union itself and on which the investors relied) in breach of Italy's EU-law obligations.

The relevant provisions of Swedish and EU law

Skiljeförfarandelagen

19. Under the first subparagraph of Paragraph 1 of lagen (1999:116) om skiljeförfarande (Law (1999:116) on arbitration proceedings; 'the SFL'), disputes which the parties may be able to settle may be submitted by agreement to the decision of one or more arbitrators. Subparagraph 1 reads as follows:

> 'Paragraph 1 Disputes which the parties may be able to settle may be submitted by agreement to the decision of one or more arbitrators. Such an agreement may relate to future disputes concerning a legal relationship set out in the agreement. The dispute may relate to the occurrence of a specific situation.
>
> ...'

20. Arbitration proceedings are to be based on the arbitration agreement. The agreement is based on the parties' entitlement to reach a settlement concerning the subject-matter of the dispute. It may also follow from specific legislative provisions that a dispute on a particular issue may not be submitted to arbitration. [...]

[Or. 8] 21. An arbitration award is invalid if it involves consideration of a question which, under Swedish law, cannot be decided by arbitrators (Paragraph 33, first subparagraph, point 1, of the SFL). An arbitration award is also invalid if the arbitration award or the manner in which it came into being is manifestly contrary to public policy in Sweden (Paragraph 33, first subparagraph, point 2). Those parts of Paragraph 33 of the SFL are worded as follows:

> 'Paragraph 33 An arbitration award shall be invalid:

WORKING DOCUMENT

1. if it involves consideration of a question which, under Swedish law, cannot be determined by arbitrators,

2. if the arbitration award or the manner in which it came into being is manifestly contrary to public policy in Sweden, or

...'

22. The court must take account of the grounds of invalidity of its own motion.

23. Under Paragraph 34, first subparagraph, point 1, of the SFL, an arbitration award on appeal by a party is to be annulled, in whole or in part, if it is not covered by a valid arbitration agreement between the parties. In that regard, a party is not entitled to rely on a fact on which, by participating in the proceedings without objection or otherwise, it must be regarded as having waived its right to rely (Paragraph 34, second subparagraph). The relevant parts of Paragraph 34 of the SFL are worded as follows:

'Paragraph 34 An arbitration award which cannot be challenged under Paragraph 36 shall be set aside, in whole or in part, on appeal of one of the parties

1. if it is not covered by a valid arbitration agreement between the parties;

…

A party shall not be entitled to rely on a fact on which, by participating in the proceedings without objection or otherwise, it must be regarded as having waived its right to rely. A party, by the mere fact of having appointed an arbitrator, shall not be regarded as having accepted the competence of the arbitrator to rule on the question referred.

…'

24. The rule set out in Paragraph 34, second subparagraph, of the SFL does not preclude a party from relying on the fact in question in support of invalidity under Paragraph 33.

The Energy Charter Treaty, ECT

The ECT was signed on 17 December 1994 by, inter alia, the European Communities [(EC)], Italy, Denmark, Luxembourg and a number of third countries which were not members of the [...] European Communities [...]. Just over 50 States or international organisations, such as the EU and Euratom, are currently contracting parties. Italy has now left the ECT, but it is common ground that that fact does not affect the dispute between the parties. The ECT entered into force within the EC on 16 April 1998 (see Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on **[Or. 9]** the conclusion, by

WORKING DOCUMENT

the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p. 1).

26. The ECT is thus a multilateral cooperation agreement in the field of energy. The Treaty contains provisions intended to promote access to international energy markets under commercial conditions and to develop an open and competitive market in energy equipment and energy products. The Treaty contains, inter alia, the following provisions, reproduced below in the [English] translation (see OJ 1998 L 69, p. 1 […]).

27. Article 26 lays down rules for settling investment disputes between private investors and a Contracting Party.

> **'Article 26: Settlement of disputes between an investor and a Contracting Party**
>
> (1) 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.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph 1 within a period of three months from the date on which either party to the dispute requested amicable settlement, the investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this article.
>
> …
>
> (4) In the event that an investor chooses to submit the dispute for resolution under subparagraph (2)(c), the investor shall further provide its consent in writing for the dispute to be submitted to:
>
> …

WORKING DOCUMENT

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

…

(6) A tribunal established pursuant to paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

…

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its area of such awards.'

[Or. 10] 28. Disputes under the ECT may therefore be decided by the courts of the Contracting Party or submitted for arbitration with a view to a final and binding decision in accordance with the ECT and the applicable rules and principles of international law.

29. Article 16 governs relations to other agreements.

'Article 16 Relations to other agreements

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the investor or investment.'

30. The substantive rule mainly applied, so far as concerns the issues arising in the case before the hovrätten (Court of Appeal), is Article 10(1) ECT.

'Article 10 Investment promotion and protection

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent

WORKING DOCUMENT

conditions for investors of other Contracting Parties to make investments in its area. Such conditions shall include a commitment to accord at all times to Investments of investors of other Contracting Parties fair and equitable treatment. Such investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any other Contracting Party.

…'

The need for a preliminary ruling

31. The dispute in the main proceedings raises the question whether the ECT, which forms part of the EU legal order, must be interpreted as meaning that Article 26 [thereof] also governs a dispute between one EU Member State and an investor from another Member State concerning an investment in the former made by the latter.

32. Furthermore, if Article 26 ECT governs those disputes, the question arises as to whether EU law precludes such an interpretation of that article in an internal EU relation or **[Or. 11]** its application in an internal EU dispute. The principles and positions developed by the Court in the judgment in *Achmea* originated in a bilateral investment treaty applicable between two EU Member States. The ECT is a multilateral investment treaty and, unlike the bilateral treaty at issue in the *Achmea* case, the ECT has a number of contracting parties which neither are nor have been members of the European Union. A further difference from the bilateral treaty lies in the fact that the ECT was concluded by both the European Communities, now the European Union, and by its Member States. Furthermore, in accordance with the ECT, an applicant may choose between initiating arbitration proceedings and bringing proceedings before the national courts for the settlement of disputes. As regards the ECT, therefore, the European Union participated in the creation of that treaty and accepted the dispute settlement mechanism provided for in Article 26, by being a party to that treaty.

33. In that regard, even taking into account the positions defined by the Court in the judgment in *Achmea*, the manner in which EU law must be interpreted does not emerge either clearly or as having been clarified.

34. Lastly, the question arises in the case before the hovrätten (Court of Appeal) as to the effect which EU law, in particular the principle of the primacy of EU law and of the requirement of effectiveness, has on the application of the time-bar rule laid down in Paragraph 34, second subparagraph, of the SFL, namely whether EU law precludes a party to the appeal proceedings from being able to raise the

WORKING DOCUMENT

objection that the manner in which the arbitration agreement came into being or the arbitration agreement itself is contrary to EU law. In that regard, the hovrätten (Court of Appeal) notes that, in Case T 1569-19, the Swedish Högsta domstolen (Supreme Court) decided to make a reference to the Court for a preliminary ruling and that the Court's preliminary ruling, in so far as can now be assessed, may also be relevant to the case before the hovrätten. In any event, pending an answer from the Court, the interpretation of EU law in that regard is not clear and has not been clarified.

35. In those circumstances, the hovrätten (Court of Appeal) regards it as necessary to request a preliminary ruling from the Court of Justice on all the above points.

[Or. 12] Request for a preliminary ruling

The hovrätten (Court of Appeal) requests the Court of Justice, by a preliminary ruling, to answer the following questions.

1. Is the ECT to be interpreted as meaning that the arbitration clause in Article 26 thereof, by which a Contracting Party gives its consent to the international arbitration of a dispute between a Contracting Party and an investor of another Contracting Party concerning an investment by the latter in the former's area, also governs a dispute between an EU Member State, of the one part, and an investor from another EU Member State, of the other?

If Question 1 is answered in the affirmative:

2. Are Articles 19 and 4(3) TEU and Articles 267 and 344 TFEU to be interpreted as precluding the arbitration clause in Article 26 ECT or the application of that clause where an investor from an EU Member State may, on the basis of Article 26 ECT, in the event of a dispute concerning an investment in another EU Member State, initiate proceedings against the latter Member State before an arbitral tribunal whose competence and decision that Member State is bound to accept?

If Question 2 is answered in the affirmative:

3. Must EU law, in particular the principle of the primacy of EU law and the requirement of its effectiveness, be interpreted as precluding the application of a provision of national law which provides for a time-bar, such as Paragraph 34, second subparagraph, of the SFL, if the consequence of such application is that a party to an appeal may not raise the objection that there is no valid arbitration agreement on the ground that the arbitration clause in or the proposal in accordance with Article 26 ECT is invalid or not applicable as it runs counter to EU law?

WORKING DOCUMENT