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SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	2024-12-23	T 12646-21
Division 020114	Stockholm	

PARTIES

Claimant

1.Festorino Invest Limited, HE 292682
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Cyprus

2. Fosontal Limited, HE 290578
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Cyprus

3. Peter Derendinger
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4.Petr Rojicek
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Respondent

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MATTER
Invalidity of arbitral award etc.

JUDGMENT OF THE COURT OF APPEAL

1.The Court of Appeal rejects the Republic of Poland's claim for partial dismissal of the case.

2.The Court of Appeal declares the arbitral award of 30 June 2021, as amended and supplemented in Stockholm on 30 July 2021, in SCC case no. V2018/098 invalid.

3.The Republic of Poland shall compensate Festorino Invest Limited for its litigation costs amounting to SEK 315 012.66, together with interest on that amount pursuant to Section 6 of the Interest Act from the date of the judgment of the Court of Appeal until payment is made. Of compensation, SEK 314,037.66 constitutes legal fees.

4.The Republic of Poland shall compensate Fosontal Limited for its litigation costs amounting to SEK 315 012.66, together with interest pursuant to Section 6 of the Interest Act from the date of the judgment of the Court of Appeal until payment is made. Of compensation, SEK 314,037.66 constitutes legal fees.

5.The Republic of Poland shall compensate Peter Derendinger for his litigation costs amounting to SEK 105 004.22, together with interest on that amount pursuant to Section 6 of the Interest Act from the date of the judgment of the Court of Appeal until payment is made. Of compensation, SEK 104,679.22 constitutes legal fees.

6.The Republic of Poland shall compensate Petra Salesny for her litigation costs amounting to SEK 105 004.22, together with interest on that amount pursuant to Section 6 of the Interest Act from the date of the judgment of the Court of Appeal until payment is made. Of compensation, SEK 104,679.22 constitutes legal fees.

7.The Republic of Poland shall compensate Petr Rojicek for his litigation costs in the amount of SEK 105 004.22, together with interest on that amount in accordance with Section 6 of the Interest Act from the date of the judgment of the Court of Appeal until payment is made. Of compensation, SEK 104,679.22 constitutes legal fees.

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1 BACKGROUND

Festorino Invest Limited, Fosontal Limited, Peter Derendinger, Petra Salesny and Petr Rojicek (the investors) held one hundred per cent of the shares in Blue Gas Holding, a company registered in Poland.

The arbitration proceedings stem from activities conducted by the investors in Poland in the 2010s within the framework of Blue Gas Holding. The business consisted in the development and potential operation of natural gas-based secondary generation/combined heat and power in mines.

One of the five investors, Mr Peter Derendinger, is a citizen and resident of Switzerland. The other investors are either domiciled or nationals of a Member State of the European Union (EU). Poland is a Member State of the EU.

On 27 August 2018, the investors initiated arbitration proceedings against Poland before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), pursuant to Article 26 of the Energy Charter Treaty (cf. OJ L 69, 9.3.1998), and the SCC Rules. In support of their action, the investors alleged that Poland had breached its obligations under the Energy Charter Treaty.

In the proceedings, Poland raised an objection to the jurisdiction of the arbitral tribunal. Poland's objection was that it would follow from the case law of the Court of Justice of the European Union that EU law precludes arbitration between an investor from an EU Member State and another EU Member State initiated under the Energy Charter Treaty. The arbitral tribunal allowed the European Commission to intervene as a third party on the issue of the tribunal's jurisdiction.

The arbitral award was rendered in Stockholm on 30 June 2021, with corrections and additions on 30 July of the same year (the Award).

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By the award, the Arbitral Tribunal rejected Poland's challenge to the jurisdiction of the Arbitral Tribunal.

On the merits, the arbitral tribunal dismissed the investors' claim. In the costs part, the arbitral tribunal decided that the investors should bear the costs and ordered the following on this issue on pages 7 and 8 of the corrigendum and addendum to the award.

51. Paragraph 778.4 of the Award shall now read as follows:

"ORDERS Claimants to bear all costs of the arbitration. Claimants are jointly and severally liable to pay such costs, which are as follows:

- The Fee of Chairperson Bernardo M. Cremades, which amounts to EUR 255,170 and compensation for expenses EUR 735, in total EUR 255,905, plus VAT of EUR 63,976.25.
- The Fee of Co-Arbitrator Kaj Hobér, which amounts to EUR 127,585, plus VAT of EUR 31,896.25.
- The Fee of Co-Arbitrator Zachary Douglas QC, which amounts to EUR 127,585.
- The Administrative Fee of the SCC, which amounts to EUR 60,000, plus VAT of EUR 15,000."

52. Paragraph 778.5 of the Award shall now read as follows:

"ORDERS Claimants to pay Respondent the amount of EUR 340,973.75 to reimburse Respondent for 50% of the costs of the arbitration."

53. A new paragraph, paragraph 778.6, is hereby added, which shall read as follows:

"ORDERS Claimants to pay Respondent the amount of PLN 1,296,584.50 to reimburse Respondent for the legal fees incurred by the General Counsel to the

And on page 9.

67. For the reasons stated above, the Arbitral Tribunal:

67.1. ORDERS that the EUR 340,973.75 Claimants have been ordered to pay Respondent to reimburse Respondent for 50% of the costs of the arbitration be subject to 5% interest per annum accruing from the date of this additional award. Claimants are jointly and severally liable to pay such costs.

On 12 November 2021, the Court of Appeal, following a motion by the investors, decided

that further enforcement of the arbitral award between the parties may not take place until further notice, and on 8 July 2022 rejected a motion to set aside the injunction decision.

2 MOTIONS BEFORE THE COURT OF APPEAL

The investors have requested that the Court of Appeal annul or set aside the arbitral award.

Poland has submitted to the Court of Appeal the question of whether the arbitral award is invalid as regards the decision in the main proceedings in so far as the decision relates to the dispute between the EU investors, i.e. Festorino Invest Limited, Fosontal Limited, Petra Salesny and Petr Rojicek, and Poland.

Poland has furthermore opposed the annulment of any part of the award on the grounds of challenge.

Poland, for its part, has requested that the Court of Appeal reject the investors' request for annulment or setting aside of the arbitral award with respect to the decision on the investors' obligation to reimburse the costs of the arbitral tribunal and the SCC, as well as the decision on the investors' obligation to reimburse Poland for the advance paid by Poland for these costs. In any event, Poland has objected to the annulment of the award on the issue of costs, i.e. both with respect to the decision on the investors' obligation to reimburse the costs of the arbitral tribunal and the SCC's administrative fee, the decision on the investors' obligation to reimburse Poland for the advance paid by Poland for these costs, and the decision that the investors shall reimburse part of Poland's own procedural costs.

In any event, Poland has opposed the annulment or setting aside of any part of the award in respect of the dispute between the third country investor, Mr Derendinger, and Poland.

Should the Court of Appeal consider that it is not possible to adjust the payment obligation in the arbitral award so that it only covers Mr Derendinger, and should the Court of Appeal consider invalidating the arbitral award in its entirety despite the fact that the Court has found that the relevant ground for invalidity only covers part of the award, Poland has requested that the Court of Appeal, pursuant to section 35 of the Arbitration Act, refer the

question of costs in this part back to the arbitral tribunal.

The investors have opposed both Poland's motion to dismiss the arbitration and the request that the Court of Appeal remand the arbitration in part to the arbitral tribunal.

The parties have claimed compensation for legal costs.

The case was disposed of without a main hearing.

3 GROUNDS PRESENTED BY THE PARTIES

3.1 The investors

3.1.1 Invalidity under section 33(1) or (2) of the Arbitration Act

The arbitral award shall be annulled in its entirety in accordance with section 33(1)(2) of the Swedish Arbitration Act (1999:116), or alternatively in accordance with section 33(1)(1) of the Swedish Arbitration Act.

Primarily, the arbitral award, and the manner in which it was made, is contrary to fundamental norms and principles of EU law, which means that it is manifestly incompatible with the foundations of the Swedish legal order. Accordingly, it is invalid in accordance with section 33, first paragraph, section 2 of the Arbitration Act.

In its judgment of 2 September 2021, Komstroy, C-741/19, EU:C:2021:655, the CJEU ruled that the Energy Charter Treaty is Union law. According to the CJEU, an arbitral tribunal lacks jurisdiction to interpret or apply Union law because an arbitral tribunal is not authorised to request preliminary rulings from the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU) and the courts of the Member States are only able to review limited parts of an arbitral award under national law. The full effect of Union law cannot therefore be ensured in arbitration proceedings under the Energy Charter

Treaty. It follows that Article 26(2)(c) of the Energy Charter Treaty does not apply to disputes involving a Member State and an investor from another Member State.

Consequently, an arbitration award applying Article 26 of the Energy Charter Treaty in a situation such as the present one is contrary to Articles 4(3) and 19 of the Treaty on European Union (TEU) and Articles 267 and 344 TFEU, which are fundamental to ensuring the legal order of the Union.

In the dispute between the investors and Poland, the arbitral tribunal has applied EU law. The arbitral award was made without the arbitral tribunal having had the opportunity to request a preliminary ruling from the CJEU. Since the preliminary ruling procedure is a fundamental part of the Swedish legal system, the arbitral award has thus been made in a manner that is manifestly incompatible with the basic principles of the Swedish legal system.

Furthermore, the arbitral tribunal has based its jurisdiction on Article 26(2)(c) of the Energy Charter Treaty. According to the CJEU, this article is not applicable to so-called intra-EU disputes. The present dispute is such a dispute because it concerns a dispute between investors from the EU Member States Cyprus, the Czech Republic and Austria and the EU Member State Poland. The interpretative prerogative of the CJEU is a fundamental part of Swedish law. The arbitral award is therefore manifestly incompatible with the public policy of the Swedish legal system.

Since the ground of invalidity is not separable in the sense that it can be attributed to only one part of the award, the entire award is invalid.

Alternatively, the award shall be set aside in its entirety in accordance with section 33(1)(1) of the Arbitration Act.

As indicated above, the CJEU has ruled, in Komstroy, that arbitral tribunals are not competent to apply Union law under the Energy Charter Treaty because it is contrary to

Union law. Thus, according to the Court, a dispute under the Energy Charter Treaty involving an EU Member State and investors from another Member State may not be decided by arbitrators.

Through Sweden's ratification of the Energy Charter Treaty, the Treaty constitutes Swedish law. Since the EU is a party to the Energy Charter Treaty, the Treaty also constitutes Union law. It follows that the European Court of Justice's interpretation of the provisions of the Energy Charter Treaty takes precedence over Swedish law and case law. Furthermore, Swedish courts are obliged to interpret Swedish law in the light of Union law. Therefore, in accordance with the CJEU's pronouncements, it is not possible for a matter under the Energy Charter Treaty between a Union State and an investor from another Member State to be decided by arbitrators in accordance with Swedish law.

In the present case, an issue under the Energy Charter Treaty, which under Swedish law may not be decided by an arbitrator, has been decided by an arbitrator through the arbitral award. Since the dispute concerned breaches of the Energy Charter Treaty, the grounds for invalidity cover the entire arbitral award. The award shall therefore also be annulled in its entirety.

3.1.2 Cancellation following challenge under section 34(1)(1) or (6) of the Arbitration Act

In the event that the Court of Appeal finds that the arbitral award should not be annulled in its entirety, the award shall in any event be set aside in its entirety in accordance with section 34(1)(1) of the Arbitration Act since the award is not covered by a valid arbitration agreement between the parties.

In the present case, the basis for the conclusion of the arbitration agreement is Article 26(2)(c) of the Energy Charter Treaty. According to the Court of Justice of the European Union, for the reasons set out above, that provision is inappropriate because of its incompatibility with EU law.

The CJEU's interpretation of the provisions of the Energy Charter Treaty takes precedence over Swedish law and case law. The precedence of EU law cannot therefore be limited by Swedish law by an assessment of which party objects to the arbitral tribunal's jurisdiction. The investors have therefore not lost their right to now invoke that the arbitral award was not covered by a valid arbitration agreement between the parties.

Since the ground for setting aside is so fundamental that the arbitral award was not covered by a valid arbitration agreement, the award shall be set aside in its entirety.

In any event, the award on costs in the arbitral award shall be set aside pursuant to section 34(1)(6) of the Arbitration Act, as it stood prior to 1 March 2019, since there were errors in the proceedings which, through no fault of the claimants, likely affected the outcome of the arbitral tribunal's award on costs.

In the parties' simultaneous exchange of cost statements after the main arbitration hearing, Poland failed to send its statement to the investors, contrary to the parties jointly agreed *Procedural Order No. 1*. Despite this, the arbitral tribunal did not communicate Poland's cost statement to the investors, with the result that Poland's cost claims were left unchallenged. In doing so, the arbitral tribunal violated the fundamental principle of communication. As a result, the investors were deprived of the right to pursue their claims regarding Poland's alleged costs.

If the investors had been given the opportunity to object to Poland's claim for costs, the arbitral tribunal would have had to examine the existence and reasonableness of the alleged costs, considering the investors' objections that Poland was not represented by external counsel and therefore had not incurred any legal costs. The arbitral tribunal would then have dismissed the claim or alternatively awarded a significantly lower amount.

As the investors had no opportunity to object to the procedural error, the objection is not precluded.

3.1.3 Poland’s motion to dismiss the investors’ action in part

Poland's motion to dismiss is unfounded and based on a misrepresentation or misunderstanding of the scheme of the Arbitration Act. The Investors bring an action for annulment and challenge of the arbitral award. The arbitral tribunal's right to compensation is not affected by such an action.

3.1.4 Invalidity/cancellation regarding the cost part

It is the arbitral tribunal's application of EU law that is both voidable and challengeable. The outcome of the arbitral tribunal's application of substantive EU law governs the outcome in the cost section. The grounds for invalidity and challenge therefore also affect the award in the costs section, which means that the latter part of the award must also be annulled or set aside. Without the outcome on the merits, there is no legal basis for the outcome in the costs section.

It is irrelevant to who initiated the arbitration. Equally irrelevant are the hypothetical costs and the hypothetical allocation of costs if the arbitral tribunal had instead rejected the claim, or for that matter the subsequent outcome of the proceedings.

As regards section 37, first paragraph, second sentence of the Arbitration Act, this is a rule that can only be applied by the arbitral tribunal when deciding the question of the arbitral tribunal's remuneration in the arbitration. The rule is irrelevant to the Court of Appeal's review in this case pursuant to Sections 33 and 34 of the Arbitration Act.

3.1.5 Invalidity/cancellation in relation to the third country investor

In the Komstroy judgment, the CJEU states that EU law directly covers a dispute between a third-country economic operator and a Member State. This means that the arbitral tribunal has applied EU law also in relation to the third-country investor. In the present case, it is the arbitral tribunal's application of EU law that is both invalid and grounds for challenge.

Moreover, in Komstroy, the Court of Justice of the European Union recognised that there is a clear Union law interest in ensuring that Article 26 of the Energy Charter Treaty is interpreted in a uniform manner even in situations not directly covered by Union law. The decisive factor in the interpretation is whether the Court is likely to apply the same provision to a case which directly are subject to Union law, not whether the subjects of a particular dispute are Member States and/or investors from Member States.

Furthermore, if the Court of Appeal were to annul or set aside the award except for the costs portion in relation to the third country investor, the third country investor would have no right of recourse against the other investors. This would be contrary to the award on joint and several liability, i.e. a liability that includes recourse. In such a situation, the liability for costs would be transformed into a shared liability, but the nature of the shared liability in such a case is not set out in the arbitral award and has not been reviewed by the arbitral tribunal.

The Court of Appeal is not able to reallocate the costs without carrying out a substantive examination, which should not be done in the context of an examination of an action for annulment or a challenge.

3.1.6 Poland's request for referral back to arbitration

The Court of Appeal may not order the arbitral tribunal, which was not authorised to make the award on the grounds that the award and the manner in which it was made are manifestly incompatible with public policy, to reopen the arbitral proceedings or take any other measure in order to make a new award.

Only situations that can be resolved by the arbitral tribunal may be referred back to the arbitral tribunal. With respect to invalidity under section 33(1)(1) or (2) of the Arbitration Act, a remedy is only possible in exceptional circumstances. There is no such exceptional case in this case.

3.2 Poland

3.2.1 Invalidity under section 33(1)(1) or (2) of the Arbitration Act

The conditions exist for the annulment of the arbitral award as regards the decision in the main proceedings between the EU investors on the one hand and Poland on the other. This follows from the rulings of the Court of Justice of the European Union in, inter alia, judgment of 6 March 2018, Achmea, C-284/16, EU:C:2018:158 and judgment of 26 October 2021, PL Holdings, C-109/20, EU:C:2021:875, which rulings have also been confirmed by the Court of Justice of the European Union in Komstroy.

The dispute in this part is not *primarily* arbitrable.

Union law, through the CJEU's interpretation of Articles 267 and 344 TFEU in Achmea, PL Holdings and Komstroy, among others, constitutes an in dispositive procedural obstacle to arbitration under Article 26(2)(c) of the Energy Charter Treaty. The EU law prohibition on arbitration regarding intra-EU investment disputes is thus not limited to future disputes but also applies after the dispute has arisen and for the time thereafter. Thus, the situation is such that there is an absolute obstacle under EU law to the settlement of intra-EU investment disputes - including the issues arising between the parties to such a dispute - by arbitration.

In the present case, it is also clear that the substantive issue in the arbitration between the EU investors and Poland is also in dispositive because of the aforementioned decisions of the CJEU. The substantive examination of the case necessarily involves both the interpretation and application of EU law, particularly the provisions of the Energy Charter Treaty. In this regard, it is evident from the arbitral award that the arbitral tribunal has de facto interpreted and applied the Energy Charter Treaty and thereby found that the behavior of the Polish authorities in the cases in question did not constitute a violation of the Energy Charter Treaty.

It follows from Union law that intra-EU investment disputes under the Energy Charter Treaty cannot be settled by arbitration. These disputes are thus not arbitrable, and the arbitral award should be annulled as regards the decision in the main case between the EU investors and Poland pursuant to Section 33, first paragraph, point 1 of the Arbitration Act.

Furthermore, the award and the manner in which it was made are, in the same part referred to above, *in the alternative*, manifestly incompatible with the public policy of Sweden.

It is clear from the judgments of the Court of Justice of the European Union in Achema, Komstroy and PL Holdings that the principle of the autonomy of European Union law, guaranteed, inter alia, by Articles 267 and 344 TFEU, is constitutional in nature and forms a fundamental part of the foundations of the EU legal order (ordre public). According to the principles of direct applicability and loyal cooperation, it is for the national courts of each Member State to observe the public policy of the Union to the same extent as national public policy when applying national rules in proceedings for the annulment or setting aside of an arbitral award made in breach of public policy. That Member States have such an obligation follows, inter alia, from the judgment of the Court of Justice of the European Union of 1 July 1999, Eco Swiss, C-126/97, EU:C:1999:269.

The arbitration between the EU investors and Poland concerns such a public interest that arbitral awards rendered in violation of Union law are invalid pursuant to section 33(1)(2) of the Arbitration Act, as they are contrary to Union law - and thus also Swedish - public policy.

3.2.2 Cancellation following a challenge under section 34(1)(1) or (6) of the Arbitration Act

It is submitted that there is no valid arbitration agreement between the EU Investors and Poland. Thus, there is also a potential basis for setting aside the arbitral award in that part as far as the decision in the main proceedings is concerned. However, the investors have not claimed in the arbitration proceedings that there was no valid arbitration agreement, but

have, on the contrary, actively promoted the view that there was a valid arbitration agreement. Through their litigation, the investors may be deemed to have refrained from claiming that the arbitration agreement was invalid. Accordingly, there are no grounds for setting aside the arbitral award on the basis that a valid arbitration agreement did not exist.

There is no reason to set aside the award as regards the cost award in any part on the separate grounds that there were procedural irregularities. There has been no violation of *Procedural Order No. 1*. The investors have deliberately remained in ignorance of the specific claim which they understood Poland to have made. To the extent that there was no procedural error, it was therefore due to the investors' own fault. In any event, the investors have not made it likely that the procedural error affected the outcome. In the arbitral award, the arbitral tribunal has described in detail how it reached its decision on the question of what constituted reasonable compensation for Poland's own costs. In this respect, the arbitral tribunal has made a particularly strict assessment of reasonableness. The arbitral tribunal has furthermore explained in the corrigendum and addendum to the arbitral award that the objections raised by the investors, inter alia that Poland was represented by state employees with fixed salaries, had already been considered by the arbitral tribunal.

3.2.3 The motion to dismiss the investors' action in part

The annulment or setting aside of the award on costs in the arbitral award is precluded in so far as it concerns the decisions on the remuneration of the arbitrators and on the obligation of the investors to reimburse Poland for half of the costs paid by Poland in advance.

For the investors to have been able to change the decision on compensation for the costs of the arbitral tribunal, they would have had to appeal the decision to the district court, which the investors have not done. The Court of Appeal is therefore precluded from deciding whether this part of the award should be annulled or set aside.

The fact that the Court of Appeal cannot annul the decision on compensation to the arbitral tribunal in paragraph 778.4 of the corrected version of the arbitral award also means in this

case that the Court of Appeal, as the award in the arbitral award is formulated, cannot annul the decision that the investors shall reimburse Poland for the amount paid by Poland for the arbitrators' compensation. This is because the arbitral tribunal, in the decision on compensation to the arbitral tribunal, determined that these costs shall not be paid jointly and severally by the parties, but that the investors alone shall pay compensation to the arbitral tribunal. If the decision on Poland's right to compensation from the investors for compensation already paid to the arbitral tribunal is annulled, the consequence will nevertheless be that Poland has been forced to pay half of the compensation to the arbitral tribunal, contrary to the arbitral tribunal's final decision. There is thus such a connection between the two decisions that the upholding of the decision in paragraph 778.4 regarding compensation to the arbitrators becomes purely illusory if the decision in paragraphs 778.5 and 67.1 (in the corrected and amended version of the award) regarding Poland's right to compensation for the advance payment is not also upheld. All these parts of the award may be considered to have become final.

3.2.4 Invalidity/cancellation of the cost part

The award of costs in the arbitral award shall stand notwithstanding the annulment or setting aside of the award in the main proceedings.

The decision on costs is not subject to any grounds of invalidity. It is not in itself contrary to EU law.

The decision of an arbitral tribunal on the costs of the proceedings is a distinct part from the main issue decided by the arbitral award.

The provision in the second sentence of the first paragraph of Section 37 of the Arbitration Act applies by analogy in cases where an arbitral tribunal declares that it has jurisdiction, but a court subsequently finds that the arbitral tribunal did not have jurisdiction.

Therefore, Poland should not bear any part of the costs of the arbitration tribunal. The

investors invoked the arbitration with full knowledge that the jurisdiction of the arbitral tribunal could be questioned on very good grounds. According to the ruling of the CJEU in Achmea, rendered almost six months before the investors' invocation, it was clear that a clause such as Article 26(2)(c) of the Energy Charter Treaty could not be applied in the relationship between the EU investors and Poland. In addition, Poland had warned the investors of its view on the jurisdictional issue in a letter dated 28 June 2018, but the investors chose to ignore this and instead initiated a costly and time-consuming procedure in August 2018, which caused Poland to incur costs far more than the amount that the investors were ordered to pay in the arbitration award. To annul or set aside the award of costs in the arbitral award in these circumstances effectively means that the investors escape liability for negligent initiation of arbitration and negligent conduct of the proceedings.

Furthermore, there is reason to adopt the same approach to the costs award also in so far as it concerns the obligation of the investors to compensate Poland for its own legal costs. If the arbitral tribunal had reached the decision on the jurisdiction issue that is correct according to what the parties now agree, the outcome would have been that the arbitral tribunal had rejected the EU investors' claim and Poland would have been reimbursed for its legal costs. The mere fact that the arbitral tribunal reached the wrong conclusion on the jurisdictional issue but dismissed the claim on the merits should not have the effect that Poland, because of an annulment or a cancellation of the costs award, loses the right to reimbursement of costs. In such cases, the investors would be in a better position in terms of costs to have their claim reviewed on the merits and dismissed than if the arbitral tribunal had instead dismissed the claim for lack of jurisdiction.

The fact that the investors could be held liable for Poland's litigation costs in the event that the arbitral tribunal was deemed to be unauthorised to hear the dispute was also fully foreseeable for the investors and should have been a risk that they had calculated. By invoking the arbitration, the investors may already be considered to have accepted potential liability for the costs of the proceedings - there is no corresponding acceptance from Poland.

Furthermore, it would be remarkable if the consequence of the development of the CJEU's

jurisprudence in this area were to be that investors - unlike the Member State party which is obliged under EU law to challenge the jurisdiction of the arbitral tribunal - are free to invoke arbitration proceedings on the basis of invalid arbitration clauses without any risk of ultimately having to bear the litigation costs of the other party. In the event of an unfavorable ruling - as in in the present case, the investor would still have to expect that the award, including its own liability for costs in relation to the Member State party, would be set aside. Such an application of the law seems neither reasonable nor intended.

The imposition of costs on an EU investor who invokes arbitration in breach of an inapplicable arbitration clause in an intra-EU investment agreement and thereby causes the other party to incur litigation costs can be seen as a necessary element in maintaining the effectiveness of the prohibition of arbitration in intra-EU investment disputes under EU law. Cost liability in these cases can have both a deterrent and a remedial effect. Without the financial sanction of costs liability, the prohibition of arbitration in intra-EU investment disputes risks becoming illusory where, as in this case, the claim is dismissed, and the only practical consequence of the arbitral award is precisely the obligation of the investors to reimburse the costs of the other party.

The fact that the investors first argue in the Court of Appeal that the arbitration should never have been conducted can also be equated with the fact that the investors in the Court of Appeal have withdrawn the action brought in the arbitration or have requested that the action brought in the arbitration now be dismissed. If the Court of Appeal annuls the cost award, the consequence will be the opposite of what would have been the case if an appeal had been lodged against a district court judgment. Instead of the investors being ordered to reimburse Poland's costs for the process that the investors initiated unnecessarily and which they now themselves admit should never have been initiated, the investors are released from their liability for compensation. Such an outcome is neither reasonable nor appropriate.

3.2.5 Invalidity/cancellation in relation to the third country investor

EU law, as interpreted in the case-law of the Court of Justice of the European Union on

intra-EU investment disputes, is not relevant to the dispute between Mr Derendinger and Poland. The dispute is not intra-EU in this respect. The arbitral award or the manner in which it was made is therefore not contrary to public policy and the dispute between the parties is arbitrable. Furthermore, there is a valid arbitration agreement between these parties. Therefore, in any event, there is no reason to annul or set aside the arbitral award in any respect in this part.

According to the statements of the CJEU in Komstroy, the obligation of a Member State to comply with the dispute settlement rules provided for in the Energy Charter Treaty remains in force in relation to investors from non-Member States which are also parties to the Energy Charter Treaty. There is no support in Komstroy for interpreting Article 26(2)(c) of the Energy Charter Treaty in any other way than as applicable to the dispute between the third-country investor and Poland. The fact that an arbitral tribunal in a dispute between a Member State and a third country investor might in itself need to take account of EU law - for example, in disputes under the Energy Charter Treaty, which is an act of EU law - is not in itself a reason why the arbitral tribunal should not be competent to hear the dispute.

Furthermore, the grounds of invalidity and challenge relied on are distinct and independent in that they do not apply to the action brought by the third country investor against Poland but only in relation to the other investors. It is a fundamental principle that a decision which is open to challenge in part must not be set aside to a greater extent than is necessary to remedy the defect caused by the ground of challenge.

The third-country investor, for its part, could have invoked a separate arbitration procedure in relation to Poland with reference to the dispute resolution clauses of the Energy Charter Treaty concerning its investment. The fact that the third country investor nevertheless chose to invoke arbitration jointly with the EU investors, well aware of the risks in relation to the jurisdiction of the arbitral tribunal that those investors' action entailed, is a decision for which the third country investor itself is responsible and bears the risk.

It should furthermore be noted in particular that in principle all issues that the arbitral

tribunal had to consider in the arbitration were common to all investors and that the costs would therefore have been incurred even if the third country investor alone had invoked the arbitration against Poland. This applies without further ado to the costs of the arbitrators and SCC's administrative fee.

As regards Poland's own costs, the arbitral tribunal has not found reason to order the investors to reimburse the costs in certain proportions, e.g. since the examination of certain issues attributable to only one or a few of the investors was particularly costly. On the contrary, the investors have been obliged to reimburse each other jointly and severally for the full amount of costs awarded. This in itself is an expression of the fact that the disputed issues in the case were essentially common to the investors. The fact that the investors' liability for payment is joint and several according to the arbitral award also means that the third country investor, even if no action for annulment or challenge was ever brought, still risked ultimately bearing the costs alone, depending on, inter alia, the ability of the EU investors to pay.

3.2.6 Request for referral back to the arbitral tribunal

The Court of Appeal can, by a simple and, given the Court of Appeal's mandate, fully permissible adjustment of the arbitral award, achieve an enforceable award with respect to the costs award that applies only in the relationship between the third country investor and Poland. If the Court of Appeal nevertheless considers that it lacks the possibility to rule on the costs of the arbitration and is considering setting aside the entire arbitral award even though the relevant ground for annulment only covers part of the award, the Court of Appeal shall instead refer the matter back to the arbitral tribunal pursuant to section 35 of the Arbitration Act.

4 THE INVESTIGATION IN THE COURT OF APPEAL

The parties have not adduced any evidence.

5 JUDGMENT

5.1 Disposition and order of review

The parties agree that there are grounds for declaring the award null and void in so far as it relates to the main proceedings between the EU investors on the one hand and Poland on the other. The question of the invalidity of an arbitral award is in dispositive in the sense that the parties cannot reach a settlement that would render an arbitral award valid. However, there should not be any obstacle to the parties agreeing that an arbitral award is invalid (see Heuman, JT 2014/15 p. 446 and Lindskog, Skiljeförfarande, En kommen- tar, third edition, 2020, p. 922 f.). Even if the parties agree that the circumstances are such that the arbitral award is essentially invalid, Poland has not conceded the claim in any part for the reasons set forth in the statement of claim. The Court of Appeal must therefore conduct a full review of the investors' entire claim.

The main issue to be decided by the Court of Appeal is thus whether the arbitral award is invalid. Within the framework of this question, the Court of Appeal must decide whether the arbitral award shall be declared invalid in its entirety, i.e. both in relation to the third-party investor Mr Derendinger and in relation to the costs. Depending on what the Court of Appeal decides in these respects, the Court of Appeal may also have to decide on other issues in the case.

However, the Court of Appeal begins by examining whether the investors' action should be dismissed in part as requested by Poland.

5.2 The question of inadmissibility of part of the investors' statement

Poland has moved that the Court of Appeal shall reject the investors' motion to annul or set aside the arbitral award with respect to *the* decision on compensation to the arbitrators and the SCC, as well *as the* decision that the investors shall reimburse Poland for the advance paid by Poland for these costs.

The arbitration in question was conducted in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce from 2017. The SCC Arbitration Rules state that the costs of arbitration consist of the arbitral tribunal's fees, the administrative fee and the expenses of the arbitral tribunal and the SCC. The Arbitration Rules further state that the arbitral tribunal shall, prior to the issuance of the final award, request the SCC Board to finalise the costs of the arbitration. The Board shall finalise the costs of the arbitration in accordance with the Rules on Costs in force on the date of commencement of the arbitration. In the final award, the Arbitral Tribunal shall set out the costs of the arbitration as finally determined by the Board and shall specify the fees and expenses of each of the Arbitrators and of the SCC (See Sections 49(1), (2) and (5) of the Arbitration Rules).

Paragraph 771 of the award states that on 17 June 2021, the SCC determined the remuneration of each arbitrator. The arbitral tribunal also set out in the award the costs of the arbitration as determined by the SCC. An action against such a decision on the costs of the arbitration made by an arbitral institution and included in an arbitral award may be brought pursuant to the provision in section 41 of the Arbitration Act (see NJA 2008 p. 1118).

With respect to Poland's motion to dismiss in this part, the investors have clarified that their claim does not include the decision on compensation to the arbitrators and the SCC for the costs of the arbitration included in the arbitral award. Since the motion to dismiss in this part thus does not correspond to any part of the investors' claim, there is no basis whatsoever for Poland's motion to dismiss in the present regard.

With respect to the decision in the arbitral award that the investors shall reimburse Poland for the advance paid by Poland for the costs of the arbitration, Poland has argued that the arbitral tribunal's decision to only order the investors to pay the compensation to the arbitrators is also a decision that is appealed to the district court pursuant to section 41 of the Arbitration Act. Since this has not been done, Poland has argued that the decision that the investors shall bear the entire cost of the arbitration has become res judicata, which is why the Court of Appeal is precluded from also annulling or cancelling the decision that the

investors shall repay the advance amount paid by Poland. Poland has further argued that an analogous application of the provision in section 37, first paragraph, second sentence of the Arbitration Act, regarding liability for the costs of the arbitration when the arbitral tribunal is deemed to be unauthorised, would prevent the Court of Appeal from reviewing the issue.

The investors' action in this case is directed against Poland and thus concerns the relationship between the parties. Poland's motion for dismissal in this part also concerns how the costs of the arbitration itself should be allocated between the parties in light of the outcome of the case on the merits. Regardless of whether the cost orders in the arbitral award were formulated in such a way that they could fulfil a legal function between the parties and the arbitrators, for example as a writ of execution, this cannot, in the Court of Appeal’s opinion, mean that the cost orders, insofar as they concern the legal relationship between the parties, could not be reviewed by the Court of Appeal in the context of an action for annulment and challenge. Nor can Poland's arguments regarding an analogous application of section 37 of the Arbitration Act prevent such a review.

Poland's application for partial dismissal of the investors' action must therefore be rejected.

5.3 The question of the invalidity of the award

5.3.1 The question of the invalidity of the arbitral award regarding the intra-EU relationship

In the three preliminary rulings Achmea, Komstroy and PL Holdings, the Court of Justice of the European Union has ruled on arbitration clauses in investment protection agreements concluded between two or more Member States and on the compatibility of such agreements with EU law.

Referring to the fact that the preliminary ruling procedure constitutes the core of the EU court system, the CJEU stated in Achmea *that* the arbitral tribunal could interpret and apply EU law but *that* the arbitral tribunal did not constitute a court or tribunal within the meaning of Article 267 TFEU that could request a preliminary ruling, and *that* the competent national

court could only conduct the limited review that follows from national law (see Achmea, paragraphs 37-53). The Court further held that, by concluding a bilateral agreement, the Member States concerned had established a mechanism for resolving disputes between an investor and a Member State which could lead to those disputes being settled in a manner which did not ensure the full effectiveness of EU law. According to the CJEU, the arbitration clause at issue in the agreement was not compatible with the principle of sincere cooperation and thus undermined the autonomy of EU law (see Achmea, paragraphs 56-59).

In Komstroy, which concerned, inter alia, the interpretation of Article 26 of the Energy Charter Treaty, the CJEU held that, although the international agreement of which the provision forms part is a multilateral agreement, such a provision is in fact intended to regulate bilateral relations between two contracting parties in a manner similar to the provision of the bilateral investment treaty at issue in Achmea (see Komstroy, paragraph 64). The CJEU stated that it follows that, although the Energy Charter Treaty may require Member States to comply with the prescribed arbitration mechanisms in their relations with investors from non-Member States which are also parties to the Treaty, in respect of investments made by those investors in Member States, the preservation of the autonomy and specific character of EU law precludes the Energy Charter Treaty from imposing the same obligations on Member States as between themselves (see Komstroy, paragraph 65). The CJEU therefore concluded that Article 26(2)(c) of the Energy Charter Treaty must be interpreted as not applying to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the former (see Komstroy, paragraph 66).

In NJA 2022 p. 965, the Supreme Court has stated that an arbitral award in an intra-EU investment dispute made on the basis of an arbitration clause in an international investment treaty may be considered to have been made in an unlawful manner, since it is incompatible with the fundamental rules and principles governing the legal order in the Union and thus also in Sweden. Accordingly, it follows from the Supreme Court's decision that upholding such an arbitral award would be manifestly incompatible with the foundations of the legal order in Sweden, and such an arbitral award shall therefore be declared invalid pursuant to

section 33, first paragraph, section 2 of the Arbitration Act. (See paragraphs 59 and 60 of the Supreme Court's decision.)

The present arbitral award was rendered pursuant to Article 26 of the Energy Charter Treaty. Given that four of the five investors who invoked the arbitration against Poland are from EU Member States, it is thus a matter of an intra-EU investment dispute. It is thus clear that upholding such an arbitral award would be manifestly incompatible with the public policy of the Swedish legal system and that the award is invalid pursuant to section 33, first paragraph, section 2 of the Arbitration Act.

However, Poland has argued that the arbitral award in relation to the third-country investor should be upheld despite the invalidity of the award in general. The Court of Appeal will therefore consider whether it is possible to uphold the arbitral award in so far as it relates to the third country investor.

5.3.2 The question of the invalidity of the award in relation to the third country investor

It is clear from the Court of Justice of the European Union's statements in Komstroy, cited above by the Court of Appeal, that the Energy Charter Treaty may require Member States to comply with the arbitration mechanism provided for in that treaty in their relations with investors from non-member states which are also parties to that treaty, in respect of investments made by those investors in the Member States (see Komstroy, paragraph 65). It is thus clear that Member States may be bound by arbitration clauses in multilateral international agreements. However, in the Court of Appeal’s opinion, whether the award can be partially upheld in relation to the third country investor when the action before the arbitral tribunal has been brought jointly with investors from Member States and it is clear that the award is invalid in relation to the latter for the reasons at issue in this case, must be answered within the framework of the review to be conducted pursuant to section 33 of the Arbitration Act. As far as the Court of Appeal is aware, this question has - since the European Court of Justice issued its judgments in Achmea, Komstroy and PL Holdings - not previously been considered by a Swedish court.

Section 33, second paragraph of the Arbitration Act states that the invalidity may apply to a certain part of the arbitral award. The preparatory works state that the provision clarifies that the invalidity does not necessarily affect the parts of the award that are not subject to any grounds for invalidity. As an example, the situation is highlighted where the arbitrators have decided a non-arbitrable issue and at the same time decided other disputed issues, and in such a case the invalidity affects only the part of the award dealing with the non-arbitrable issue, provided that the non-arbitrable issue can be distinguished from the other issues dealt with in the award. (See Bill 1998/99:35 p. 234.)

According to Lindskog, the provision should be understood as meaning that the extent of the effects of the invalidity effects is determined by the grounds for invalidity. This means, for example, that the entire award is invalid if the award does not fulfil the requirements of written form and signature in section 31(1) of the Arbitration Act. According to Mr Lindskog, this should also normally be the case if the procedure is incompatible with public policy. If, on the other hand, the ground for invalidity is that the arbitral award is incompatible with public policy in a certain distinct and independent part, Mr Lindskog states that the effects of invalidity should be limited to that part. The same should apply to the examination of a non-arbitrable issue (see Lindskog, a.a., p. 918 f.).

The ground of invalidity that affects the present arbitral award is to be attributede to procedural public policy, where the CJEU has clarified through its decisions that arbitration clauses based on international investment protection agreements between Member States are contrary to some of the most fundamental principles of EU law in the EU Treaties, such as the principles of mutual trust between Member States, loyal co-operation and the autonomy of EU law (see, for example, PL Holdings, paragraph 46 with references to Achmea).

In the Court of Appeal's opinion, the invalidity of an arbitral award rendered by an arbitral tribunal constituted in violation of the aforementioned principles is of such nature that the invalidity should affect the award as a whole. The Court of Appeal therefore concludes that,

given the nature of the invalidity, the arbitral award in question should not be upheld to the extent that it includes the arbitral tribunal's review of the third country national's claim, even if it might be possible to separate the action in this part from the rest of the case. The arbitral award is therefore also invalid in relation to the third-country investor, Mr Derendinger.

5.3.3 The question of the invalidity of the award in the cost part

For the reasons stated above, the Court of Appeal has found that the arbitral award is invalid in its entirety. In this assessment, there is no basis for allowing the arbitral award to remain in the costs section as regards the party's mutual liability for compensation for the proceedings and for the other party's costs. That the investors at the time of the proceedings before the arbitral tribunal, in contrast to Poland, considered that there was no impediment for the arbitral tribunal to hear the dispute does not lead to a different assessment. Nor is it possible for the Court of Appeal to apply the provision in section 37, first paragraph, second sentence of the Arbitration Act by analogy in the context of an invalidity action, as argued by Poland, and allow the award to remain in the costs section.

To summarise, the Court of Appeal's findings mean that the arbitral award is invalid in its entirety, including the decision in the costs section insofar as it relates to the parties' mutual liability for the arbitrators' remuneration and the other party's costs.

5.3.4 The question of whether the arbitral tribunal should be given the opportunity to act under Section 35 of the Arbitration Act

Based on the assessments made by the Court of Appeal, there is no reason to consider Poland's request that the Court of Appeal, pursuant to section 35 of the Arbitration Act, should give the arbitrators the opportunity to resume the proceedings or take any other measure which, in the arbitrators' opinion, removes the grounds for the invalidity or annulment.

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5.4 Costs of proceedings before the Court of Appeal

The investors' action has been fully upheld. However, Poland has argued that the investors should be regarded as the losing party in the Court of Appeal even in this outcome.

Poland has primarily argued that the investors alone and through negligence have caused the proceedings in the Court of Appeal, which is why they, pursuant to Chapter 18, Section 3 of the Code of Judicial Procedure, shall compensate Poland for its legal costs. In this context, Poland has pointed out that Poland, for its part, argued already during the arbitration that the arbitral tribunal did not have jurisdiction to hear the dispute and that a decision on the merits would result in an invalid arbitral award - a view which the investors refused to accept at the time - and that the investors were also informed of Poland's view on the jurisdiction issue several months before the investors invoked the arbitration. According to Poland, the investors have brought an action before the Court of Appeal without Poland being able to be said to have given cause for this and they have, through their behavior, intentionally or through negligence caused unnecessary proceedings, which is why they alone have caused the court of appeal proceedings, and the costs associated with them. Poland has, in the alternative, with reference to a possible analogous application of the provision in Chapter 18, section 5 of the Code of Judicial Procedure, argued that the investors' action for annulment is to be equated with a withdrawal of the action brought in the arbitration. According to Poland, the investors' action in the Court of Appeal in practice means that they recognise that no arbitration should ever have taken place. Poland has emphasised that it was already clear at the time of the investors' invocation of the arbitration and throughout the proceedings that there was an imminent and concrete risk that an arbitral award would not be enforceable due to the requirements of EU law on Member States. Alternatively, in Poland's view, the Court of Appeal's decision to annul the arbitral award can be equated with the Court of Appeal's dismissal of the investors' claim before the arbitral tribunal.

The investors have objected that, regardless of the outcome of the case, they should be

ordered to pay Poland's costs in the Court of Appeal. They argued that they invoked arbitration in good faith and that the legal position regarding the impact of EU law on arbitration under the Energy Charter Treaty, as now clarified, was neither generally accepted nor foreseeable at the time of their invocation. They have pointed out that the arbitral tribunal, which consisted of experts in international arbitration and investment disputes, considered itself competent to render the award as late as 30 June 2021. According to the investors, they had legitimate reason to assume that they could rely on the arbitration agreement in the Energy Charter Treaty, and they therefore did not invoke the arbitration against their better judgment. In addition, the investors have pointed out that Poland in the proceedings in the Court of Appeal has contested the claim and has not made any admissions of the investors' claim. According to the investors, considering Poland's position, it was necessary for them to bring an action before the Court of Appeal.

Chapter 18, section 1 of the Code of Judicial Procedure contains the main rule for the allocation of responsibility for costs in civil proceedings, i.e. that the losing party must reimburse the other party for its costs. Chapter 18, sections 3 and 5, provide that the successful party may instead, on various grounds, be ordered to pay the other party's legal costs or that the parties' legal costs may be set off.

As a preliminary remark, the Court of Appeal notes that the investors have been fully successful in their action in that the arbitral award has been declared invalid in its entirety. The question is then whether the circumstances pointed out by Poland constitute grounds for allocating the costs in a manner other than according to the general rule.

As the Court of Appeal has stated above, there should in itself not be any obstacle to the parties reaching a settlement on the invalidity of the arbitral award (see the above references to Heuman, JT 2014/15 p. 446 and Lindskog, a.a., p. 922 f.). However, Poland has not conceded the investors' claim in any part and has opposed the arbitral award being declared invalid in relation to the third country investor and in the costs part.

Poland has also requested that the investors' claim be dismissed in part. In the Court of

Appeal's opinion, it follows from Poland's position on the claim alone that the investors cannot be considered to have initiated a lawsuit without Poland having given reason to do so.

As to the question of whether the investors otherwise intentionally or through negligence caused unnecessary proceedings, the Court of Appeal has understood that Poland has argued that if the investors had had the attitude they have now, the arbitration would never have been initiated or in any event not concluded through a substantive review and the current proceedings in the Court of Appeal would therefore not have been necessary.

The applicability of arbitration clauses in international investment treaties to intra-EU disputes has, at least since the CJEU's decision in Achmea, been the subject of extensive discussion in the legal literature. The Court of Appeal also notes that both the Cour d'appel de Paris and the Swedish Supreme Court, following the CJEU's decision in Achmea, have been prompted to ask the CJEU further questions of interpretation regarding such arbitration clauses, which have only been answered since the arbitration award in question was issued. As recently as 13 December 2022, this Court of Appeal issued a judgment in a case concerning, inter alia, an action for annulment of an arbitral award issued on the basis of the arbitration clause in the Energy Charter Treaty (see Svea Court of Appeal's judgment of 13 December 2022 in case no. T 4658-18) and the Supreme Court, following a request for a preliminary ruling from the CJEU in PL Holdings, issued a judgment on 14 December 2022 (see NJA 2022 p. 965). In addition, the arbitral tribunal in the present case - following the judgment of the Court of Justice of the European Union in Achmea and despite Poland's objection to the Board's lack of jurisdiction, which was also supported by the opinion of the European Commission as Amicus Curiae during the proceedings - found itself competent to hear the dispute.

According to the Court of Appeal, the fact that the investors at the time considered it appropriate to invoke and conduct arbitration pursuant to the arbitration clause in the Energy Charter Treaty, but now consider that the arbitral award is invalid and have chosen to bring an action in the matter, cannot be considered to mean that the investors intentionally or

through negligence have caused unnecessary proceedings in a way that entails that they must compensate Poland's legal costs in the case.

There is no basis for equating the outcome of the case in the Court of Appeal with the dismissal of the case following the party's withdrawal pursuant to Chapter 18, Section 5 of the Code of Judicial Procedure according to the Court of Appeal.

In conclusion, the Court of Appeal finds that Poland is to be regarded as the losing party in accordance with the general rule in Chapter 18, Section 1 of the Code of Judicial Procedure. Poland shall therefore compensate the investors for their legal costs.

The investors have claimed compensation for legal costs totaling SEK 945,037.98, divided between the claimants in such a way that one third is attributable to Festorino Invest Limited (1/3), one third to Fosontal Limited (1/3) and the remaining third in equal parts to Petra Salesny (1/9), Peter Derendinger (1/9) and Petr Rojicek (1/9).

Of the amount claimed, Poland has confirmed that an amount of SEK 860,466.98 is reasonable but has left it to the Court of Appeal to assess the reasonableness of an amount of SEK 84,571 for legal fees for the period 28 January 2023 and 27 March 2023.

The Court of Appeal finds that the claimed amount relating to attorney's fees during the period 28 January 2023 and 27 March 2023 is also reasonable. Accordingly, Poland shall compensate the investors for their legal costs in the Court of Appeal in the manner set out in the judgment.

5.5 Executive summary

The Court of Appeal has found that it is clear from the case law of the European Court of Justice that the arbitration clause in the Energy Charter Treaty is not applicable to intra-EU disputes. The Court of Appeal has further found that it follows from the Supreme Court's case law that an arbitral award which has nevertheless been rendered in an intra-EU

investment dispute on the basis of this arbitration clause may be considered to have been made in an unlawful manner, since it is incompatible with the fundamental provisions and principles governing the legal order in the Union and thus also in Sweden. Based on this practice, the Court of Appeal has found that upholding the arbitral award rendered between the parties would be manifestly incompatible with the foundations of the legal order in Sweden, which is why the arbitral award shall be declared invalid pursuant to section 33, first paragraph, section 2 of the Arbitration Act.

The Court of Appeal has further found that the invalidity is of such a nature that it shall affect the arbitral award in its entirety, i.e. also in so far as it relates to the dispute between the investor from a third country and Poland. The invalidity also affects the arbitral award in the costs section as regards the parties' mutual liability for the arbitrators' remuneration and the other party's costs.

The Court of Appeal's judgments mean that the investors' action shall be granted in full. The arbitral award rendered between the parties in Stockholm on 30 June 2021, as corrected and supplemented on 30 July 2021, in SCC case no. V2018/098 shall thus be declared invalid.

The outcome of the case means that the investors are to be considered as winning parties and are to be awarded compensation for their legal costs in the case in the Court of Appeal in the manner set out in the judgment.

By this judgment, the Court of Appeal has declared the arbitral award invalid. Since invalidity is a matter that applies ipso jure, there is no reason to specifically order a continued stay of the arbitral award (that the effects of the invalidity occur ipso jure and that they are thus different from the legal effects of an impeachable error, see Lindskog, supra, p. 920). The Court of Appeal's earlier decision on inhibition has thus also fallen.

6 The question of whether the judgment can be appealed

The Court of Appeal considers that the case involves issues where it is important for the

guidance of the application of the law that the Supreme Court hears an appeal. The Court of Appeal therefore authorises an appeal (section 43(2) of the Arbitration Act 1999:116).

HOW TO APPEAL, see Annex A Appeal by 17 January 2024

The judgment was delivered by Amina Lundqvist, Judge Advocate General of the Court of Appeal, Kerstin Norman, Judge-Rapporteur, and Mats Holmqvist, dissenting.

Dissenting opinion

Counsel for the Court of Appeal, Mr Mats Holmqvist, dissented from the reasoning on the question of what considerations should form the basis for the assessment of whether it is possible to uphold the arbitral award in so far as it relates to the third-country investor (section 5.3.2).

I agree with the legal premises set out by the majority in this part.

However, when assessing whether an award is invalid in its entirety, it must be taken into account that the circumstances may be different in different arbitration proceedings concerning both intra-EU relations and relations between Member States and third country investors. The various parts of a proceeding may be more or less distinguishable, and the intra-EU element may be greater or lesser.

Since Sweden must uphold both EU law and other obligations under international law, including the obligation to recognise written agreements whereby parties undertake to submit disputes to arbitration (cf. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, the "New York Convention", Article II.1), it is going too far to always consider an arbitral award to be invalid in its entirety if the position of the parties is such that it is partly a matter of an intra-EU investment dispute.

It should therefore be possible to allow the part of an award relating to the dispute with a third-country national to stand, despite the invalidity of other parts. In that case, the various parts of the award must be clearly distinguishable. Neither the outcome nor the conduct of the proceedings in the part concerning the third-country national should have been affected by the part of the proceedings before the arbitral tribunal that concerned the intra-EU relationship, i.e. the part of the proceedings that took place in violation of so-called procedural public policy. That this is the case should be evident from a reading of the arbitral tribunal's award. It would be an inappropriate arrangement if an arbitration - which is at least in part clearly incompatible with the public policy of the Swedish legal system - were to be

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followed by extensive litigation on how the parties' conduct of the proceedings before the arbitral tribunal differed in respects not clearly reflected in the arbitral award (cf. Heuman, Skiljemannarätt, 1999, Norstedts Juridik, p. 584).

In my judgment, the part of the arbitration and the award concerning the third country investor cannot be separated from the other issues before the tribunal and in the award in such a way that the invalidity does not arise in relation to the third country investor. I therefore share the majority's conclusion that the arbitral award is invalid also in relation to the third country investor.