UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CEF Energia, B.V. Petitioner, v. The Italian Republic Respondent.	
Greentech Energy Systems A/S (now known as Athena Investments A/S), Novenergia General Partner S.A. (acting as liquidator of Novenergia II Energy & Environment (SCA) SICAR) Novenergia II Italian Portfolio Petitioners, v. The Italian Republic Respondent.	**Case No. 1:19-cv-03443**

Expert Declaration of Torbjörn Andersson

1. My name is Torbjörn Andersson. I have been asked by Petitioners CEF Energia, B.V. and Greentech Energy Systems A/S (now known as Athena Investments A/S), Novenergia General Partner S.A. (acting as liquidator of Novenergia II Energy & Environment (SCA) SICAR) Novenergia II Italian Portfolio to provide a declaration discussing Swedish law as it applies in this above captioned consolidated matter, and specifically to discuss the extent (if any) to which the ruling of the Court of Justice of the European Union ("CJEU") in *the Slovak Republic v Achmea BV* (Case C-284/16) ("*Achmea*") affects the validity of the agreement made between Petitioners and Italy to submit any disputes arising out of Petitioners' investments in Italy to binding arbitration in Stockholm, Sweden under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules").

2. It is my opinion that *Achmea* — a ruling involving different parties and a dispute arising out of a different treaty (and different type of treaty) than is at issue in this case — has not invalidated the agreement between Petitioners and Italy to arbitrate under Article 26 of the Energy Charter Treaty ("ECT"), and that, as a matter of Swedish contract law, that agreement was both validly formed and remains valid, enforceable, and effective as of this date.

3. I am currently professor of Civil and Criminal Procedural Law at the Faculty of Law, Uppsala University, a position I have held since 2001. I was Dean at the Faculty of Law, Uppsala 2008-2014, Vice-Dean, same faculty 2004-2008, Guest professor at the Faculty of Law Vienna University 2019, guest professor at the Faculty of Law Zürich University 2017, guest professor at the Faculty of Law Vienna University 2017, guest professor at the Faculty of Law Vienna University 2015, guest instructor at the Faculty of Law Zürich University 2006-2010, Jean Monet Professor of EC law at the Faculty of Law Uppsala University 2002-2007, guest professor at the Faculty of Law, Bologna University 2005, Reader in Procedural Law, Uppsala University 1999-2001, Lecturer in Private Law, Uppsala University 1999-2001 and Ll. D. in Procedural Law, Uppsala University 1997. I graduated as LL.M. in 1992. Most of my research and teaching has been in Swedish and international civil and criminal procedure (including arbitration), but also in European Union law. During the last 15 years I have written approximately 10 legal opinions on the relationship between European Union law and arbitration in Sweden.

4. In the course of preparing this declaration, I have reviewed the Awards sought to be enforced herein, the submissions filed by Italy in this case, and pertinent provisions of the ECT. In making this declaration, I have relied upon my knowledge of Swedish and European Union law.

Scope of This Declaration

5. It is my understanding that Italy claims before this Court (and elsewhere) that the arbitration agreement between Petitioners and Italy that led to issuance of the Awards at issue in this case was "invalidated," *ab initio*, by the decision of the Court of Justice of the European Union ("CJEU") in *Achmea*. Because the arbitration was seated in Sweden, however, Swedish contract law principles govern whether *Achmea* "invalidated" the agreement as a matter of law, which Italy appears to concede was made as a matter of fact. I will therefore address that question in the first part of this declaration.

6. In addition, I understand that Italy has claimed that the award has been "suspended," and that this purported suspension would authorize this Court to refuse to recognize the award under Article V(1)(e) of the New York Convention. My declaration discusses this point as well in part two.

Part One: Swedish Law Governing Agreements to Arbitrate

7. The SCC is commonly used as a venue for investor-state arbitrations. Between 1993 and 2018, a total of 106 such arbitrations were registered at the SCC. As a result, Sweden has a robust and well-developed body of law related to arbitration and arbitration agreements.

8. As in the United States, Swedish law requires a court to apply contract law principles when determining whether parties to a dispute have agreed to arbitrate that dispute; as pertinent here, Swedish law also requires the application of contract law principles to determine

whether any such agreement that has been made has been subsequently invalidated, and, if so, when that invalidation occurred.[1]

9. When determining whether parties have agreed to arbitrate a particular investor-state dispute, a Swedish court requires two elements. **First**, the court will examine whether the state has entered into a bilateral or multilateral agreement with another state or states that contains an agreement to submit investment-related disputes to arbitration. Such provisions in a treaty — *i.e.*, those authorizing arbitration of disputes between investors from one treaty-signatory state, on the one hand, and another treaty-signatory state, on the other, are called **diagonal dispute resolution provisions**. The state's ratification of a treaty containing a diagonal dispute resolution provision is considered by Swedish courts to represent a standing offer to arbitrate disputes falling under the treaty's substantive provisions.

10. **Second**, assuming the court finds that the state has entered into such an agreement, a Swedish court will examine whether the investor seeking to invoke arbitration has properly done so by filing a request, or a notice of arbitration. Swedish courts consider the filing of such a notice of arbitration to be an acceptance by the investor of the signatory state's standing offer to arbitrate, and as such, the filing of that notice of arbitration creates the contract necessary to form a valid and binding arbitration agreement as a matter of Swedish law.

11. Swedish courts have held in prior cases that the ECT's arbitration provision constitutes a valid arbitration agreement and have confirmed the existence of arbitration agreements under the ECT.[2]

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[1] Hobér, K, International Commercial Arbitration in Sweden (Oxford 2011) p 90 et seq, p 114 et seq and p 141 et seq. (**Exhibit 1**)

[2] *See e.g.*, Swedish Svea Court of Appeal judgment in Kazakhstan v. Ascom Group in setting aside proceedings 9 December 2016 Stockholm, case T 2675-14 (**Exhibit 2**); *see also* Swedish Supreme Court in in Petrobart Ltd v. Kyrgyz Republic 28 March 2008, case NJA 2008 s 406 (**Exhibit 3**).

12. Based on these principles, when an investor requests arbitration in Sweden by invoking the diagonal dispute resolution provision set forth in a valid treaty, the parties to the dispute have formed a valid arbitration agreement and a tribunal thereafter appointed will have jurisdiction under the Swedish Arbitration Act to decide the dispute in accordance with the SCC Rules. The respondent state cannot oppose arbitration under these circumstances as long as the arbitrators act within the subject matter of the dispute submitted to them. Assuming the tribunal observes these limitations on its jurisdiction, the award will be considered a valid and enforceable award in Sweden.

13. Moreover, the 1999 Swedish Arbitration Act provides that where the parties have agreed to arbitrate in Sweden, "the arbitrators may rule on their own jurisdiction to decide the dispute."[3] Therefore, where an arbitration is seated in Sweden, Swedish law delegates questions concerning the jurisdiction of the arbitrators to the arbitrators themselves in the first instance.

14. There is no question that each of the criteria for establishing an agreement to arbitrate was met in the current case. Italy (and the European Union) ratified the ECT, and Article 26 of the ECT represents a standing offer by each signatory state to arbitrate any disputes arising between it and an investor of another signatory state. The first element was thus clearly established. Further, it appears to be undisputed that Petitioners herein accepted Italy's offer to arbitrate disputes arising under the ECT by filing respective notices of arbitration, satisfying the second element. As a matter of Swedish law, therefore, Petitioners' filing of the notices of arbitration in this case on 20 November 2015 (in the arbitration involving CEF Energia BV) and on 7 July 2015 (in the arbitration involving the remaining Petitioners) each constituted valid and proper acceptances of Italy's standing offer to arbitrate and resulted in the formation of valid and

[3] Swedish Arbitration Act (SFS 1999:116), § 2 (**Exhibit 10**).

enforceable agreements between Italy and the respective Petitioners to arbitrate these disputes. These agreements gave the tribunals that decided the disputes jurisdiction to decide them and to render valid and binding awards.

15. Under Swedish law, an arbitral award can be deemed invalid *ab initio*, or it may be deemed voidable. Importantly here, when a challenge is based on the alleged invalidity of the arbitration agreement, the arbitral award is not invalid *ab initio*, but is merely voidable by a court ruling, should the arbitration agreement be declared invalid by the court. It is my understanding that Italy has claimed before this Court that *Achmea* rendered the arbitration agreement it made with Petitioners to be void *ab initio*. As discussed below, it is clear as a matter of Swedish law that *Achmea* could not have had and did not have this effect on the agreement to arbitrate, because (a) *Achmea* did not have, and does not have, any direct legal effect on the agreements to arbitrate at issue in this case; and (b) *Achmea* does not apply to the ECT. As a result, the arbitration agreements at issue in this case – which have been fully performed – remain valid and intact.

16. *Achmea* involved a dispute arising out of a bilateral investment treaty between the Netherlands and the Slovak Republic. In that decision, familiarity with which is presumed on account of papers filed by the parties herein, the CJEU held that Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU") precluded the state parties to the treaty from agreeing to submit disputes with investors to arbitration because doing so would prevent European national courts (and, if necessary, the CJEU) from ruling on issues of European Union law, which (unlike under the ECT) constituted the rule of decision in the bilateral treaty at issue and the arbitration convened under it. Because these articles of the TFEU grant national courts, and ultimately the CJEU, exclusive jurisdiction to rule on questions of European Union

law, the CJEU found that the agreement to submit such legal questions to an arbitral tribunal (from which no recourse to the CJEU was available) would violate the European Union's fundamental legal structure.

17. It is my view that, as a matter of Swedish law, the *Achmea* ruling had no direct legal effect on the existence or validity of the arbitration agreements reached between Petitioners and Italy.

18. Similar to the grounds of invalidity of arbitral awards, in order for an existing arbitration agreement to be invalidated and rendered void *ab initio* under Swedish law, a **Swedish** court must find that the agreement is contrary to public policy or that another ground for contractual invalidity, like fraud or duress, has been established by the party seeking to invalidate the agreement.

19. These elements of invalidity *ab initio* are not present here. No Swedish court (nor, as discussed below, the CJEU) has held that the arbitration agreement at issue in this case is void or that it may not be performed. Indeed, while the Swedish government was asked to adopt a declaration stating that agreements of the kind at issue in this case are void as a result of the CJEU's decision in *Achmea*, it declined to do so. Specifically, as the Court is aware, while several EU member states have issued declarations opining that *Achmea* renders arbitration agreements made between EU-based investors and EU member states unenforceable, the Swedish government declined to sign this declaration, and chose instead to issue a different declaration declining to adopt this view. It is my understanding from Petitioners' U.S. counsel that Italy has the burden of proving that the arbitration agreement has been rendered invalid *ab initio* as a matter of Swedish law, and based on my review of the record, I do not believe that Italy has done so under the principles of Swedish law that govern that question.

20. I cannot agree with the argument that *Achmea*, as a ruling by the CJEU, "held" that all arbitration agreements between investors from EU member states and EU member states that are rooted in investment treaties are void. This is an unreasonably broad interpretation of the *Achmea* ruling. **First**, *Achmea* only concerns a single bilateral investment treaty in force between only two EU member states, the Netherlands and Slovakia. While the CJEU found that arbitration as provided in that treaty "is precluded" under EU law, it did not address whether the investor, Achmea, nevertheless was entitled to rely on the arbitration clause in its dispute against Slovakia, as it had done when pursing the underlying arbitration.

21. **Second**, compared to the present case, not only did *Achmea* involve different parties, but it also involved a dispute that arose out of a different category of treaty, (a) to which the EU was not a party and (b) which expressly required the application of EU law. Those two critical facts – which were instrumental in the *Achmea* decision – are not present in this case, which involves a multilateral treaty, the ECT, that the EU itself ratified (and many non-EU states have ratified), and which requires that disputes be resolved with reference to international (as opposed to EU) law. In my opinion, these distinguishing facts are sufficient to demonstrate that the *Achmea* ruling has no application to this dispute.

22. It is my understanding that the scope of the *Achmea* ruling is addressed in the declaration being submitted by Professor Piet Eeckhout, and for that reason I do not dwell on it further here. Still, it should be pointed out that preliminary rulings by the CJEU differ from rulings by American federal appellate courts in that they are not decisive of the outcome of the disputes before the CJEU. After the CJEU has ruled on an issue of EU law put before it, it is still the responsibility of the national court to (a) determine whether the case at hand actually meets the criteria laid down by the CJEU and (b) establish the relevant facts in the case before applying

the CJEU decision to those facts and issuing a judgment that binds and determines the rights of the parties. Thus, it is within the jurisdiction of the national court, not of the CJEU, to decide the actual case.

23. To sum, since the facts underlying *Achmea* are significantly different from the facts of this case, this Court should reject, on the merits, any suggestion that *Achmea* invalidated Italy's treaty-based agreement to arbitrate a case under ECT.

24. Further, whether or not that agreement was invalidated *ab initio* is exclusively a question for the Svea Court of Appeal, which has made no statement or ruling on that issue. Accordingly, at the present time — as at the time the arbitrations were commenced — the arbitration agreements between Petitioners and Italy remain effective and enforceable and have been fully performed. In my opinion, there are not any grounds upon which the Svea Court could find that those agreements have been, or may be, invalidated.

Part Two: Stay of Execution

25. Prior to the (1999) Swedish Arbitration Act, the separation between the binding effect of an arbitration award and its enforceability was obvious. Independent of whether or not an arbitration award had been made subject to set aside proceedings, execution was dependent on the Swedish Enforcement Authority ("EA") making a formal declaration on the award's enforceability.[4] The EA would assess whether the award met three criteria, one of which was that the defendant's likelihood of success in ongoing or future set aside proceedings. These decisions, negative or positive, were subject to separate appeal. Consequently, there could be two parallel sets of proceedings where the basis for setting aside the award was assessed – one

[4] SOU 1994:81, *Ny lag om skiljeförfarande* (Public Report of a Government Committee, preparatory work preceding the Swedish Arbitration Act 1999,) (SOU 1994). at p 214. **(Exhibit 4)**

concerning the actual setting aside (carried out before the Court of Appeal) and the other concerning the execution of the award (carried out before the EA).

26. But with the 1999 Swedish Arbitration Act, the EA is no longer tasked with assessing the probabilities of an applicant's success in setting aside an arbitral award. This is because Swedish legislators wanted to facilitate the execution of arbitration awards and avoid parallel proceedings.[5] Thus, the Svea Court of Appeal became the exclusive forum for adjudicating set aside proceedings, and it had the power to issue a stay of execution at the losing party's request. This follows from Code of Execution ("CoE") Chapter 3, Section 18.

27. Now that the Svea Court of Appeal assesses both stay of execution and set aside proceedings, it is nevertheless the case that the binding effect of an arbitral award is a separate question from its execution. A decision to stay execution does not deprive the award of its validity or its binding effects.

28. That said, under Swedish law there are certain overlapping criteria when determining (i) if an award should be set aside or (ii) if a stay of execution of an award should be issued. The overlapping criteria are outlined under section 34 of the Swedish Arbitration Act.

29. Of particular relevance here is the Swedish measure called an *inhibition* (i.e., a stay or stop of execution), which is generally applied in Swedish (civil and administrative) procedure. In some fields, the criteria for an *inhibition* order are explicitly laid down in writing, but in other fields the regulatory law simply provides that a court seized of a case is competent to issue a stay of execution. Chapter 3, Section 18 CoE contains a provision of the latter type. Generally, the criteria for a stay of enforcement include the probability that a previously contested judgment will be altered, and the estimated potential harm of execution or a stay of execution. These are

[5] Government Bill 1998/99:35 p. 180f **(Exhibit 9)**.

the two most important criteria, though the decision maker should also consider all known factors which may be of relevance, even those which are not invoked by the parties.[6] This means that the decision whether or not to stay enforcement has the character of a balancing-of-interests test and an "overall-assessment",[7] which makes it different from the assessment of whether or not the award should be set aside under section 34 of the Arbitration Act.

30. Generally, a stay of execution by way of an *inhibition* order is decided as a matter of urgency and often *ex parte*. Consequently, such decisions are extremely brief and contain practically no express reasoning from which one may deduce the reasons for the decision. This is the case with respect to the *inhibition* orders that the Svea Court of Appeal issued, on an *ex parte* basis, in each of the set aside proceedings concerning the two arbitrations at issue in this case. In contrast to those orders, the ultimate decisions from the Svea Court of Appeal determining the enforceability of those arbitral awards in the context of the pending set aside proceedings will take considerable time, will not be decided *ex parte*, and will be thoroughly reasoned both as to matters of fact and law.

31. Several additional differences between a decision to stay execution and a set aside decision should also be noted. **First**, under Swedish law, a decision to stay execution (like the *inhibition* orders issued here) does not possess *res judicata* effects, which means that a party may make subsequent applications to have it altered. On the other hand, a judgment in set aside proceedings is final and only subject to very limited appeal.

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[6] Eklund, H, Inhibition. Om verkställighetsförbud m.m. i judiciell process, inom förvaltningsrätten och i utsökningsförfarandet (Uppsala 1998) ("Stay of Execution: on the prohibition of implementation of judgments and decisions in the general courts, in administrative law and execution law") at p 265 (**Exhibit 5**). See also Heuman, L. Skiljemannarätt (Stockholm 1999) ("Arbitration Law") at p 667 (**Exhibit 6**).

[7] Eklund at p. 265 (**Exhibit 5**).

32. **Second**, a decision to stay execution of an award does not affect the court's ultimate decision concerning the binding nature of the award, as it is possible for execution of an award to be stayed pending the court's adjudication of the set aside proceeding, and for the court to ultimately issue a decision in the set aside proceeding finding that the award is binding and enforceable. On the other hand, a decision in the set aside proceeding would necessarily affect the ability to execute the award **in Sweden**, making the award executable if the award is deemed valid and binding and inexecutable if the award is set aside.

33. Under Article V(1)(e) of the New York Convention, the enforcement of an award may be refused where the award has been suspended by a competent authority of the country in which that award was made. Thus, it is important to consider whether the stays of execution issued by the Svea Court of Appeal concerning the two arbitral awards at issue here qualify as a suspension of those awards in the context of Article V(1)(e).

34. The wording of the provision indicates that what is relevant is whether ***the award***, not ***the enforcement*** of the award, has been suspended. As noted above, a decision to stay enforcement does not deprive an arbitral award of its binding effects; the effect of the decision is merely that the award is temporarily made impossible to enforce in Sweden.

35. Courts have taken slightly different views as to what will suffice as a "suspension" of the award within the meaning of Article V(1)(e) of the New York Convention. In my opinion, an automatic suspension due to commencement of set aside proceedings should not suffice, because a formal and reasoned decision will be required to formally "suspend" the award.[8] I note that the overriding objective of Article V(1)(e) is to give a defendant an opportunity to avoid seizure of assets when there is a significant possibility that the award will be set aside. One

[8] UNCITRAL pp 222 et seq. (**Exhibit 7**).

cannot conclude that there is a significant possibility that the awards at issue here will be set aside merely by reference to the *inhibition* orders, as they contain no substantive reasoning to indicate the strength or weakness of the arguments underlying the set aside proceeding. The only contribution *ex parte* decisions like the *inhibition* orders issued in this case can make to the analysis is that it is impossible to completely rule out the possibility that the award could be set aside.

36. Nevertheless, in Sweden, it is unusual for an arbitral award issued under Swedish law to be set aside. Despite this, it is not that unusual for the Svea Court of Appeal to first issue a decision to stay enforcement only for that decision to be lifted once the court rejects the applicant's request to have the award set aside, particularly where the set aside proceeding involves questions of EU law or complex cases. For example, in a recent case involving two arbitral awards resulting from arbitration under an ***intra***-EU bilateral investment treaty against Poland, the Svea Court of Appeal issued an *ex parte* stay of enforcement, but ultimately concluded, in the set aside proceeding, that the awards were valid and enforceable. This and other examples make clear that a decision to initially stay execution of an award does not have a direct correlation with the court's ultimate findings of the award's validity.[9]

37. Thus, it would not be peculiar for the Svea Court of Appeal to issue a stay of enforcement and eventually reject the applicant's claim that the arbitral award should be set aside. As held above, a decision to stay execution must be taken promptly and often *ex parte*, which are not ideal conditions for making a thorough and elaborate assessment of whether a claim for setting an arbitral award aside is well-founded.

[9] Svea Court of Appeal judgment in cases T 8538-17 and T 12033-17 on 22 January 2019 (**Exhibit 8**) (*see* point 4 of the actual judgment).

38. Therefore, as held above, a decision to stay enforcement contributes little to an assessment of the probability of the final outcome.

39. Furthermore, since the Svea Court of Appeal's decision to stay enforcement is binding only in Sweden, such a decision cannot be read to preclude other actions to enforce the award in foreign jurisdictions pursuant to the New York Convention. In Sweden, the evidentiary value of a non-binding judicial decision (such as the *inhibition* orders issued in this case), is determined by the court's reasoning in respect of questions of law and its evaluation of evidence. Since the *inhibition* orders contain practically no reasoning on the issues which are relevant to determine the probability of potentially setting aside the award, they are of little persuasive value in that context.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Executed on February 5, 2020 in Uppsala Sweden.

Torbjörn Andersson

Index of Exhibits for Expert Opinion of Professor Torbjörn Andersson

Exhibit	Description
1	Hobér, K, International Commercial Arbitration in Sweden (Oxford 2011)
2	Swedish Svea Court of Appeal Judgment in *Kazakhstan v. Ascom Group*, 9 December 2016, Stockholm, case T 2675-14
3	Swedish Supreme Court Judgment in *Petrobart Ltd. v. Kyrgyz Republic*, 28 March 2008, case NJA 2008 s 406.
4	Public Report of a Government Committee, preparatory work preceding the Swedish Arbitration Act 1999) (excerpts)
5	Eklund, Stay of Execution: on the prohibition of implementation of judgments and decisions in the general courts, in administrative law and execution law (excerpts)
6	Heuman L., Skiljemannarätt (Stockholm 1999) ("Arbitration Law") (excerpts)
7	UNCITRAL, Guide on New York Convention (excerpts)
8	Svea Court of Appeal judgment in cases T 8538-17 and T 12033-17 on 22 January 2019 (*Poland v PL Holdings*).
9	Government Bill 1998/99 :35
10	Swedish Arbitration Act (SFS 1999:116)