ARBITRATION INSTITUTE OF THE

STOCKHOLM CHAMBER OF COMMERCE

In the Matter of

CEF ENERGIA B.V.

Claimant

v.

THE ITALIAN REPUBLIC

Respondent

REQUEST FOR ARBITRATION

November 20, 2015

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1. CEF Energia B.V. ("**CEF**") hereby requests the initiation of an arbitration proceeding against the Italian Republic ("**Italy**") under the Energy Charter Treaty ("**ECT**").[1]

2. CEF files this Request for Arbitration pursuant to Article 26(4)(c) of the ECT and Article 2 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

I. PARTIES TO THE DISPUTE

3. CEF is a company duly established under the laws of the Kingdom of the Netherlands.[2] Its corporate address is:

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4. CEF is represented in this proceeding by King & Spalding and Orrick, Herrington & Sutcliffe.[3] All correspondence and communications with CEF should be directed to its counsel as follows:

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[1] A copy of the ECT is attached as CEF's Exhibit ("**CEX-**") **1**.

[2] *See* CEF Articles of Incorporation, **CEX-2**; and Excerpt from the Corporate Registry for CEF, **CEX-3**.

[3] Copies of CEF's powers of attorney to King & Spalding and Orrick, Herrington & Sutcliffe are attached as **CEX-4**.

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5. The Respondent is the Italian Republic. The governmental authority likely to represent Italy in this proceeding is the *Avvocatura Generale dello Stato* (Attorney General's Office), which is located at the following address:

Via dei Portoghesi, 12
Rome 00186
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II. BRIEF SUMMARY OF THE LEGAL DISPUTE

A. Italy's Early Attempts to Encourage Investments in the Renewable Energy Sector

6. Italy's attention to renewable energy policy dates back to 1981, when Italy developed its first comprehensive National Energy Plan, setting targets for the development of renewable energy facilities across the country. A second National Energy Plan followed in 1988, which included further measures for the development of national renewable energy sources. However, Italy only implemented the first concrete measures for the development of renewable energy sources in 1991, during its electricity sector reforms. In particular, Law No. 9 of January 9, 1991, simplified the authorization procedure for the production of energy from renewable sources. It required that Italy's regional governments develop energy plans prioritizing the production of energy from renewable sources.

7. In 1992, Italy established the first fixed feed-in tariff for renewable energy production through its CIP6/92 regulation. That regulation allowed renewable energy producers to produce electricity from renewable sources without any capacity limit and established a remuneration procedure based on kilowatt-hours of electricity produced. The CIP6/92 regulation also provided some certainty to investors because it obligated ENEL S.p.A., Italy's state-owned electricity company, to buy all electricity produced from renewable energy sources. By 1997, 16% of Italy's electricity was being produced from renewable energy sources.

8. Italy continued to encourage investments in its developing renewable energy sector by enacting Legislative Decree No. 79 on March 16, 1999. Known as the Bersani Decree, that act encouraged electricity production from renewable energy sources by prioritizing their access to the grid. The Bersani Decree also obligated generators and importers of electricity from non-renewable sources beyond a certain threshold to inject a portion of electricity from renewable sources into the grid. To satisfy that obligation, the non-renewable generators or importers could purchase a corresponding amount of renewable energy from other producers or from the GSE, or they could purchase "green certificates" from third parties.

9. The foregoing measures were relatively "soft" in that they demonstrated Italy's interest to promote investment in renewable energy, but they did not contain commitments that would induce large numbers of international investors to enter Italy's renewable energy market.

B. Italy Implemented *Conto Energia* Decrees to Induce Significant Investments in Photovoltaic Plants

10. With the turn of the century, policies to promote renewable energy like those already existing in Italy became a priority, particularly among the European Union states. On September 27, 2001, the European Parliament and the Council enacted Directive 2001/77/EC, promoting electricity produced from renewable energy sources in the internal electricity market. That directive set national targets for each member state for renewable energy production in light of the EU's stated objective of having 22.1% of total Community electricity consumption generated from renewable energy sources by 2010. Italy was expected to produce 25% of its total electricity consumption from renewable energy sources by 2010.[4]

11. Because the cost of producing electricity from renewable sources was substantially higher than the cost of producing electricity from fossil fuels, to meet its target, Italy needed to implement measures and above-market incentives that would further develop and encourage investments in its renewable energy sector. Thus, on December 29, 2003, Italy

[4] Directive 2001/77/EC was subsequently replaced by Directive 2009/28/EC, which aims to achieve a 20% share of energy from renewable sources in the Community's gross final consumption of energy by 2020. It requires that Member States report on planned or existing measures put in place to meet those targets. It also requires Member States to adopt indicative targets for the following 10 years. For Italy, the target is for 17% of overall energy consumption to come from renewable energy sources by 2020.

enacted Legislative Decree No. 387, the goal of which was to "promote a greater contribution from renewable energy sources to the production of electricity in the Italian and European markets." In broad strokes, Legislative Decree No. 387 set out measures to encourage investment in each type of renewable energy source. For example, Article 7, which addressed solar power, stated that Italy would implement incentive tariffs to encourage investments in photovoltaic facilities. Accordingly, from 2005 to 2012, Italy enacted attractive incentive schemes for photovoltaic plants known as *Conto Energia* Decrees ("***Contos***"). Through successive *Contos*, Italy guaranteed incentive tariffs to eligible photovoltaic plants that would supplement the revenues generated from the sale of electricity to the Italian national grid.[5]

12. Each *Conto* set forth a range of incentive tariffs to be granted to eligible renewable energy producers. Italy designed the regime to ensure that the producers received the incentive tariff (or premium) offered in the *Conto* in addition to the market price of electricity produced and sold to the grid. The value of the applicable tariff varied based on criteria specific to each of the *Contos*, including the size, location, and the date of connection to the grid of the photovoltaic plant under consideration. Once Italy granted a particular tariff to an eligible photovoltaic facility pursuant to the applicable provision of the *Conto* in force at the time, the facility was entitled to that tariff for 20 years. The *Contos* did not contain any provision allowing subsequent amendment of the tariff rate granted to an eligible photovoltaic facility.

13. Each *Conto* stated that the incentive tariffs it offered would remain available to photovoltaic plants until a fixed date or until the market reached a specific installed capacity or expenditure cap. Once the date, installed capacity, or expenditure cap was reached, the incentives under that particular *Conto* were no longer available to new facilities. New photovoltaic plants could benefit from the tariffs offered in a subsequent *Conto* program, provided that they met its eligibility requirements.

14. On July 28, 2005, Italy – through its Ministry of Productive Activities – enacted *Conto* I. *Conto* I granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity between 1 kW and 1,000 kW. Italy originally intended to maintain the incentive scheme under *Conto* I until installed capacity reached 100 MW; however, on

[5] This is true of the first four *Contos* relevant to this arbitration, as described herein.

February 6, 2006, the Ministry of Productive Activities enacted a decree amending *Conto* I and increasing the threshold to a maximum installed capacity of 500 MW.

15. Italy further promoted investment in renewable energy with the enactment of *Conto* II on February 19, 2007. *Conto* II granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* II applied to all eligible photovoltaic plants that were connected to the grid between April 13, 2007 and December 31, 2010, or until installed capacity reached 1,200 MW, whichever occurred first. Installed capacity reached the 1,200 MW threshold in the summer of 2010. Nevertheless, Italy extended *Conto* II to any eligible photovoltaic plant connected to the grid before June 30, 2011, provided the plant itself was built by December 31, 2010.[6]

16. Soon after the capacity target under *Conto* II was reached in the summer of 2010, on August 6, 2010, Italy enacted *Conto* III to further encourage investment in photovoltaic facilities. *Conto* III offered incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* III applied to all eligible photovoltaic plants that were connected to the grid between January 1, 2011 and December 31, 2013, or until installed capacity reached 3,000 MW, whichever occurred first.[7]

17. Italy continued to encourage investments in the photovoltaic sector by enacting *Conto* IV on May 5, 2011. *Conto* IV granted incentive tariffs for a 20-year period to photovoltaic plants with a nominal capacity equal to or higher than 1 kW. The incentive scheme under *Conto* IV applied to all eligible photovoltaic plants that entered into operation starting from June 1, 2011, until December 31, 2016. Italy replaced *Conto* IV with new legislation – *Conto* V – during the summer of 2012.[8]

18. The *Contos* proved successful in encouraging substantial investment in photovoltaic plants and rapidly increasing the installed capacity of those plants in Italy. For illustration, the production of electricity from solar energy in Italy amounted to 193 gigawatt-

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6 *See* Law Decree No. 105/2010 of July 8, 2010, converted into law by Law No. 129 of August 13, 2010.

7 On March 3, 2011, however, Italy enacted Legislative Decree No. 28/2011 limiting the application of *Conto* III to photovoltaic plants that were connected to the grid by May 31, 2011.

8 *Conto* V did not apply to the facilities at issue in the present dispute.

hours (GWh) in 2008. That figure increased to 676 GWh in 2009 and to 1,906 GWh in 2010. By 2011, it had skyrocketed to 10,730 GWh.

19. For each photovoltaic plant accepted into the regime, Italy further confirmed its commitment to the incentive tariffs granted under the different *Contos* in an agreement between the *soggetto responsabile* (*i.e.*, the company or person that held the project rights to the plant) and the *Gestore dei Servizi Energetici* ("**GSE**"), the state-owned company responsible for the implementation of renewable electricity incentive programs under the direction and control of the Italian Ministry of Economy and Finance ("*convenzione per il riconoscimento delle tariffe incentivanti*" or "**GSE Agreement**").[9]

20. To enter into a GSE Agreement and thus benefit from a particular *Conto*, the *soggetto responsabile* had to file an incentive tariff request ("*richiesta di accesso agli incentivi*") with the GSE after its photovoltaic plant was connected to the grid, along with specific supporting documentation. Once the GSE confirmed that the photovoltaic plant met the necessary prerequisites to benefit from a particular *Conto*, the GSE and the *soggetto responsabile* executed the GSE Agreement, which was then published on the GSE's website. If the *soggeto responsabile*'s application to the GSE was timely and correctly filed, the incentive tariff granted under the specific *Conto* applied to the facility as from the date it was connected to the grid.

21. The GSE Agreements identified the particular *Conto* and incentive tariff granted to a specific photovoltaic plant and confirmed that the plant was entitled to receive that tariff for 20 years. The GSE Agreements did not contain any legal provision authorizing the GSE or any other Italian state entity to unilaterally amend or abrogate the incentive tariff granted thereunder.

C. CEF Invested in the Italian Photovoltaic Sector in Reliance on Italy's Incentive Programs

22. CEF specializes in investing in and operating renewable energy facilities across Europe. CEF followed Italy's development and implementation of the incentive legislation described in the preceding sections, and CEF decided to invest in the Italian photovoltaic sector as a result of those incentives. Italy's commitments under the *Conto*

[9] The rules of application that the GSE published after the enactment of *Contos* II, III, IV, and V, as well as Article 24 of Legislative Decree No. 28/2011 of March 3, 2011, all required the *soggetto responsabile* and the GSE to enter into these GSE agreements.

legislation and corresponding GSE Agreements were particularly crucial to CEF's decision to invest, in part because the substantial upfront cost of constructing and developing a photovoltaic facility is generally only recovered several years after a plant begins operating. Thus, the 20-year commitment in the *Contos* and GSE Agreements ensured the future profitability of the plants. CEF expected Italy to abide by its promises to maintain the fixed tariffs for 20 years, as well as to further promote investments in photovoltaic facilities as set forth in the legislation described above.

23. In January 2010, CEF first invested in Italy by acquiring Sunholding S.r.l. ("**Sunholding**"). Sunholding owned Megasol S.r.l., a company that held all project rights to a photovoltaic plant of approximately 13 MW located in Montalto di Castro in the Lazio region ("Megasol"). The Megasol photovoltaic plant was connected to the grid in May 2011 and received an incentive tariff of 0.346€/kWh under *Conto* II, as confirmed by a GSE Agreement dated November 2, 2011.

24. Encouraged by Italy's continued promotion of renewable energy investments with its enactment of *Conto* III, in December 2010, CEF acquired a 70% controlling stake in Phenix S.r.l., a company that held all project rights to a photovoltaic plant of approximately 24 MW located in Canino in the Lazio region ("Sugarella"). The Sugarella photovoltaic plant was connected to the grid in April 2011 and was entitled to an incentive tariff of 0.297€/kWh under *Conto* III, as confirmed by a GSE Agreement dated November 23, 2011.

25. Italy's enactment of *Conto* IV on May 5, 2011, further assured CEF that Italy remained serious about its commitments to support investments in the photovoltaic industry. Thus, in December 2011, CEF acquired Enersol S.r.l., a company that held all project rights to a multi-section photovoltaic plant of approximately 48 MW located in Canaro in the Veneto region ("Enersol"). The Enersol photovoltaic plant was partitioned in seven sections. Section 1 of the plant was connected to the grid in April 2011, and was entitled to an incentive tariff of 0.297€/kWh under *Conto* III, as confirmed by a GSE Agreement dated November 2, 2011. Sections 2 and 3 of the plant were connected to the grid in July 2011, and were entitled to an incentive tariff of 0.251€/kWh under *Conto* IV, as confirmed by two separate GSE Agreements (one per Section) dated March 2, 2012. Sections 4 to 7 of the plant were connected to the grid in August 2011, and were entitled to an incentive tariff of 0.238€/kWh under *Conto* IV, as confirmed by four separate GSE Agreements (one per

Section) dated January 11, 2012 (for Sections 5 and 7), February 6, 2012 (for Section 4), and March 2, 2012 (for Section 6).

26. In reliance on Italy's commitments to promote a thriving renewable energy sector and to maintain the incentive tariffs granted under the respective *Contos* and confirmed in the GSE agreements, CEF invested approximately € 100 million in the above-mentioned plants.

D. Italy Imposed Unexpected, Arbitrary Costs on Investors That Undermined the Incentive Schemes

27. After having induced CEF to invest in its photovoltaic sector and while continuing to benefit from the resulting increase in renewable energy investments, Italy enacted a series of measures that imposed additional, arbitrary costs on CEF's investments, in violation of the commitments Italy had made guaranteeing incentive tariffs and pricing. Those measures also created an environment of legal and regulatory uncertainty that severely depressed Italy's once-burgeoning photovoltaic market. The measures, discussed below, violate the ECT and international law and directly harmed CEF's investments.

28. On July 5, 2012, Italy's Ministry of Economic Development enacted a decree requiring all renewable energy producers benefiting from any *Conto* to pay, as of January 1, 2013, an administrative fee corresponding to € 0.0005 per kW of incentivized energy.[10] The fee, which is offset against the incentive tariffs granted under the *Contos* and guaranteed by the GSE Agreements, reduced the payments that CEF expected to receive pursuant to the *Contos* governing its facilities.

29. Furthermore, also on July 5, 2012, the *Autorità per l'energia elettrica, il gas e il sistema idrico* (**"AEEG"**), an entity responsible for regulating the electricity market, passed Resolution 281 requiring renewable energy producers to pay so-called "imbalance costs" as of January 1, 2013. The "imbalance costs" stemmed from a history of Italy requiring non-renewable energy producers to provide advance projections to the grid manager of the quantity of electricity they would deliver to the grid, in order to create predictable supply and assist the grid manager in balancing supply and demand. If a producer missed its projections, it was required to rectify the imbalance by paying certain costs based on the difference between the producer's projections and the energy it delivered.

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[10] *See Conto* V, July 5, 2012.

30. Historically, and when CEF decided to invest in the sector, Italy exempted renewable energy producers from paying "imbalance costs." Since the "imbalance costs" only applied to non-renewable energy producers, when CEF invested in its photovoltaic plants in Italy, it reasonably expected that those costs would not apply to its plants. Resolution 281, however, unexpectedly and arbitrarily extended those costs to CEF and other renewable energy producers.

31. The Italian courts later annulled Resolution 281 because it unlawfully failed to distinguish between renewable and non-renewable energy producers, as well as between different types of renewable energy producers, regarding the quantification of "imbalance costs." On October 23, 2014, in an attempt to address the deficiencies of Resolution 281, the AEEG passed Resolution 522, which again required renewable energy producers, including CEF, to pay "imbalance costs" starting from January 1, 2015. That Resolution also undermined CEF's expectation that these costs would not apply to their plants when it invested in Italy. It too violates the ECT and international law.

32. In addition to Resolutions 281 and 522, Italy enacted other legislation that imposed unexpected costs on renewable energy producers, including CEF. In 2008, Italy had enacted a windfall tax on the profits of energy companies with an annual gross income of over € 25 million, the so-called "Robin Hood" tax. The rationale behind the tax was to use the profits that oil companies and other energy groups were earning from record oil and energy prices to fund aid for low-income households that had been hard-hit by high energy and food prices. As no such windfall profits befell renewable energy producers, Italy expressly excluded renewable energy producers from the scope of the Robin Hood tax. Thus, when CEF invested in the Italian photovoltaic plants, it reasonably expected that its plants would not be subjected to the tax.

33. However, in 2011, Italy unexpectedly and arbitrarily broadened the scope of the Robin Hood tax by extending it to all energy producers, including renewable energy producers, with a gross annual income of over € 10 million and taxable income of over € 1 million.[11] In 2013, Italy again extended the scope of the Robin Hood tax by reducing the applicable income thresholds to gross annual income over € 3 million and taxable income

[11] *See* Law Decree No. 138/2011 of August 13, 2011, converted into law by Law No. 148 of September 14, 2011.

over € 300,000.[12] That measure resulted in the application of the Robin Hood tax to CEF's facilities. The Robin Hood tax directly reduced the profits and revenues that CEF reasonably expected to receive on the basis of the incentive remuneration guaranteed under the *Contos* and GSE Agreements. The tax rate was 10.5% for 2013 and 6.5% for 2014.

34. On February 9, 2015, the Italian Constitutional Court declared the Robin Hood tax unconstitutional. However, the Court also ruled that its decision would not have retroactive effect. This means that Italy will not reimburse CEF for the sums wrongfully paid under the Robin Hood tax legislation, despite its violation of the ECT and international law and despite Italy's own acknowledgement that the tax violated Italian law. On April 28, 2015, Italy confirmed by way of Circular No. 18/E that it required investors to pay all amounts purportedly owed pursuant to the Robin Hood tax for the 2014 fiscal year.

35. Italy implemented a further measure harming CEF's investments on December 19, 2013. The Italian tax authorities issued Circular No. 36/E, which changed the rules for the depreciation of capital investments in photovoltaic plants. Prior to Circular No. 36/E, photovoltaic plants were classified as movable property and subject to a depreciation rate of up to 5% per year. Circular No. 36/E, however, reclassified photovoltaic plants as immovable property for tax purposes, which reduced the applicable depreciation rate for photovoltaic plants to a maximum of 4% per year. Because a higher depreciation rate results in lower taxable income, the decrease of the applicable depreciation rate pursuant to Circular No. 36/E increased the taxable income of photovoltaic plant owners. Moreover, Italy's reclassification of photovoltaic plants as immovable property made them more likely to be subjected to the IMU (*imposta municipale propria*) and TASI (*tassa sui servizi*) taxes. Each of these measures has harmed CEF's investments by unexpectedly and arbitrarily increasing CEF's costs, and thus decreasing the revenues that CEF reasonably expected it would be receiving pursuant to Italy's guarantees under the relevant *Contos* and GSE Agreements.

36. In addition, on December 27, 2013, Italy declared a need to establish a capacity market in its electricity system and enacted Law No. 147 (the so-called *Legge di Stabilità 2014*).[13] In electricity capacity markets, electricity producers receive compensation

[12] *See* Law Decree No. 69/2013 of June 21, 2013, converted into law by Law No. 98 of August 9, 2013.

[13] *See* Law Decree No. 147/2013 of December 27, 2013. On March 10, 2015, the AEEG issued Resolution No. 95/2015 proposing that the capacity market be implemented by 2017, with the first auctions taking place in September 2015.

for selling capacity, *i.e.*, the power that they will provide in the future. The implementation of a capacity market in Italy's electricity system is meant to ensure that the grid operator, Terna S.p.A., always has a sufficient amount of available electricity to cover demand. The *Legge di Stabilità 2014* indicated that the compensation that would be paid to electricity producers for selling their capacity on the capacity market would not result in an increase of the electricity price for end consumers. Although the manner in which this compensation will be funded remains unclear, it is likely that some costs will be borne by renewable energy producers like CEF. Any such costs would further damage CEF's investments.

37. Each of the measures described above, separately and in combination, constitutes a violation of the ECT and international law. By enacting these measures, Italy wrongfully repudiated the guarantees regarding the incentive tariffs that it had made pursuant to the *Contos* and the GSE Agreements. Italy burdened renewable energy producers, including CEF, with unexpected, arbitrary costs that significantly reduced the profits and revenues that CEF reasonably expected to receive on the basis of the incentive remuneration guaranteed under the *Contos* and GSE Agreements. As discussed below, however, these were not Italy's only breaches of the ECT.

E. Italy Wrongfully Abrogated the *Conto* Incentive Schemes

38. The foregoing retroactive alterations to the legal and economic regime governing photovoltaic plants in Italy caused significant damage to CEF's investments, principally by reducing the revenues that CEF reasonably expected when it decided to invest in Italy. Italy further violated the ECT through the enactment of Law Decree No. 91/2014 on June 24, 2014 ("**LD 91/2014**"), which was converted into law by Law No. 116 of August 11, 2014.

39. LD 91/2014 abolished (as of January 1, 2015) the incentive tariffs guaranteed for a 20-year period under the five *Contos* and the GSE Agreements for photovoltaic plants with a nominal capacity above 200 kW. LD 91/2014 replaced the incentive tariffs with new tariffs that are calculated pursuant to one of three mechanisms (Options A, B and C), each of which provides materially less compensation than the incentive tariffs guaranteed in the *Contos* and GSE Agreements. Italy instructed owners and operators of photovoltaic plants to select their preferred option by November 30, 2014. If no choice was made, Option C would automatically apply.

40. Under Option A, the new tariff is paid over twenty-four years (starting from the date when the photovoltaic plant was connected to the grid), rather than the twenty-year period guaranteed in the *Contos* and the GSE Agreements. However, Option A also reduces the tariff by a percentage that depends on when the plant began benefiting from it. For example, if the plant is entitled to twelve more years of incentive tariffs (having benefited from them for the past eight years), then the tariff is reduced by 25%. If the plant is entitled to eighteen more years of incentive tariffs (having benefited from them for the past two years), then the tariff is reduced by 18%.

41. Under Option B, the new tariff is still paid over a twenty-year period. Its amount, however, is reduced between 2015 and 2019 by a percentage that depends on when the photovoltaic plant began benefiting from the incentive tariffs. It is then increased during an equivalent number of years toward the end of the twenty-year period. Although the new increased tariff in later years superficially appears to offset the new decreased tariff in the earlier years, the changes are likely to result in a reduction of the total value of the tariff because: (i) the lower tariff applies in the early life of the projects when plants are more productive; and (ii) a delay in receiving the expected tariff will result in losses due to the time value of money.

42. Under Option C, the new tariff is still paid over a twenty-year period, but it is reduced for the duration of that period by a fixed percentage depending on the photovoltaic plant's nominal capacity. For plants with a nominal capacity higher than 900 kW, the incentive tariff is reduced by 8%.

43. Faced with those three unpalatable choices and the threat of automatically defaulting to Option C if no choice were made, CEF directed its Italian investment companies to send protest letters to the GSE regarding each of its plants. The Italian investment companies sent those letters in November 2014, noting that Italy was applying Option C to the plants over CEF's objections and in violation of its contractual and legal rights.

44. In addition to the abrogation of the incentive tariffs guaranteed under the *Contos* and the GSE Agreements – and their wholesale replacement by highly reduced tariffs pursuant to one of three options – LD 91/2014 amended the payment modalities of the tariffs. Before LD 91/2014 was enacted, the remuneration that a *soggetto responsabile* received was based on data indicating the photovoltaic plant's production and was paid at the end of every

month. Under the new law, the new tariffs are paid by monthly installments amounting to 90% of the estimated yearly average production of electricity. The payment of the remaining 10% is postponed for six to eighteen months, resulting in adverse impacts to investment cash flows.

45. LD 91/2014 also imposed additional annual "fees" on renewable energy producers that purportedly cover the GSE's expenses for management of the new tariff scheme,[14] despite the fact that the GSE Agreements do not provide for such fees. One such fee applies to any photovoltaic plant benefiting from incentive tariffs under the *Contos* and ranges from € 1.20 to € 2.20 per kW, depending on the specific plant's nominal capacity. Another fee – known as the RID fee – applies to all renewable energy sources. For solar energy producers, the RID fee ranges from € 0.60 to € 0.70 per kW, depending on the specific photovoltaic plant's nominal capacity, with a maximum cap of € 10,000 per year per plant. These new fees ostensibly replace the administrative fee that Italy introduced in 2012, referred to above.[15]

46. Italy's enactment of LD 91/2014 has severely harmed CEF's investments. Italy abrogated the incentive tariffs that it originally ensured would apply to CEF's plants for 20 years pursuant to the *Contos* and the GSE Agreements, and Italy replaced them with new, severely reduced tariffs.

F. Italy Continues to Aggravate the Dispute

47. As discussed in Section III.F, below, CEF wrote in July and October 2014 to notify Italy that the measures discussed above, which reduced the revenues and profits guaranteed to its photovoltaic plants, constituted a legal dispute for purposes of the ECT. CEF requested an opportunity to resolve the dispute amicably and requested that Italy take no further measures to aggravate the dispute. Despite those letters, Italy has continued to impose harmful measures on renewable energy producers, including CEF.

48. On May 1, 2015, the GSE published technical rules ("*regole tecniche per il mantenimento degli incentivi*") regulating the impact of certain modifications or "interventions" on operating plants and providing a general obligation to communicate those modifications or interventions to the GSE. Under these new regulations, even the most

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[14] *See* Ministerial Decree of December 24, 2014, implementing Art. 25 of LD 91/2014.

[15] *See supra* ¶ 28.

routine modifications – such as a simple refurbishing to maximize efficiency– must be communicated to the GSE. Furthermore, if any type of intervention on a plant results in increased efficiency, the technical rules unlawfully purport to cap the incentives that would otherwise apply to the increased production levels. For example, if such a "modified" plant has been receiving incentivized remuneration for three or more calendar years before it is deemed to have increased efficiency and production, the cap that the GSE will impose will be equal to the maximum quantity of energy generated in any one year during the three years prior to the modification, plus 2%. If the "modified" plant has been receiving incentivized remuneration for less than three calendar years, then the cap will be calculated on the basis of estimates provided by the Italian Ministry of Economic Development.

49. The May 1, 2015, GSE rules also listed a variety of potential modifications that the GSE may or may not permit under certain conditions. Those include, for example, the relocation of a plant, a change in the connection point to the grid, and the replacement of spare parts. If an investor is found to have made modifications that the GSE deems material to the facilities' original technical characteristics, the GSE could sanction that investor, including by revoking the investor's right to incentivized tariffs and requiring the investor to return incentive tariffs previously paid by the GSE.

50. Italy's latest measure, in addition to aggravating the existing dispute with CEF, is manifestly unreasonable, arbitrary, and constitutes an additional breach of the ECT. The technical regulations threaten to harm CEF's investments in Italy by unexpectedly decreasing – and possibly eliminating – the revenues CEF reasonably expected pursuant to the Italian legislative framework, which formed the basis for its investments. The GSE's technical regulations have already triggered confusion and complaints in the market regarding their unreasonableness, arbitrariness, and lack of clarity.

51. CEF is not in a position to determine the precise impact that this measure, which is currently under review, will have on its investments, in part because the GSE suspended the effectiveness of the technical regulations on July 9, 2015. Nevertheless, CEF reserves its rights to claim for the harm caused by that measure and any other aggravating measures that Italy may take during the course of this proceeding.

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52. In summary, Italy's abrogation of the incentive tariffs, combined with its past and continued imposition of arbitrary costs and unfair regulations, have severely damaged CEF's investments. CEF seeks relief through arbitration under the ECT for the harm that Italy's conduct has caused, and continues to cause, to its investments.

III. THE PARTIES HAVE AGREED TO SETTLE THIS DISPUTE THROUGH SCC ARBITRATION

53. Article 26 of the ECT grants CEF the right to submit this dispute to international arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. Article 26 states:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
>
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
>
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2) (a) or (b).[16] …
>
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).[17]

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[16] Italy is listed under Annex ID. However, CEF has not previously submitted this dispute to the courts or administrative tribunals of Italy or in accordance with any previously agreed dispute settlement procedure. Consequently, Article 26(3)(b)(i) is irrelevant for purposes of this arbitration.

> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2) (c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
>
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce. …
>
> (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

54. The requirements under Article 26 of the ECT may be summarized as follows: a) the dispute must concern a breach of Part III of the ECT; b) the dispute must involve a covered "investment;" c) the Respondent must be a Contracting Party to the ECT; and d) the opposing party must be a covered "investor" that is a national or company of another Contracting Party to the ECT. Each of these requirements is satisfied in the present case.

A. This is a Dispute Concerning a Breach of Part III of the ECT

55. As explained in Section II above, this dispute concerns Italy's failure to fulfill legislative, regulatory, and contractual commitments it made in relation to CEF and its investments in photovoltaic plants. The acts and omissions of Italy described above and to be developed further in the course of this proceeding constitute serious and repeated breaches of the protections accorded to CEF's investments in Italy under Part III of the ECT. Those protections include, but are not limited to, the obligations of Italy found in Articles 10 and 13 of the ECT.

56. Article 10 provides a number of guarantees and protections to CEF and its investments, including: 1) a requirement that Italy treat CEF's investments fairly and equitably; 2) a requirement that Italy grant "the most constant protection and security" to CEF's investments; 3) a prohibition against unreasonable or discriminatory measures that impair the management, maintenance, use, enjoyment, or disposal of investments; 4) a prohibition against treatment less favorable than that required by international law, including treaty obligations; and 5) a requirement to observe any obligations that Italy entered into with an investment or an investor. By way of example only, Italy treated CEF's investments unfairly and inequitably by altering, and then abrogating, the incentive schemes governing

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[17] Italy is not listed under Annex IA. Consequently, CEF is entitled to assert a claim based on the last sentence of Article 10(1), the ECT's "umbrella clause," which it does.

those investments, in violation of its commitments and the clear terms of the different *Contos* and the GSE Agreements. Italy's misconduct in that respect also unlawfully impaired CEF's investments in an unreasonable or discriminatory manner and violated the obligations Italy entered into with respect to CEF's investments.

57. Additionally, Article 13 of the ECT prohibits Italy from unlawfully expropriating CEF's investments or subjecting them to measures having an equivalent effect. As CEF will demonstrate during the course of the arbitration proceeding, Italy breached Article 13 of the ECT by abrogating the rights granted to CEF's investments pursuant to *Conto* II, *Conto* III, *Conto* IV, and the GSE Agreements. Since those rights, granted by law and enshrined in contract, formed part of CEF's investments in this case, Italy's repudiation of those rights constitutes a measure tantamount to expropriation, if not a direct expropriation, under the ECT and international law.

B. The ECT Covers CEF's Investments

58. The ECT provides a broad definition of the term "investment." As stated in ECT Article 1(6),

> "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes

> all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
>
> "Investment" refers to any investment associated with an Economic Activity in the Energy Sector.

59. Under this definition, and as discussed in Section II, above, a number of different investments of CEF have been harmed in this case, including but not limited to: (i) CEF's ownership of tangible and intangible property and property rights; (ii) CEF's ownership of shares and equity participation in Italian companies and business enterprises, as well as debt obligations; (iii) CEF's right to returns and claims to money; (iv) rights conferred to CEF by law, such as the rights to fixed incentive tariffs conferred under *Conto* II, *Conto* III, *Conto* IV; and (v) rights conferred by contracts, licenses, and permits, such as the contractual rights conferred in the GSE Agreements.

60. CEF thus owns several covered "investments" under the ECT that have been damaged by Italy.

C. Respondent is a Contracting Party to the ECT

61. Italy is a Contracting Party to the ECT. Italy signed the ECT on December 17, 1994, and ratified it on December 5, 1997. Italy deposited its instrument of ratification on December 16, 1997. The ECT entered into force for Italy on April 16, 1998.[18]

D. CEF is a Covered Investor and a National of a Contracting Party to the ECT

62. Article 1(7) of the ECT defines "investor" as "a company or other organization organized in accordance with the law applicable in that Contracting Party."

[18] *See* excerpts from Energy Charter website, **CEX-5**. CEF notes that Italy reportedly has given notice of its intention to withdraw from the Energy Charter Treaty and that such withdrawal is scheduled to take effect in January 2016. While CEF has been unable to confirm the validity of Italy's reported withdrawal, it notes that any such withdrawal does not affect the protection of CEF's investments or the jurisdiction of the Arbitral Tribunal under the ECT. CEF further notes that the ECT remains in force for Italy for a period of twenty years.

63. CEF is a company duly established under the laws of the Kingdom of the Netherlands. The Netherlands is a Contracting Party to the ECT. It signed the ECT on December 17, 1994, and ratified it on December 11, 1997. The Netherlands deposited its instrument of ratification on December 16, 1997. The ECT entered into force for the Netherlands on April 16, 1998.[19] Thus, CEF is a covered investor and a national of a Contracting Party to the ECT.

E. The Parties Have Consented to Arbitration

64. Italy consented to arbitration under the ECT by signing and ratifying the treaty. As noted above, the ECT entered into force for Italy on April 16, 1998.

65. CEF consented to arbitrate this dispute pursuant to Article 26 of the ECT through two letters dated July 7, 2014, and October 20, 2014.[20] CEF hereby confirms its consent to arbitration under the ECT and elect to submit this dispute to the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with Article 26(4)(c) of the ECT.

F. CEF Attempted to Settle This Dispute Amicably

66. Before submitting a dispute to arbitration, Article 26 of the ECT states that disputing parties should, if possible, attempt to settle their disputes amicably. On July 7, 2014, CEF sent a letter to Italy notifying it of this dispute and offering to settle the dispute amicably. CEF sent a second letter to the same effect on October 20, 2014. Italy has not responded to CEF's offers to pursue a settlement, and no resolution of the present dispute has been achieved.

67. Article 26 of the ECT permits an Investor to submit its dispute to arbitration under the ECT if the parties have not resolved their dispute after a three month period. As more than three months have passed since CEF attempted to settle this dispute amicably with Italy, CEF is entitled to submit this Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

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19 *See* excerpts from Energy Charter website, **CEX-6**.

20 Letter from CEF to Italy dated July 7, 2014, **CEX-7**; and Letter from CEF to Italy dated October 20, 2014, **CEX-8**.

IV. PROCEDURAL MATTERS

68. Pursuant to Articles 12 and 13 of the SCC Arbitration Rules, and in view of the size and complexity of this case, the Arbitral Tribunal should consist of three arbitrators.

69. CEF hereby appoints Prof. Dr. Klaus Sachs, a national of Germany, as its party-appointed arbitrator for this proceeding. His contact information is:

> Prof. Dr. Klaus Sachs
> CMS Hasche Sigle
> Nymphenburger Straße 12
> 80335 Munich
> Germany
> Tel. +49 89 23807 109
> Email: klaus.sachs@cms-hs.com

70. With respect to the selection of the Chairman of the Arbitral Tribunal, in accordance with Article 13(1) of the SCC Arbitration Rules, CEF proposes that the Chairman be selected by the two party-appointed arbitrators, with agreement of the parties. If Italy fails to appoint an arbitrator or if the two party-appointed arbitrators are unable to agree upon a Chairman, the SCC Board should make the necessary appointment(s) as provided in Article 13(3) of the SCC Arbitration Rules.

71. CEF chooses English as the procedural language for the arbitration and proposes Geneva, Switzerland, as the seat of the arbitration.

72. This Request is submitted by e-mail. CEF is transferring an amount of € 2,000 corresponding to the registration fee to the Arbitration Institute and will provide confirmation of that transfer in the coming days.

V. PRELIMINARY REQUEST FOR RELIEF

73. Pursuant to Article 2(iii) of the SCC Arbitration Rules, CEF requests an award granting it the relief set forth below:

(a) a declaration that the dispute is within the jurisdiction of the ECT;

(b) a declaration that Italy has violated Part III of the ECT, including but not limited to Article 10 and Article 13, as well as international law with respect to CEF's investments;

(c) compensation to CEF for all damages it has suffered, to be developed and quantified in the course of this proceeding but likely to include, by way of example and without limitation, sums invested by CEF to acquire and develop the investments, lost profits, and consequential damages flowing from Italy's breaches;

(d) all costs of this proceeding, including CEF's attorneys' fees; and

(e) pre- and post-award compound interest until the date of Italy's final satisfaction of the award.

74. CEF reserves its right to modify, amend, or supplement its claims during the course of the arbitration proceeding.

Dated: November 20, 2015

Respectfully submitted,

K Fleuriet

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