SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In the Matter of the Arbitration Between

CEF ENERGIA, B.V.
Petitioner,

v.

THE ITALIAN REPUBLIC
Respondent.

Index No. _____

Petition to Confirm Foreign Arbitral Award

PETITION TO CONFIRM FOREIGN ARBITRAL AWARD

Petitioner CEF Energia B.V., by and through its undersigned counsel, hereby petitions this Court for an order pursuant to 9 U.S.C. § 207 (i) confirming and recognizing the final arbitral award (the "Award") rendered on November 14. 2018 in an arbitration between Petitioner and Respondent the Italian Republic ("Republic") pursuant to the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules");[1] (ii) entering judgment in Petitioner's favor against Italy in the amount of the Award with pre- and post-award interest and costs as provided therein and as authorized by law, plus the costs of this proceeding; and (iii) awarding Petitioner such other and further relief as this Court deems just and proper.

Parties, Jurisdiction and Venue

1. Petitioner brings this summary proceeding under the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (June 10. 1958), 21 U.S.T.

[1] A true and correct copy of the Award is attached as **Exhibit A** to the Affirmation of Charlene C. Sun, dated August 16, 2019 ("Sun Aff."), Exhibit A ¶ 9.

2517, 330 U.N.T.S. 38 (the "New York Convention") and Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 *et seq.*, to confirm a duly-rendered arbitration award (the "Award") issued in their favor against Respondent the Italian Republic ("Italy").

2. Petitioner CEF Energia B. V. is a company duly established under the laws of the Kingdom of the Netherlands (the "Netherlands") and is registered with the Netherlands Chamber of Commerce Commercial Register under the RSIN 821442430.

3. Respondent is a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-611.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1330(a) and personal jurisdiction over Italy pursuant to 28 U.S.C. § 1330(b).

5. Specifically, 28 U.S.C. § 1605(a)(6) provides that a foreign state is not immune with respect to any claim against it that seeks recognition of an arbitration award made pursuant to an agreement to arbitrate if the "agreement or award may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards[.]" 28 U.S.C. § 1605(a)(6)(B). This Court therefore has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1330(a), because Italy is not entitled to sovereign immunity in connection with this proceeding, which seeks recognition of a foreign arbitral award falling under the New York Convention.

6. Venue is proper in this Court pursuant to CPLR 503(a), and the amount in controversy herein exceeds the jurisdictional limits of all courts of inferior jurisdiction.

The Arbitration Agreement

A. Italy's Agreement to Arbitrate

7. Italy agreed to arbitrate its dispute with Petitioner through its accession to the Energy Charter Treaty ("ECT").[2] The arbitration agreement between Petitioner and Italy consists of two elements: (i) Italy's consent contained in Article 26(3) of the ECT; and (ii) Petitioner's consent contained in their Request for Arbitration.

8. Italy signed the ECT on December 17, 1994 and ratified it on December 5, 1997. The ECT entered into force in Italy on April 16, 1998. In accordance with Article 1(2) of the ECT, Italy was a Contracting Party to the ECT until December 31, 2014 when it withdrew from the ECT.[3] While Italy is no longer a member of the ECT (as of January 1, 2016), all investments existing at the time of its renunciation of the ECT remain protected, and investors from Italy are allowed to use the Dispute Settlement Provisions of the ECT until 2036.[4] Therefore, in accordance with Article 1(2) of the ECT, Italy is a Contracting Party to the ECT.[5]

9. Article 26 of the ECT, entitled "Settlement of Disputes between an Investor and a Contracting Party," provides as follows in sub-paragraph (3)(a):

> (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.

10. Subparagraphs (b) and (c) do not apply to this dispute. Accordingly, Italy provided its written consent to the arbitration in ECT Article 26(3), as it is a Contracting Party to the ECT.

---

[2] A true and correct copy of the ECT is attached as **Exhibit B** to the Sun Aff.

[3] Italy's withdrawal took effect on January 1, 2016.

[4] Exhibit B, Article 47(3) of the ECT provides for a "sunset period" of 20 years during which the ECT will continue to apply to pre-existing qualifying investments after a signatory state's withdrawal from the Treaty.

[5] Exhibit B, Article 1(2) of the ECT provides that a "Contracting Party" means "a state or Regional Economic Integration Organization which has consented to be bound by this Treaty and for which the Treaty is in force."

B. Petitioner's Consent to Arbitrate

11. The Netherlands signed the ECT on December 17, 1994 and ratified it on December 11, 1997. The ECT entered into force in the Netherlands on April 16, 1998. In accordance with Article 1(2) of the ECT, the Netherlands is a Contracting Party to the ECT.

12. As "a company or other organization organized in accordance with the law applicable in" the Netherlands, CEF is an "Investor" within the meaning of Article 1(7)(a)(ii) of the ECT.[6]

13. As an "Investor" under Article 1(7) of the ECT, Petitioner's investment-based claims against Italy were properly submitted to arbitration in accordance with the ECT, and the tribunal properly found that it had jurisdiction over Petitioner's claims.

14. Articles 26(2)(c) and 26(4)(c) of the ECT provide that an Investor may elect to submit a dispute for resolution through arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce. The Investor is required to make its consent in writing.[7]

15. Petitioner provided its written consent to the Arbitration in ¶ 65 of its Request for Arbitration dated November 20, 2015[8], as follows:

> "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."[9]

---

[6] Exhibit B, Article 1(7) of the ECT provides, in pertinent part, that an "Investor" means "with respect to a Contracting Party," "(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law," or "(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party."

[7] See Exhibit B, ECT, Article 26(4)(c) ("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 . . . [arbitration pursuant to the SCC Rules]."

[8] A true and correct copy of the Request for Arbitration, dated November 20, 2015 is attached as **Exhibit C** to the Sun Aff.

[9] Exhibit C, ¶ 65.

The Arbitration

16. Petitioner commenced the arbitration at issue herein by serving a Request for Arbitration on Italy on November 20, 2015. The Request for Arbitration invoked Article 26(4)(c) of the ECT, which permits the submission of disputes arising under the ECT to arbitration "under the Arbitration Institute of the Stockholm Chamber of Commerce."

17. The arbitration was seated in Stockholm, Sweden and proceeded in accordance with the SCC Rules, as provided by the ECT. The selection of the arbitral tribunal consisted of Professor Dr. Klaus Sachs (appointed by Petitioner), Prof. Giorgio Sacerdoti (appointed by Respondent). and Mr. Klaus Reichert, S.C. (Chairperson, appointed by Messrs. Sachs and Sacerdoti).

18. Italy was represented by counsel in the arbitration by its attorneys (the Avvocatura Generale dello Stato). Italy participated in all aspects of the arbitration: Italy submitted an Answer, a Statement of Defense, and Rejoinder as well as witness statements and expert reports.

19. The tribunal conducted a hearing on Jurisdiction and Merits from February 19-22, 2018 at the ICC's hearing facility in Paris, France, during which the tribunal heard testimony from both Petitioner's and Respondent's witnesses.

20. The tribunal issued the Award on January 16, 2019. The Award found that Italy had violated its obligations under the ECT with respect to Petitioner's investments and found Italy liable to Petitioner in the amount of €9,600,000.00, plus pre- and post-award interest at a rate of LIBOR plus 2% compounded annually from January 1, 2015 until full and final satisfaction of the Award. The tribunal further ordered Italy to pay Petitioner €1,000,000.00 for the reasonable costs incurred by Petitioner. This Petition seeks recognition of the Award by this

Court. A true and correct certified copy of the Award is attached as Exhibit A to the Sun Affirmation.

Summary of the Dispute

21. Petitioner's case arises out of certain legislative and regulatory measures introduced by Italy since the early 1980s which were aimed at promoting and encouraging the development and use of renewable energy sources.[10] Specifically, after the European Parliament and the European Council enacted Directive 2001/77/EC promoting electricity produced from renewable energy sources in the internal electricity market, Italy began enacting incentive schemes for photovoltaic ("PV") plants known as *Conto Energia* Decrees.[11]

22. Between January 2010 and March 2012, CEF invested in three large PV projects: In January 2010, Petitioner acquired Sunholding S.r.l., which owned Megasol S.r.l., a company holding the rights to a 13MW PV plant known as Megasol;[12] in December 2010, Petitioner acquired a 70% controlling stake in Phenix S.r.l. ("Phenix") a company which held all project rights to a 24 MW PV plant known as the Sugarella plant;[13] and in March 2012, Petitioner acquired Enersol S.r.l., a company which held all project rights to a multi-section PV plant of approximately 48 MW known as the Enersol plant.[14]

23. Each of these plants was granted a specific incentive tariff based on the *Conto Energia* decree in force at the time the plant began operating. As a result, Megasol was governed by *Conto II*; Phenix and Section 1 of Enersol by *Conto III*; and the remaining 6 sections of Enersol by *Conto IV*. Each plant receiving incentives under the *Conto Energia*

[10] Exhibit A, ¶ 105.
[11] Exhibit A, ¶¶ 109-110.
[12] Exhibit A, ¶ 151.
[13] Exhibit A, ¶ 156.
[14] Exhibit A, ¶ 161.

framework also received a confirmation letter known as a "Tariff Recognition Letter" from the *Gestore dei Servizi Energetici GSE S.p.A.* ("GSE"), the state-owned company responsible for paying the incentive tariffs to electricity producers under the *Conto Energia* decrees, confirming the plant's right to a specific tariff. Additionally, the operator of the plant would also enter into a contract with the GSE known as a "GSE Agreement." The GSE Agreements would set for the specific tariff incentive rate that the PV plant would be paid. [15]

24. Shortly after Petitioner's investments, Italy began enacting a number of decrees and administrative fees that reduced the value of the incentive tariffs, and which later served as the basis for Petitioner's arbitration claims, including:

- In July 2012, Italy enacted *Conto V*, which provided that as of January 1, 2013, all PV producers benefiting from incentive tariffs under any *Conto* were now required to pay an annual administrative fee of €0.0005 per kWh of incentivized energy.[16]

- In June 2014 and August 2014, Italy enacted Law Decrees 91/2014 and 116/2014 respectively. Article 26 of Law Decree 91/2014, known as *Spalmaincentivi* (or "incentive spreading") modified the existing incentive scheme provided by the *Conto Energia* decrees such that the incentive tariff would be spread over 24 years instead of the original 20.[17] PV producers were offered a choice between three options: (i) the original *Spalmaincentivi*, (ii) a tariff reduction from 2015-2019, with a promise of increased tariffs in the remaining years; or (iii) a 6-8% cut over 20 years.[18]

- In October 2014, Italy issued Resolution No. 522/2014/R/EEL, which imposed "imbalance costs" on renewable energy producers. As a result, producers have had to pay these costs since January 1, 2015.[19]

- In August 2011, Italy began expanding its so-called "Robin Hood" tax, which was designed to increase the tax on profits of oil, gas and other traditional energy companies, to include all energy producers – including renewable energy producers. Thus, all energy producers with a gross annual income over €10

[15] Exhibit A, ¶¶ 151-162.
[16] Exhibit A, ¶ 167.
[17] Exhibit A, ¶¶ 164-165.
[18] Exhibit A, ¶ 166.
[19] Exhibit A ¶¶ 170.

million and taxable income of over €1 million were now taxed at a rate of 34%-38% for the fiscal years 2011-2013.

- In June 2013, Italy expanded yet again the Robin Hood tax by reducing income thresholders to a gross annual income of €3 million and taxable income over €300,000.

- In December 2013, Italy classified PV plants as immovable property. These plants thereby became subject to increased IMU and TASI charges. While Italy ultimately reduced these charges by about 90% in 2016, the charges paid in 2014 and 2015 have yet to be refunded.[20]

25. The net effect of these new regulations drastically reduced the profitability and value of Petitioner's investments.

26. Petitioner's Request for Arbitration alleged that Italy, through its adoption of these measures, violated Article 10(1) of the ECT by failing to provide fair and equitable treatment ("FET") to Claimants' investments, that notwithstanding Italy's contractual, legislative and regulatory obligations with regard to CEF and its investments, Italy failed to observe those obligations and thereby violated the "umbrella clause" of Article 10(1) of the ECT by violating its obligations to Petitioner under the *Conto Energia* decrees.[21] CEF also alleged that Italy failed to provide a transparent legal framework and unreasonably impaired CEF's investments.

27. Italy presented two objections to the tribunal's jurisdiction: (i) that the dispute was an Intra-EU dispute and that European Union ("EU") law forbids EU Member States from arbitrating disputes with investors from other EU Member States[22] and (ii) that the Robin Hood Tax, qualification of assets for fiscal and cadastral purposes, imbalance charges and

[20] Exhibit A, ¶ 178.
[21] Exhibit A, ¶¶ 179-180.
[22] Exhibit A, ¶ 101.

administrative fees all are legitimate taxation measures, subject to the carve-out in ECT Article 21(1).[23]

28. The tribunal rejected the first jurisdictional objection. The tribunal recalled that it is called "to resolve the alleged breach by Respondent of Art. 10(1) ECT on the basis of principles of public international law relevant to the interpretation and application in the present case of the ECT, a multilateral treaty in force between The Netherlands and [Italy]."[24] The tribunal then went on to reject Italy's and the Commission's position that "*clause [Article 26, ECT], if interpreted as applying intra-EU is incompatible with EU primary law and thus inapplicable.*"[25]

29. The tribunal sustained the second objection and therefore dismissed Petitioner's claims arising out of Italy's various taxation measures.[26] The tribunal also rejected CEF's argument that Article 26 of Law Decree 91/2014 or *Spalmaincentivi* breached the umbrella clause of Article 10(1) because this Law Decree was not *per se* illegal under Italian law.[27]

30. However, the tribunal did conclude that by imposing the *Spalmaincentivi*, Italy violated CEF's legitimate expectations. The tribunal found that, unlike the Megasol and Phenix plants which "still had a number of steps to take before [CEF] knew for certain that the hoped-for incentives [would] actually awarded," the Enersol plant "enjoyed crystallised rights" to the 20-year incentive.[28] The tribunal found that CEF had a legitimate expectation based on the *Contos*, Tariff Recognition Letters, and GSE Agreement, and Enersol's connection to the national grid, that the tariff cut Enersol received from Italy would remain constant and last the

[23] Exhibit A, ¶ 181.
[24] Exhibit A, ¶ 99.
[25] Exhibit A, ¶ 99 (emphasis in original).
[26] Exhibit A, ¶¶ 200, 203, 205, 207.
[27] Exhibit A, ¶ 259.
[28] Exhibit A, ¶¶ 188, 190.

full 20-year period.[29] The tribunal found that by enacting *Spalmaincentivi*, Italy significantly reduced the tariff cut Enersol received and breached its Article 10(1) FET obligations.[30]

31. The tribunal unanimously awarded Petitioner € 9,600,000.00 and pre- and post-award interest in damages relating to Petitioner's FET claim, and ordered Respondent to pay Petitioner's costs of the Arbitration and reasonable costs incurred, totaling € 1,000.000,000.

Cause of Action

32. Petitioner repeats and realleges the allegations in paragraphs 1 through 31 as if set forth fully herein.

33. The arbitration agreement set forth herein at paragraphs 7 through 15 constitutes "an agreement in writing" within the meaning of Article II(2) of the New York convention.[31]

34. The Award arose out of a legal relationship that is commercial within the meaning of 9 U.S.C. § 202.

35. The Award was made in Sweden, a nation that is a signatory to the New York Convention, and which is a State other than the State where recognition and enforcement is sought hereby.

36. The Kingdom of the Netherlands and the Italian Republic are also each signatories to the New York Convention.

37. The Award is final and binding within the meaning of the New York Convention and Chapter 2 of the FAA.

---

[29] Exhibit A, ¶¶ 234, 242, 260.
[30] Exhibit A, ¶ 260.
[31] *See* Exhibit B, ECT, Article 26(5)(a)(ii) ("The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for . . . an 'agreement in writing' for the purpose of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the 'New York Convention').").

38. None of the grounds for refusal or deferral of the Award set forth in the New York Convention apply.

39. The Award is required to be recognized, and judgment entered thereon, pursuant to the New York Convention and 9 U.S.C. § 207.

WHEREFORE, Petitioner prays:

(a) That the Court enter an order pursuant to 9 U.S.C. § 207 recognizing the Award against Italy; and

(b) That, on the basis of the Award, the Court enter a judgment that Italy is liable to Petitioner in the amount of €9,600,000.00 plus (i) Petitioner's reasonable costs from the Arbitration in the amount of € 1,000,000,000; (ii) any applicable Value Added Tax; (iii) pre- and post-award interest at a rate of LIBOR plus 2% compounded annually from January 1, 2015 to the date that judgment is entered herein; and (iv) post-judgment interest pursuant to N.Y. C.P.L.R. § 5004 from the date that judgment is entered to the date of satisfaction; and

(c) That Petitioner be awarded such other and further relief as may be proper.

Dated: New York, New York
August 16, 2019

Respectfully submitted,

/s/ James E. Berger
James E. Berger
Charlene C. Sun

KING & SPALDING LLP
1185 Avenue of the Americas
New York, NY 10036-4003

11

Tel: (212) 556-2200
Fax: (212) 556 -2222
jberger@kslaw.com
csun@kslaw.com

Attorneys for Petitioner
CEF Energia B.V.