

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

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.

Index No. _____

**Petition to Confirm Foreign
Arbitral Award**

PETITION TO CONFIRM FOREIGN ARBITRAL AWARD

Petitioners 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), and NovEnergia II Italian Portfolio (together, “Petitioners”), by and through their undersigned counsel, hereby petition this Court for an order pursuant to 9 U.S.C. § 207 (i) confirming and recognizing the final arbitral award (the “Award”) rendered on December 23, 2018 against the Italian Republic (“Italy”) pursuant to the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC Rules”);¹ (ii) entering judgment in Petitioners’ favor against Italy in the amount of the Award with pre- and post-judgment interest

¹ A true and correct copy of the Final Award is attached as **Exhibit A** to the affirmation of Enrique J. Molina, dated April 5, 2019 (“Molina Aff.”).

and costs as provided therein and as authorized by law, plus the costs of this proceeding; and (iii) awarding Petitioners such other and further relief as this Court deems just and proper.

Parties, Jurisdiction and Venue

1. Petitioners bring this summary proceeding under the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), 21 U.S.T. 2517, 330 U.N.T.S. 38, and Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201 *et seq.*, to confirm a duly-rendered arbitration award issued in their favor against Italy.

2. Petitioner Greentech Energy Systems A/S (“Greentech”), now known as Athena Investments A/S, is a company incorporated under the laws of the Kingdom of Denmark, with its corporate address at Frederiksborggade 15, 3rd Floor, DK -1360 Copenhagen K, Denmark. Greentech became Athena Investments A/S on December 12, 2017.

3. Petitioner NovEnergia General Partner S.A. is the liquidator of NovEnergia II Energy & Environment (SCA) SICAR (“NEE”), which is a company incorporated under the laws of the Grand Duchy of Luxembourg, with its corporate address at 28 Boulevard Royal, L-2449 Luxembourg. NovEnergia General Partner S.A. was appointed by NEE’s shareholders to oversee its dissolution and liquidation.²

4. Petitioner NovEnergia II Italian Portfolio SA (“NIP”) is a company incorporated under the laws of the Grand Duchy of Luxembourg, with its corporate address at 28 Boulevard Royal, L-2449 Luxembourg. NEE owns a 97.6% interest in NIP, and 100% of the voting shares in NIP.

² A copy of the notarial deed recording the resolution of the general shareholders of NEE is attached as **Exhibit B** to the Molina Aff.

5. Respondent is the Italian Republic and is a foreign state within the meaning of the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§1330, 1332, 1391(f), 1441(d), 1602-11.

6. 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).

7. Specifically, 28 U.S.C. § 1605(a) provides an exception to sovereign immunity for any claim against a foreign state 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 the 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 and enforcement of a foreign arbitral award falling under the New York Convention.

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

The Arbitration Agreement

A. Italy’s Agreement to Arbitrate

9. Italy agreed to arbitrate its dispute with Petitioners pursuant to the Energy Charter Treaty (“ECT”).³ The arbitration agreement between the Petitioners and Italy consists of two elements: (i) Italy’s consent contained in Article 26(3) of the ECT; and (ii) Petitioners’ consent contained in their Request for Arbitration.

³ A true and correct copy of the ECT is attached as **Exhibit C** to the Molina Aff.

10. Italy signed the ECT on December 17, 1994 and ratified it on December 5, 1997. The ECT entered into force in the Italian Republic on April 16, 1998. In accordance with Article 1(2) of the ECT, Italy was a Contracting Party to the ECT at the time the arbitration underlying the Award was commenced. Italy gave notice of its withdrawal from the ECT on December 31, 2014 and its withdrawal became effective on January 1, 2016.⁴ Pursuant to Article 47(3) of the ECT, the post-withdrawal period during which the ECT continues to apply to pre-existing qualifying investments like Petitioners,' is twenty years.⁵ In other words, all investments existing at the time of Italy's renunciation of the ECT remain protected, and investors in Italy are allowed to use the Dispute Settlement Provisions of the ECT against Italy until 2036.⁶ Italy's withdrawal from the ECT is of no consequence to this case.

11. Article 26 of the ECT, titled "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.

12. 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 was a Contracting Party to the ECT at the time the arbitration was commenced, and the ECT's post-withdrawal period lasts until 2036.

⁴ Molina Aff. ¶ 5.

⁵ Molina Aff. ¶ 5.

⁶ Molina Aff. ¶ 5.

B. Petitioners' Consent to Arbitrate

13. Denmark signed the ECT on December 17, 1994 and ratified it on August 22, 1997. The ECT entered into force in Denmark on April 16, 1998. In accordance with Article 1(2) of the ECT, Denmark is a Contracting Party of the ECT.

14. Luxembourg signed the ECT on December 17, 1994 and ratified it on February 7, 1997. The ECT entered into force in Luxembourg on April 16, 1998. In accordance with Article 1(2) of the ECT, Luxembourg is a Contracting Party to the ECT.

15. As “company[ies] or other organization[s] organized in accordance with the law applicable in” Denmark and Luxembourg, respectively, Petitioners are “Investors” within the meaning of Article 1(7)(a)(ii) of the ECT.⁷

16. As “Investors” under Article 1(7) of the ECT, Petitioners’ 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 Petitioners’ claims.

17. 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 express its consent in writing.⁸

18. Petitioners provided their written consent to the Arbitration in ¶ 77 of their Request for Arbitration dated July 7, 2015,⁹ as follows:

⁷ Molina Aff., **Exhibit C**, 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.”

⁸ See Molina Aff., **Exhibit C**, 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].”

⁹ A true and correct copy of the Request for Arbitration, dated July 7, 2015 is attached as **Exhibit D** to the Molina Aff.

Claimants hereby confirm their 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.¹⁰

The Arbitration

19. Petitioners commenced the arbitration at issue herein by serving a Request for Arbitration on Italy on July 7, 2015. The Request for Arbitration invoked Article 26(4)(c) of the ECT, which permits the submission of disputes arising under the ECT to an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

20. The arbitration was seated in Stockholm, Sweden and proceeded in accordance with the Stockholm Chamber of Commerce (“SCC”) Rules, as provided by the ECT. The Tribunal consisted of David R. Haigh, Q.C., appointed by Petitioners, Professor Giorgio Sacerdoti, appointed by Respondent, and Professor William W. Park, appointed by the two co-arbitrators.¹¹

21. Italy was represented in the arbitration by a competent team of lawyers from the Italian Republic’s State General Attorney’s Office (the Avvocatura Generale dello Stato), and by Professor Maria Chiara Malaguti, External Counsel to the Legal Services of the Ministry of Foreign Affairs.¹² Italy participated in all aspects of the arbitration: it submitted an Answer to Petitioners’ Request for Arbitration, which included a Request for Bifurcation; a Statement of Defense on the Merits; a Reply on Bifurcation; and a Rejoinder on the Merits. Italy submitted witness statements and expert reports along with its various pleadings.

¹⁰ Molina Aff., **Exhibit D**, ¶ 77.

¹¹ Molina Aff., **Exhibit A**, ¶¶ 20-23.

¹² Molina Aff., **Exhibit A**, ¶ 64.

22. The Tribunal conducted a hearing on Jurisdiction, the Merits, and Quantum, from June 26 - 30, 2017 at the ICC's hearing facility in Paris, France, during which the Tribunal heard testimony from Petitioners' and Respondent's witnesses.

23. The Tribunal issued the Award on December 22, 2018. In the Award, the Tribunal found Italy had violated its obligations under the ECT with respect to Petitioners' investments, and found Italy liable to Petitioners in the amount of €11.9 million plus interest at the rate of LIBOR plus 2%, compounded annually. The Tribunal also awarded Petitioners the costs of the arbitration, totaling €478,000, and half their legal and related expenses, in the amount of €1,408,268.¹³ 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 Molina Affirmation.

Summary of the Dispute

24. Petitioners' case arises out of certain legislative measures introduced by Italy starting in 2005, the purpose of which was to induce private investment in renewable energy facilities in order to enable Italy to meet national and EU level targets for electricity generation from renewable energy sources by 2010.¹⁴ Under these legislative measures, called *Conto Energia* (Energy Account), investors in Italy's renewable energy sector received incentive payments for each unit of electricity generated and fed into the system.¹⁵ These incentive payments were in addition to the wholesale prices the electricity generating companies received for the sale of their electricity.¹⁶ Each *Conto Energia* provided that the incentive payment, once granted, would continue for twenty years, starting on the date on which the benefitted plant

¹³ Molina Aff., **Exhibit A**, ¶ 594.

¹⁴ Molina Aff., **Exhibit A**, ¶¶ 106-08.

¹⁵ Molina Aff., **Exhibit A**, ¶ 109.

¹⁶ Molina Aff., **Exhibit A**, ¶ 109.

began operation.¹⁷ As a first step, each operator of a renewable energy facility receiving the *Conto Energia* incentives received a letter expressly stating the term of the incentive.¹⁸ Thereafter, the operator would enter into a contract with Italy's electric utility, *Gestore dei Servizi Energetici* ("GSE"), setting forth the incentive rates the investor was entitled to, and the specific dates comprising the twenty year term of the incentives.¹⁹

25. In addition to the *Conto Energia* incentive premiums, Italy also established a regime whereby it would purchase electricity directly from smaller energy producers at minimum guaranteed prices.²⁰ These prices were intended to prevail irrespective of what the wholesale electricity market did.²¹

26. Encouraged by Italy's favorable regime for renewable energy investments, Petitioners started developing photovoltaic projects in Italy starting in 2008.²²

27. Between 2010 and 2013, NIP and NEE invested in fifty-two photovoltaic projects in Italy, fifty of which were structured as an equity holding in a joint venture company called Holding Fotovoltaica S.p.A ("HFV").²³ NIP purchased 49.75% of HFV's shares, while Novenergia Italia S.p.A., a subsidiary of NEE, purchased .25% of HFV's shares.²⁴ Thereafter, two independent joint venture partners purchased the remaining 50% of HFV's shares.²⁵ In

¹⁷ Molina Aff., **Exhibit A**, ¶ 109.

¹⁸ Molina Aff., **Exhibit A**, ¶ 109.

¹⁹ Molina Aff., **Exhibit A**, ¶ 109.

²⁰ Molina Aff., **Exhibit A**, ¶ 129.

²¹ Molina Aff., **Exhibit A**, ¶ 129.

²² Molina Aff., **Exhibit A**, ¶ 132.

²³ Molina Aff., **Exhibit A**, ¶ 133.

²⁴ Molina Aff., **Exhibit A**, ¶ 133.

²⁵ Molina Aff., **Exhibit A**, ¶ 133.

addition to the fifty photovoltaic projects held by HFV, NIP and NEE invested directly in two other photovoltaic projects.²⁶ NIP and NEE's investments amounted to €175 million.²⁷

28. Greentech also invested substantial sums in the Italian renewable energy sector. Through its merger in 2011 with GWM Renewable Energy I S.A., Greentech acquired the entire share capital of GWM Renewable S.p.A.—Renewable Energy I S.A.'s wholly owned subsidiary—which held a portfolio of seventy-five photovoltaic projects in Italy.²⁸ Through its investment of more than €131 million in the merger and subsequent acquisitions, Greentech held a 100% ownership stake in eighty-two photovoltaic projects in Italy as of January 2015.

29. Starting in late 2013, Italy began enacting a number of measures to reduce the electricity cost burden on consumers attributable to its incentive programs,²⁹ including among others:

- On December 23, 2013, Italy enacted Law Decree No. 145/2013. This law provided photovoltaic energy producers two options: (i) to continue receiving incentives for the original twenty-year period, but to stop receiving incentives thereafter; or (ii) to accept reductions to their incentive payments, but for the term to be extended by seven years.³⁰
- On June 24, 2014, Italy enacted Law Decree No. 91/2014, known as the *Spalma-Incentivi*, whereby incentives previously granted to photovoltaic plants over 200 kW were modified starting January 2015.³¹ Under Article 26(3) of the *Spalma-Incentivi*, producers were given a choice between three

²⁶ Molina Aff., **Exhibit A**, ¶ 135.

²⁷ Molina Aff., **Exhibit A**, ¶ 136.

²⁸ Molina Aff., **Exhibit A**, ¶ 139.

²⁹ Molina Aff., **Exhibit A**, ¶¶ 143-44.

³⁰ Molina Aff., **Exhibit A**, ¶¶ 143-44.

³¹ Molina Aff., **Exhibit A**, ¶ 145.

different methods for Italy to calculate the incentives applicable to their photovoltaic investments—each method resulted in a reduction in the incentives due to each project.³² In addition to changing the incentives applicable to photovoltaic projects, the *Spalma-Incentivi* changed the way in which incentive tariffs were disbursed.³³ Under Article 26(2) of the *Spalma-Incentivi*, disbursements would be paid on a monthly basis based on 90% of a plant's estimated average yearly electricity production.³⁴ Lastly, under Article 10(4) of the *Spalma-Incentivi*, administrative fees applicable to each photovoltaic project were calculated based on a plant's capacity, which varied from the way they were calculated previously, which was by effective output of energy.³⁵

- Also, in December of 2013, Italy altered the minimum guaranteed price scheme applicable to photovoltaic investments by reducing the cap on eligible electricity from 2 million kWh per year to 1.5 million kWh per year.³⁶ Moreover, the size cutoff for plants eligible to receive minimum guaranteed incentive tariffs was reduced to 100 kWh.³⁷
- In March 2015, Italy announced it would seek reimbursement of certain incentives granted to photovoltaic plants since 2005 by offsetting them against incentive tariffs payable in the future.³⁸

³² Molina Aff., **Exhibit A**, ¶ 145.

³³ Molina Aff., **Exhibit A**, ¶ 146.

³⁴ Molina Aff., **Exhibit A**, ¶ 147.

³⁵ Molina Aff., **Exhibit A**, ¶ 149.

³⁶ Molina Aff., **Exhibit A**, ¶ 150.

³⁷ Molina Aff., **Exhibit A**, ¶ 151.

³⁸ Molina Aff., **Exhibit A**, ¶ 155.

- To offset the costs to the system of providing photovoltaic energy producers with incentive tariffs, Italy decided photovoltaic energy producers should pay an administrative fee to the government based on their plants' capacities.³⁹ Additionally, Italy compelled photovoltaic energy producers to pay imbalance costs to compensate Italy for their failure to make accurate projections of the amounts of photovoltaic energy would be fed into the grid.⁴⁰

30. The net effect of these measures drastically reduced the profitability of Petitioners' investments.

31. In their Request for Arbitration, Petitioners alleged that Italy's treatment of their investments was inconsistent with the standards set forth Articles 10 and 13 of the ECT.⁴¹ Italy presented multiple objections to the Tribunal's jurisdiction: (i) that the ECT does not cover intra-EU disputes; (ii) that certain measures attacked by Petitioners were exempted under Article 21 of the ECT; (iii) that the ECT's unconditional consent requirements set forth in Article 26 were not satisfied; (iv) that no amicable solution had been attempted; and, (v) that the Tribunal did not have jurisdiction over any claims arising under the ECT's umbrella clause because the GSE contracts contained exclusive jurisdiction clauses.⁴²

32. The Tribunal rejected all of Italy's jurisdictional objections, with the except for those based on Article 21 of the ECT, finding that the measures challenged by Petitioners amounted to taxation measures for purposes of the ECT. On liability, a majority of the Tribunal found that the incentive tariff reductions under the *Spalma-Incentivi* "undermined Claimants'

³⁹ Molina Aff., **Exhibit A**, ¶¶ 156-59.

⁴⁰ Molina Aff., **Exhibit A**, ¶¶ 156-59

⁴¹ Molina Aff., **Exhibit D**, ¶¶ 65-67.

⁴² Molina Aff., **Exhibit A**, ¶ 172.

legitimate expectations, failed to treat Claimants' investments transparently and consistently, and thus violated the FET Clause."⁴³ Additionally, the Tribunal found that "the incentive tariff reduction portion of the [*Spalma-Incentivi*] violated the impairment clause and breached the obligations set forth in the last sentence of [the umbrella clause]."⁴⁴

33. The Tribunal awarded Petitioners compensation for the damages caused to their investments by Italy's breaches in the following amounts: €7.4 million to Greentech, and €4.5 million to NEE and NIP. Additionally, the Tribunal (i) awarded Petitioners interest on their damages at the annual LIBOR rate plus 2% per annum, compounded annually; (ii) ordered Italy to reimburse Petitioners for their contribution to the costs of the arbitration, amounting to €478,000; and (iii) ordered Italy to reimburse Petitioners for one half of their legal and related expenses, amounting to €1,408,268.⁴⁵

Cause of Action

34. Petitioners repeat and reallege the allegations in paragraphs 1 through 33 as if set forth fully herein.

35. The arbitration agreement set forth at paragraphs 9 through 18 constitutes "an agreement in writing" within the meaning of Article II(2) of the New York Convention.⁴⁶

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

⁴³ Molina Aff., **Exhibit A**, ¶ 179.

⁴⁴ Molina Aff., **Exhibit A**, ¶ 179.

⁴⁵ Molina Aff., **Exhibit A**, ¶ 594.

⁴⁶ See Molina Aff., **Exhibit C**, 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').").

37. 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.

38. The Italian Republic, Denmark and Luxembourg are all signatories to the New York Convention.

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

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

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

WHEREFORE, Petitioners pray:

- (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 Petitioners jointly in the amount of €11.9 million plus (i) Petitioners' reasonable costs from the Arbitration in the amount of €1,886,268.00; (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 until 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 Petitioners be awarded such other and further relief as may be proper.

Dated: New York, New York

April 5, 2019

Respectfully submitted,

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Novenergia II Italian Portfolio