

brought by Spain in the Svea Court of Appeal in Sweden (“Svea Court”) to set aside each of the two arbitral awards at issue in these actions.

Section I below describes a development in a separate set aside case pending before the Svea Court, *Italian Republic v. Athena Investments A/S (f/k/a Greentech Energy Systems A/S), Novenergia II Energy & Environment (SCA) SICAR, and Novenergia II Italian Portfolio SA* (Case No. T 3229-19) (the “*Italy* proceedings”), that impacts both the *Novenergia* and *Foresight* set aside proceedings. The status of those proceedings is described in Sections II and III, respectively.

I. The Svea Court’s Decision to Refer Questions to the Court of Justice of the European Union (“CJEU”) in *Italy v. Athena Investments A/S*

In 2019, Italy brought proceedings in the Svea Court to set aside an Energy Charter Treaty (“ECT”) arbitral award obtained by three EU member State nationals, including Petitioners Greentech Energy Systems A/S and Novenergia. On February 11, 2021, the Svea Court granted Italy’s request that it make a preliminary reference to the CJEU to resolve questions of EU law.

The Svea Court proposed referring the following questions of EU law to the CJEU:

1. *Should the ECT be interpreted in such a way that Article 26 – by which a contracting party gives its unconditional consent to the referral of disputes between a contracting party and an investor from another contracting party regarding an investment that the latter has done in the former’s area, to international arbitration – also encompass a dispute between an EU member state on the one hand and an investor from another EU member state on the other hand?*

If Question 1 is to be answered in the affirmative:

2. *Should Articles 19 and 4.3 TEU and Articles 267 and 344 TFEU be interpreted so that they preclude Article 26 ECT, or the application of this article, when an investor from an EU member state, in case of a dispute regarding investments in another EU member state, may initiate proceedings according to the article against the latter member state before an arbitral tribunal whose authority and decisions that member state is bound to accept?*

If Question 2 is to be answered in the affirmative:

3. *Should union law, in particular the principle of primacy of EU law and its efficient application, be interpreted so that it precludes the application of a provision in national law regarding preclusion, such as Article 34, second paragraph, of the Swedish Arbitration*

Act, if such application entails that a party in the challenge proceedings is prevented from making an objection that the origin of the arbitration agreement, or the arbitration agreement as such, is contrary to EU law?

On February 25, 2021, the parties in the *Italy* proceeding submitted comments on the Svea Court's proposed preliminary reference. Based upon those comments, the Svea Court will decide what questions to refer to the CJEU.

II. Proceedings in Spain's Action to Set Aside the Award in *Novenergia*

On February 5, 2021, Spain filed its final submission on the Svea Court's case summary, completing merits briefing on Spain's set aside petition.

On February 10, 2021, Novenergia wrote the Svea Court, asking it to revise Spain's part of the case summary in line with the Svea Court's directions, and to thereafter grant Novenergia an opportunity to comment on Spain's final submission and, if necessary, the case summary.

On February 15, 2021, in light of the Svea Court's decision to make a preliminary reference to the CJEU in the *Italy* proceedings, the Svea Court indicated that it expects that it will not be able to hold the merits hearing scheduled for May 2021. It also requested Spain to provide comments on the effect of the *Italy* decision on the *Novenergia* set aside proceedings by March 1, 2020. Both parties were also invited to submit comments on the future handling of the *Novenergia* set aside proceedings.

On February 26, 2021, in response to the Svea Court's invitation, Spain argued that the Svea Court should reconsider its decision to deny Spain's request for a referral to the CJEU, and that it should refer the questions Spain previously identified to the CJEU. It also argued that the *Novenergia* proceedings should be stayed pending the decision of the CJEU in the *Italy* proceedings.

On March 1, 2020, Novenergia informed the Svea Court that it assumed that the Svea Court of Appeal would stay the *Novenergia* set aside proceedings, in light of the preliminary reference in the *Italy* proceedings and its indication that the scheduled hearing would not be held.

III. Proceedings in Spain's Action to Set Aside the Award in *Foresight*

On February 15, 2021, in light of the Svea Court's decision to make a preliminary reference to the CJEU in the *Italy* proceedings, the Svea Court canceled all scheduled deadlines in the *Foresight* proceedings until further notice, including the February 26, 2021 deadline for the submission of comments on the European Commission's amicus curiae brief. It also indicated that it expects that it will not be able to hold the merits hearing scheduled for October 2021 and requested the parties to provide comments on the effect of the *Italy* decision on the *Foresight* set aside proceedings.

On March 1, 2021, in response to the Svea Court's invitation, the parties submitted their comments on the effect of the *Italy* decision on the *Foresight* proceedings. Spain argued that the Svea Court should reconsider its decision to deny Spain's request for a referral to the CJEU, and that it should refer the questions Spain previously identified to the CJEU. It further argued that, if the Svea Court were to choose not to refer questions to the CJEU in the *Foresight* proceedings, the *Foresight* proceedings should be stayed pending the decision of the CJEU in the *Italy* proceedings. The *Foresight* Petitioners informed the Svea Court that it assumed that the Svea Court of Appeal would stay the *Foresight* set aside proceedings, in light of the preliminary reference in the *Italy* proceedings and its indication that the scheduled hearing would not be held.

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Respectfully submitted,

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