SCC Arbitration V (2015/095)

Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA (Claimants) v. The Italian Republic (Respondent)

DISSENTING OPINION OF ARBITRATOR GIORGIO SACERDOTI

in respect of the Tribunal's decision on the interpretation of article 10(1) of the ECT (Fair and Equitable Treatment and Umbrella Clause) and its application to the incentive tariff reduction introduced by Italy with the *Spalma-incentivi* decree (Law Decree no. 91/2014 converted into Law 116/2014) – Final Award paras. 445-467 and 594 (b)

I. Introduction.

1. My disagreement with my esteemed colleagues on this issue, and hence on para. 1(b) of the Award's Disposition, stems from a methodological divergence as to the interpretation of Art. 10(1) ECT and from a different evaluation of the relevant facts and the application to them of the several provisions contained in Art. 10 (1) properly interpreted.

II. Approach to be followed in interpreting Art. 10(1) ECT.

2. The text of Art.10(1) entitled *"Promotion, Protection and Treatment of Investments"* comprises several sentences, providing for different undertakings by the ECT member States, which are set forth distinctly hereunder:

(FET standard) [1] *Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.*

(Full protection & Security and Non-Impairment clauses) [2] *Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal.*

(Non-discrimination clause)[3] *In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.*

(Observance of Obligations - Umbrella Clause) [4] *Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*

3. I believe, following previous holdings in awards and in authoritative academic writings, that the various sentences provide for different obligations which are distinct from one another. A measure by a host State, such as here Italy, challenged as in

breach of Art. 10(1), must be examined therefore under the various parameters provided in this article.

4. The first sentence sets forth the obligation ("shall") for each Contracting Party to "*encourage and create stable, equitable and transparent conditions*" for Investors of the other Parties "*to make* [= in order that they make/ to promote] *Investments in its Area"*. The next sentence specifies that "*Such conditions shall include a commitment to accord at all time to Investments of Investors of other Contracting Parties fair and equitable treatment.*" The next sentence provides for obligations which are in addition to those of the preceding sentences, as is made clear by the use of the word "also" and the word "and": "*Such Investments shall <u>also</u> enjoy the most constant protection and security <u>and</u> no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal"*. Finally, the last sentence contains the obligation to observe certain types of obligations (Umbrella Clause).

5. It is important to note that the protection of legitimate expectations, a concept that has become key in investment disputes, is not spelled out in the text, just as it is not spelled out in most Bilateral Investment Treaties (BITs). Therefore, I share the view that (the protection of) "legitimate expectations" is not an independent obligation of a host State against which its conduct affecting foreign protected investment should be measured.[1] It is rather the other way around: the protection of legitimate expectations derives and depends from the obligations undertaken by such State. In other words: an investor protected by Art. 10(1) is entitled to expect that it will be treated fairly and equitably, in particular by enjoying stable conditions.

6. Therefore, in case of a challenge against a host State's measure, the adjudicator must establish whether the measure in question (here the *Spalma-incentivi* tariff reduction) is/was unfair and inequitable because it breached the obligation to *create stable, equitable and transparent conditions* for/applicable to Claimants' investments. If that obligation was breached by the *Spalma-incentivi*, then one can conclude that the legitimate expectation of the affected investors on such stability has been breached, and not the other way around.[2] "Legitimate expectation" includes also the expectation that even when authorities are empowered under their domestic law to modify an existing regulation, affecting thereby negatively holders of rights who do not benefit from a stabilization protection against such changes, these authorities should take care to effect the changes in a way that does not hurt unreasonably or arbitrarily the right holders.[3] Finally, legitimate expectations have also a subjective element. First, the

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[1] See Christopher Campbell, *House of Cards: The Relevance of Legitimate Expectations under the Fair and Equitable Treatment Provisions in Investment Law*, 30 J. Int'l Arbitration, 361 (2013).

[2] See *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Annulment Committee, 25 September 2007, para.89:" *Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT.*"

[3] This is the element which the ECJ has stressed in the *Plantanol* case (C-201/08, 10 September 2009) the most recent key European law case upholding (up to a certain point, as mentioned hereafter) the concept of legitimate expectations in respect to changes in domestic legislation by EU member States. A comparative examination of the concept in the framework of investors' protection is found in *Total v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 128-130.

legal regime on which an investor bases its legitimate expectations must exist when the investment was made, and it must be shown that the investor has taken it into account and relied on it in making the investment. Secondly, the legitimate expectations must be backed by an appropriate investigation (due diligence) on the elements of that regime of whose subsequent changes the investor complains[4].

7. A separate obligation is contained in the third sentence of Art. 10(1). that not to "*impair in any way by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*. In this respect I believe, again following arbitral practice and academic writings, that one has to examine in a discrete way, focusing on the challenges made by Claimants, whether the challenged measure (a) has caused an *impairment* to the investment, (b) whether the measure causing the impairment was *unreasonable*, and (c) whether it affected the *management, maintenance, use, enjoyment or disposal* of the investment.

III. Is the *Spalma-incentivi* tariff reduction contrary to Italy's obligation to "create stable, equitable and transparent conditions" for Claimants' investments?

8. The starting point in this respect must be the determination of the level of stability that the obligation of Art. 10(1), first and second sentence, requires. This is because it is beyond doubt that the provision does not require a freezing of the conditions existing at the time of the making of the investment, nor does it prevent the host State from making any change whatsoever. The Tribunal has accepted this line of reasoning when it rejected the Claimants' challenges to Italy's modifications of various other regulations applicable to the Claimants' investments in the PV sector.[5] As to the *Spalma-incentivi* tariff reduction, however, the Tribunal has concluded, by a majority, that a breach existed, relying on the following arguments: (a) "*At the time of investing, Claimants had been led to believe, reasonably, that the incentive tariffs would remain the same as promised in the Conto Energia decrees, GSE letters and GSE Agreements throughout a twenty-year period.*" (at para.447), since they had received assurances that "*constituted non-waivable guarantees*" (at paras. 449, 451); (b) the changes and the ensuing loss were more than "minor adjustments" (at para. 448); and (c) Italy did not have "*a reasonable and valid policy justification for the changes*" that, on balance, could prevail over its assurances of stability (para. 454).

9. As I pointed out above, in so approaching and deciding the issue, the Tribunal's majority undertook an evaluation of the conformity of the *Spalma-incentivi* with all the discrete obligations set forth in Art. 10(1), taken as a whole, including the Umbrella Clause of the last sentence, while, in my view, the right approach should

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[4] An investor is expected to take into account also the political, socio-economic, cultural and historical conditions of the host State, see *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para.359 ff.; *Duke Energy v. Ecuador*, ICSID Case ARB/04/19, Award 18 August 2008, para. 340.

[5] See para. 477 in respect of the payment terms changes under the *Spalma-incentivi*.

have been to test the *Spalma-incentivi* against each obligation contained in Art. 10(1) distinctly.[6]

10. Looking therefore first to what I would call the "general FET clause" of the first two sentences of Art. 10(1), arbitral tribunals that have addressed the issue (including with respect to the ECT) have concluded that the stability of a regulation is not to be understood as immutability and that States have the right, indeed the "*responsibility to adapt their regulation to emerging needs and requests of their people in the normal exercise of their prerogatives and duties*".[7]

11. In an oft-quoted statement, the tribunal in *Saluka v. Czech Republic* (2006) famously stated that "No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectation was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken in consideration as well". This "requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interest on the other"[8]. While evolution of the law is to be expected, what is prohibited is a state acting "unfairly, unreasonably or inequitably in the exercise of its legislative power."[9]

12. Under a provision such as the FET clause of the ECT the analysis to be conducted requires therefore balancing between, on the one hand, the framework of stability provided by the host State upon which a foreign investor has in a demonstrable way relied when making its investment, and, on the other hand, the host State's reasons for the changes, respect by it of procedural due process, and the magnitude of the negative impact that these changes have had on the investment.[10] The more stable the framework, the higher the burden for the host State to show that the changes were reasonable and that, on balance, they did not breach the FET clause.[11] Under the FET

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[6] See para. 466 of the Award where the majority of the Tribunal concludes that "*that, taken as a whole, the combination of the Conto Energia decrees, the GSE letters, and the GSE Agreements, amounted to obligations "entered into with" specific PV operators. Those obligations were sufficiently specific, setting forth specific tariff rates for a fixed duration of twenty years. Accordingly, whether any of the Conto Energia decrees, GSE letters, or GSE Agreements would, in isolation, be covered by the ECT's umbrella clause is not the relevant question here, given that each of Claimants' investments received benefits pursuant to all three types of 'obligations'*".

[7] See *Total v. Argentina*, cit., para. 115. See also *El Paso v. Argentina*, cit., paras. 352, 367-368. See also *Impregilo v. Argentina*, ICSID Case ARB No./o7/17, Award, 21 June 2011, paras 285, 290-291: "*The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in time of crisis, but certainly investors must be protected from unreasonable modification of that legal framework*".

[8] *Saluka v. Czech Republic*, UNCITRAL Partial Award, 17 March 2016, paras. 305, 309.

[9] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007, ¶ 332, cited in Respondent's Statement of Defense, paras. 540-541

[10] Besides *Parkering*, see also in the same vein *Micula v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013, para. 529; *Charanne v. Spain*, SCC Case No. V 062/2012, Award, 21 January 2016, paras. 510 and 513; *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction and Liability, 12 September 2014, para. 560; *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 10 January 2010, paras. 284-285. See also *Antaris* v. Czech Republic, PCA Award 2 May 2018, Case N0.2014-01, para. 360(9) "*the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own border.*"

[11] See *Total v. Argentina*, cit. para. 121, with reference to instances of "assurances, promises, commitments, offering of specific conditions" to foreign investors. In general, as to such a balancing in recent arbitral case law see Federico

standard this approach calls for a proportionality analysis between the competing interests of the investor to investment protection and the legitimate interest pursued by the State.[12]

13. Coming to the *Spalma-incentivi* and its context, it is beyond dispute that the various *Conto Energia* that Italy enacted between 2005 (*Conto I*) and 2012 (*Conto V*) provided eligible plants under each *Conto* with a given incentivized tariff (of a reduced amount under each subsequent *Conto*) that would remain in force for 20 years. Such a structure and duration was meant to encourage investments in PV facilities, considering that most fixed costs are incurred upfront to build such a plant, so as to enable the recoupment of the initial investment within the useful life of the plant. The overall aim was to enable Italy to meet its targets of percentage share of renewable energy, as set by the European Union policy and legislative instruments concerning the increase of electricity produced by renewable sources.[13]

14. At the same time, under Italian legal principles, it is also beyond dispute that the legislative decrees that enacted the various *Conti*, just as the statutes on the basis of which those decrees were enacted, did not tie the hands of the legislator or regulator. From a strict legal point of view Italy did not undertake thereby any "obligation" not to make changes towards the potential beneficiaries of the regime, namely the future and actual investors, be they domestic or foreign. The regime could (and can) be legitimately changed before the expiration of the 20-year period and also in respect to the tariff granted by any *Conto* for that duration, as the Italian Constitutional Court has held it was lawful, at least under certain conditions. In other words, Italy did not thereby "*effectively waive its right to reduce the value of the tariffs*".[14] However it is clear, and Respondent Italy does not deny it, that the *Conto* system included as an essential element the provision that granted tariffs would remain in force for 20 years.

15. Another essential feature of the Italian regime was that the expectation of stability as to the 20-year tariff was enhanced by its inclusion in specific contracts between GSE, the state-owned company charged with the management of the electricity system, and the individual PV operators, setting forth the specific tariff to which a given operator

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Ortino, *The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?* "J. Int'l Economic Law", 2018, 1-21, at 13. For other authors see Mara Valenti, *The protection of general interests of host States in the application of the fair and equitable standard*, Giorgio Sacerdoti (general editor), "General Interests of Host States in International Investment Law", CUP 2014, p. 26 ff; Caroline Henckels, "Proportionality and deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy", OUP, 2016; Valentina Vadi, "Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration", Elgar 2018.

[12] See Thomas, Cottier, Roberto Etchandi, Rachel Lietchi-McKee, Tetyana Payosova and Charlotte Sieber, *The Principle of Proportionality in International Law: Foundations and Variations*, "J. World Investment & Trade", 18, 628 ff (2017), specifically at 659 ff in respect of the FET standard.

[13] Dir. 2001/77/EC, implemented by Legislative Decree 387/2003; Dir.2009/28/EC, implemented by Legislative Decree 28/2001 (named "Romani Decree" from the name of the competent Minister at the time), see Award, paras.107 ff.

[14] Award, para. 450. Cf. *Continental v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 258: "*it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands in case of a crisis of any type or origin arose*".

was entitled for 20 years.[15] I discuss in the subsequent paragraphs the relevance of this contractual set-up under the Umbrella Clause.

16. As discussed above, the general FET clause does not impose an obligation of immutability where it provides that Contracting Parties "*shall encourage and create stable, equitable and transparent conditions*" for Investors of the other Parties *"to make investments"* in the energy sector. On the other hand, the obligation of stability would not be respected if a host country's regime is "unstable and inequitable". In view of the specificity of the *Conto* regime, which is meant to encourage long term investments in the PV sector, notwithstanding the absence of a stabilization clause changes should be strictly balanced against the legitimate expectation of the investors that the regime would remain stable.[16]

17. The ECT cannot be interpreted in any case in isolation. Since Claimants are nationals of other EU countries also the EU Treaties and the European Convention on Human Rights are relevant in their relations with Italy under the ECT. I recall that according to the principle stated in Art. 31.1(c) of the VCLT, in interpreting a treaty *"there shall be taken into account, together with the context: (c) any relevant rule of international applicable in the relations between the parties"*. The EU and ECHR are "relevant" because they contain principles, applicable in Italy to the protection of legitimate expectations of enterprises in respect of normative changes affecting their economic rights and activities to which Art. 10(1) ECT applies when covered foreign investors are involved. This is the well-known criterion of "systemic interpretation", meant to avoid conflicts and to limit fragmentation of international law.[17]

18. The ECT provisions and obligations must therefore be interpreted also in the light of those other treaties so as to have a harmonious interpretation and to avoid conflicts.[18] Hence the relevance of the decision of the Italian Constitutional Court that has held the *Spalma-incentivi* constitutional applying EU and ECHR principles (which in Italy have a quasi-constitutional position), and referencing explicitly some key judgments

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[15] The GSE contract was preceded by a Tariff Recognition Letter by the GSE communicating the admission of the PV plant to the incentive tariff, see Award paras. 127-128.

[16] The difficulty of such a balancing exercise "*when the basis of an investor's invocation of entitlement to stability under a fair and equitable treatment clause relies on legislation or regulation of a unilateral and general character*" where "*investors' expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor*" is highlighted in the *Total v. Argentina,* Decision, cit., at paras. 121-123, with reference to the holdings of the *Saluka-Czech Republic*, cit.

[17] See the seminal Study of the International Law Commission "Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law" (2006), p. 206 ff. and paras. 17-23 of the Conclusions.

[18] As held by *Electrabel v Hungary* ICSID Case No.07/19, Decision on Liability, Applicable Law and Liability, 30 November 2012 (an ECT case), para 4.167. See also the same Decision at para.7.77 "*While the investor is promised protection against unfair change, it is well stablished that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly an, consistently and predictably, taking into account the circumstances of the investment...Fairness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and the conduct of the host State"*.

of the EU Court of Justice (EUCJ) and the European Court of Human Rights (ECtHR).[19]

19. The Constitutional Court held i.a. (8.1)[20] "*As a matter of principle, the reliance[21] of citizens in legal certainty is a fundamental and indispensable element of the rule of law (decisions 822/88 and 349/85). However – as the firm case-law of this Court, in coherence with that of the ECtHR, has clarified – protection of reliance does not entail, in our legal system, that the legislature may not enact provisions which change unfavorably the regulation of long-term relationships, and even if their object is a perfect[consolidated] legal rights...*

20. (8.2) *The analysis of the "ratio" of the contested norm excludes that it has unreasonably and unforeseeably affected the long-term relations, arising from the agreements reached by the recipients of the incentives with GSE, therefore violating the principle of legal certainty. In fact, the legislature in 2014 intervened in a general context in which, on the one hand, the remuneration or incentivizing fees for energy produced through PV apparatus was gradually increasing, taking into account both the costs of production as a result of considerable technological development of the sector, and the overall European framework. But on the other hand, correlatively, one that registered the growing economic burden of such incentives on the final users of electric energy, especially on SMEs which are the fabric of national industry. Therefore, the legislature, following a balancing approach, has operated with the aim of "favoring a higher sustainability in the policies of support to renewable energies... (art. 26, para 1, Decree 2014/91)*

IV. The evolution of Italy's PV support to PV electricity production: 2009-2013.

21. It is now time to analyze the features of the *Spalma-incentivi* in light of the relevant criteria highlighted above (reasons, procedural fairness, impact). To this end I believe that a preliminary short presentation of the political and economic context of this legislation and its antecedent is appropriate. As an arbitrator in this case, I regret that neither party has adequately presented this framework in a historical perspective. This context is in any case apparent from the mass of documents that have been submitted by both parties.

22. The first element that emerges is that Italy was actively engaged from the outset in implementing the objectives of Directive 2009/28/EC to promote the use of energy from renewable sources. As the Statement of Claim, para.101 explains: "*The Directive established national targets for each EU Member State for renewable energy production in light of the EU objective of having 20% of the Community gross*

[19] Cf. the decision by the European Court of Human Rights of 21 July 2016, *Mamatas v Greece*. In rejecting the challenge of small holders of Greek bonds, which had been subject to restructuring implying a 70% reduction of their value, the Court held that the gravity of the economic and financial crisis of Greece justified the sacrifice of the private rights of the bondholders, also in view of the preeminent objective pursued, that of safeguarding the financial stability of the countries.

[20] REX-58, decision 16/2017 of 7 December 2016, in Italian and English. I have underlined the words which I consider of particular interest since they coincide with the terminology of the ECT and case-law under FET.

[21] Reliance is substantially equivalent to "legitimate expectation".

consumption of energy produced by renewable sources by 2020." Those objectives were known as the "20-20-20" objectives. Italy's target was to have 17% of its gross consumption of energy produced by renewable sources by 2020". Italy however reached and exceeded its 2020 objective of 17% already in 2015 (17.5%) against an EU average (2015) of 16.4%.[22] At the same time as providing for 20-year fixed incentive tariffs for PV operator that would conform to the criteria laid down in the various *Conti*, Italy inserted in the supporting legislation strict financial limits and future flexibilities (as underlined by me hereunder).[23] A diligent operator and investor should have taken into account these elements, in view of the link between the establishment of the incentivized tariffs (financed exclusively by, and charged to the various types of consumers - commercial industrial, households - through their electricity bills) and the renewable energy quantitative objectives for the attainment of which they had been established.

23. Law 96/2010 ("*Principles and guiding criteria for the implementation of Directive 2009/28* [and other Directives]") is the law by which Italy implemented the 2009 Directive, and which provided for the issuance of implementing Legislative Decrees such as the "Romani" Legislative Decree 28/2011. Art.17 of Law 96/2010 is titled *"Measures for conforming the national legal system to the Community's legislation on energy and recovery of rubbish*". Art. 17 states that *(1) In preparing the implementing legislative decrees...the Government shall follow...also the following guidelines: (a) ensure the attainment of the objectives incumbent upon the state by promoting at the same time energy efficiency and use of renewable energy sources...(h) adjusting and strengthening the incentive systems of renewable energy sources and of energy saving, without new or additional burdens for the public finance..."*

24. Italy specifically implemented the 2009 Directive by the Romani decree of 2011 (Legislative Decree 28), the latest (and last) statutory enactment having force of a law enacted in the sector, representing the basis of the later *Conti*. Italy further developed its PV sector at a speedy pace and with a level of support substantially more generous than that granted by other EU countries in the implementation of the 2009 Directive.[24]

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[22]See Statement of Claim, para. 249, based on FTI Regulatory Report 5.57 (according to which Italy had met its EU target already in 2012). See also CEX-183 (GSE Presentation of 2012) and the Preamble of the Decree of 2012 enacting *Conto Energia V.* See also the Statement of Claim at para.103: "*The installed capacity of PV facilities added in 2009 was more than double the capacity added in 2008, making Italy second only to Germany as the world's largest global PV market that year*".

[23] Art.7.2 (d) of the Legislative Decree 387/2003 provided that implementing legislation (the *Conti*) were to "*provide for a specific rate with decreasing amount and duration, such as to ensure a fair return on the costs of investment and operation*". The same principle of a specific rate (constant incentive through the period of entitlement, equal to the average conventional life of the specific type of plant) such as to ensure a "fair return" was spelled out in the Legislative Decree 28/2011 at Art. 24(2).

[24] See Statement of Claim, para.113: "*In January 2011, Italy reported the achievement of 4,5 GW in new PV installations in 2010, surpassing the most optimistic projections*". A presentation by GSE, "*Il Terzo Conto Energia*", dated 18 October 2010, at slides 3 and 4 (CEX-157), shows that the Italian support was much more generous than the French and German support: Italy being 100, support in France was worth 57.5 and in Germany 39 (all of them with a duration of 20 years).

25. Worth noting are the "General Principles" spelled out in the Romani Decree at Art. 23:

(1) "The present chapter redefines the regulation of support regimes applied to energy produced from renewable sources and for energy efficiency by the reorganization and strengthening of the existing incentive systems. The new regulation shall lay down a general framework for the promotion of the production of energy from renewable sources and of energy efficiency in a measure adequate to attain the objectives of Article 3, by setting forth criteria and instruments that promote effectiveness, efficiency, simplification and stability in time of the incentive systems, pursuing at the same time the harmonization with other instruments with a similar purpose and the reduction of the burden for consumers".

(2) Additional general principles of the intervention for the reorganization and strengthening of incentive systems are the gradualness of the intervention in order to safeguard the investments made and the proportionality to the objectives, as well as the flexibility of the support regimes, with a view to take into account market mechanisms and the evolution of the technology of renewable sources and energy efficiency."

26. Thus, although the tariffs for the plants under the various *Conti* were predetermined and extended for 20 years, the regulatory framework acknowledged explicitly the parameters of reducing the costs and the burden for consumers, while ensuring a fair return to operators in the pursuit of the attainment of the EU objectives for Italy.

27. Further elements, discussed and submitted in this arbitration, highlight the progressive change of direction (in Italy and in the European Union under the 2009 Directive) of the policy aimed at supporting the construction and operation of PV plants through incentivized PV electricity tariffs.

28. A GSE statistical report in English from 2012[25] shows clearly that Italy was on the way already in 2011 to go beyond the EU targets for Italy of renewable, including the sub-targets by years and type of renewables, which the Italian National Renewable Energy Action Plan (NREAP) of June 2010 had set forth.[26]

29. As mentioned in the Award at paras. 125-126, the fifth and final *Conto Energia V* (of which the Claimants have apparently made no use) provided for a somewhat altered

[25] CEX-182, listed in the Statement of Claim at para. 124, as the only document presenting *Conto IV* in English.

[26] See CEX-182 Tables p.12-14,19-20 and Introduction at p. 2: *"For the electricity sector, the [sub-] target to be achieved by 2020 is 26.4% of electricity consumption from renewables. In 2011, Italy recorded 23.5%, surpassing by wide margins the 2011 intermediate target of 19.6%.*" The document points also to the decrease of electricity consumption in Italy due to the ongoing crisis (at p.14: "*contraction of gross final electricity consumption...Final gross consumption was 346 TWh, as against 359 TWh predicted when the effects of the current economic crisis had not yet been fully perceived*"). CEX-143 contains the NREAP that has been submitted as CEX-143. Respondent has stressed (Statement of Defense, para. 270) that the Plan indicates that incentives policies must also take into consideration the overall (social) sustainability of the schemes ("*in order to avoid a parallel growth of production and of burden of the incentives*"). Claimants have stressed on the other hand (Reply, para. 189) that the Plan at p. 102 indicates that "*the regime is subject to periodical adjustments, which in light of energy commodities and PV plants components prices trends...is aimed at containing the collective costs burden in the medium and long term. In any case the incentive tariffs as recognized as of the entry into operation of the plant is to remain fixed for the whole period to which one is entitled under the law.*"

structure of tariff incentives, intended to reduce costs to end-consumers. Furthermore, *Conto* V provided that it would cease to apply thirty days after the AEEG issued a resolution stating that Italy had added EUR 700 million to the total cost of the incentive tariffs program, amounting to a total cost of EUR 6.7 billion per year, which occurred effectively on 6 July 2013.

30. I observe that the preamble of the Decree of 5 July 2012, introducing *Conto Energia V*, focuses considerably on the need to decrease the burden of the incentives for the State and the consumers. In this respect, the long list of recitals in the preamble points to the fact that *"the electricity sector in Italy is ahead of the targets"; "it is not possible to continue to follow the approach adopted to date for the pursuit of renewable energy targets"; "significant technology progress and economies of scale have led to a rapid reduction of in the costs of PV plants"... "which has involved an accelerated growth in the volume of installations, which has also led to a significant growth in the support [burden] provided as well as the depletion of the territory, including agricultural land"*. The preamble also recites: *"considering that various other European States have adopted measures intended to reduce PV incentives, in view of the high support charges and a reduction in the costs of plants and that it is necessary, also for purposes of protection of competition and end users, to follow European standards with respect of incentives"*.

31. This new tone is in line with the fact that in November 2011, under pressures from the EU, the Berlusconi government had to resign abruptly because of the lack of confidence in its ability and commitment to face the crisis in the light of current deficit and the growing debt of Italy, these factors in turn endangering Italy's compliance with its obligations as a member of the Euro-zone. It is in the public domain that the spread between the Italian State's bonds (BOT) and the German ones had exploded, that the public debt of Italy had been downgraded by rating agencies and that foreign banks had massively sold their holdings of Italian BOT. The Berlusconi government was replaced almost overnight by the "caretaker" government of Prof. Monti, which had as its principal objectives the cutting of public spending and restoring the confidence of international investors and other EU members of the euro-zone in Italy's financial position and compliance with its EU obligations.[27]

V. Italy "scaling-back" support to renewable electricity production and aiming at reducing the costs of electricity bills; from 2011 to Law Decree *Destinazione Italia* (end of 2013).

32. Claimants complain that "In 2012 and 2013, Italy began to claw back the support it had granted to PV Energy Producers [28]. Since these measures are presented as a "series of measures", it is interesting to highlight the dates of each of the listed measures by presenting them in chronological order:

[27] See Wikipedia, *Monti Cabinet* and *Mario Monti*: "*Mario Monti...is an Italian economist who served as the Prime Minister of Italy from 2011 to 2013, despite never having been an elected politician, leading a government of technocrats in the wake of the Italian debt crisis...*"

[28] Statement of claim, paras 250 ff. Claimants list these measures synthetically at paras. 251 ff.

- Extension of the "Robin Hood" tax to PV in August 2011, followed by its judicial abrogation as unconstitutional in 2015, without retroactive effects
- Imposition of administrative fees to cover GSE costs (*Conto V*, 5 July 2012)
- Cancellation of inflation-adjusted tariffs (Judicial decision, January 2012)
- Obligation to pay "imbalance costs" (5 July 2012, operative from 1 January 2013)
- Reduction of the minimum guaranteed price to plants under 1 MW in the off-take regime and abrogation of such rights for plants above 100 kW (31 October 2013 and Law Decree *Destinazione Italia*, December 2013)
- Reclassification of photovoltaic plants as "immovable property", in December 2013 (abrogated in part in 2016)
- Finally, the *Spalma-incentivi* reduction of the 20-year incentive tariff, and changes of the date of payment of amount due in respect of the electricity produced yearly (Summer 2014, effective January 2015)

33. To put these measures in perspective, it appears that, without considering the courts' decisions, they all had the aim of reducing the cost of the total "electricity bill" and easing the burden derived from the support granted to PV at a moment when (despite the general economic and financial crisis of the country) thanks to PV, Italy had not only met, but notably exceeded the renewable energy targets set by the EU for which the support for PV had been established. Authorities came apparently to the conclusion that such an approach was warranted because these benefits appeared to be "excessively" generous, as evidenced by the early attainment of the targets, the high rate of return on PV plants investments and the "race" in 2011 to construct PV plants all over Italy (mostly by domestic investors and operators[29]).

34. This policy took also into account the high rate of return that the incentivized tariffs produced, exceeding the rate of return in other investments in Italy, even taking into account different rates of return for different levels of risk.

35. The high rate of return, most likely much higher than other comparable investment is admitted by Claimants in their submissions[30]: *"The fourth facility that HFV acquired in 2010 was Montenero.....Based on the incentive tariff that would apply to Montenero, HFV projected an internal rate of return of 20%, if Montenero began operating in the first quarter of 2011 and a 16% return if it began operating in the*

[29] I regret that neither Party has supplied data on the percentage of PV plants built and owned at the time of their entry into operation by Italian investors and by foreign investors respectively. From the evidence submitted it appears that most initial investors were Italian and that foreign investors predominantly entered the PV market by buying plants that were under construction or were about to start operations. There is no evidence that Italian central authorities actively promoted foreign investments by "roadshows", etc. Thus Italy did not "induce" such foreign investments, a type of conduct which case law has considered relevant as a premise for legitimate expectations.

[30] Statement of Claim, para. 167.

second quarter of 2011". These data have to be compared with another statement by Claimants considering as remunerative and satisfactory of a rate of return of 10%. [31]

36. Looking at the political and economic evolution of Italy in those years, it appears that the "claw-back" started with the fiscal measures enacted by the Berlusconi government in August 2011[32]; new administrative measures were introduced with the last *Conto V* in Summer 2012 (Monti government); this approach was reinforced in 2013 (Law Decree *Destinazione Italia*, Letta government); finally the major rebalancing measure was taken with the Law Decree containing the *Spalma-incentivi* in Summer 2014 (Renzi Government).

37. Before addressing the *Spalma-incentivi* of 2014, Claimants mention a previous benefit-reducing legislation concerning the 20-year tariff, introduced at the end of 2013 (Law Decree 145/2013 of 23 December 2013, converted into law[33] 9/2014 of 21 February 2014, whose full title is significantly "*Urgent interventions to start the Plan "Destination Italia" in order to contain electricity and gas tariffs, for the internationalization, development and digitalization of enterprises and the realization of public works for EXPO 2015*". Law Decree *"Destinazione Italia"* also abolished the minimum guaranteed price for most PV plants that benefited from the incentive tariff. Although this Decree Law did not impact the PV incentive tariff for the reasons explained hereafter, it is important to mention it because its approach was followed six months later by the *Spalma-incentivi.*

38. It was in fact *Destinazione Italia* that, as Claimants mention, initiated (unsuccessfully) the reduction of incentivized tariffs and other benefits to renewables, with a view to reduce the costs of electricity bills to end-users. As described by Claimants[34], the decree provided an offer to PV producers to "accept voluntarily a reduction of the incentive tariff that Italy had granted to their facilities ...in exchange of a promise to extend the duration of the incentive payments from 20 to 27 years". In fact the relevant provisions were more complex[35]. Operators were offered a choice, an approach followed six months later in the *Spalma-incentivi*: either to accept an extension of the incentive tariff to 27 years as mentioned by Claimants, implying a reduction of the tariff in force (defined as *"rimodulazione"*-- remodulation/restructuring, the same term used in *Spalma-incentivi*), or maintain the tariff in force but lose the possibility of further benefits and special tariffs after the

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[31] See Statement of Claim-194: "*On June 13, 2012, driven by projections of 10% internal rate of return from a 4.4 MW PV plant in Agrigento... HFV purchased the owner of that plant, Italian company Akralux srl. HFV invested a total of € 20 million in Valle del Lupo, financed in part by an € 8.6 million equity contribution*"

[32] The summer 2011 fiscal package of the Berlusconi government, Law Decree 13 August 2011 n. 138 (which included the first "claw-back" measure, namely the extension of the Robin Hood tax to PV operators), was considered by the EU too weak and did not prevent its replacement a few months later with the Monti government, as explained at para. 31 above.

[33] Decree Laws or Law Decrees ("Decreto Legge"), are decrees having the force of a law (Statute) which Italian Governments can adopt under the Constitution in case of urgency. They must be approved, that is converted into a law, which usually happens with amendments, by Parliament within 60 days, or else they lose, even retroactively, their validity. *Spalma-incentivi* was included in one such Decree Law.

[34] Statement of Claim, para. 303.

[35] See CEX-560.

end of the 20-year period.[36] It appears that, since the benefits that would be lost in the first option (that of doing nothing) rather than accepting the second option, were hypothetical and distant in time, no operator chose to accept a reduction of the benefits by spreading their duration.[37]

VI. Putting into perspective the reduction of the incentivized 20-year tariff (Decree *Spalma-incentivi* 91/2014, converted into Law 116/2014).

39. The content and effect of the *Spalma-incentivi* tariff reduction has been fully examined and explained in the Award, since the relevant provisions represent the key measures challenged in these 'proceedings and the only one that the Tribunal has found in breach of the ECT. I will therefore not go into these aspects. I consider it appropriate however to highlight the context of its issuance in order to support my conclusion that the tariff reduction did not breach the FET clause of the first two sentences of Art. 26(1) ECT.

40. *Spalma-incentivi* ("Incentive spreading") is the journalistic name of the provisions of Art.26 of Decree Law 91/2014 of 24 June 2014, which was converted with substantial relevant changes into Law 116/2014 of 11 August 2014 (CEX-553)[38]. The actual Decree Law's shortened name is "*Decreto Competitività*" ("Competitiveness Decree")[39]. The full official name – which is relevant to understand its objective and context - is "*Urgent provisions for the agricultural sector, environmental protection, energy efficiency in school and university buildings, relaunching and development of enterprises, limitation of the costs burden on electricity tariffs and immediate enforcement of EU legislation obligations*". It was a major piece of economic legislation submitted to Parliament by the recently established Renzi Government, comprising 40 articles, covering 85 pages of the Official Journal. Measures concerning electricity costs reduction are found in Art. 23-30. They were described in the press but also in official documents (REX-31) as "*norme taglia-bollette*", that is "Electricity-bill cutting provisions" (REX-31 B).

41. The purpose of reducing the costs of the electricity bills of consumers, both small and medium enterprises (SMEs) and households, by the *Spalma-incentivi* and connected measures is evidenced by the detailed Memorandum REX-31 B annexed to the Ministerial Press Release REX-31 A (in English and Italian). Yearly savings expected from the package of measures were € 2.689 million (two billion and six-hundred-

[36] *Destinazione Italia* was adopted by the government of Mr. Letta, which succeeded to the Monti government after the elections of April 2013. The *Spalma-incentivi* was adopted by the subsequent Renzi government, which followed from 21 February 2014. Both governments had in their program the continuation of the rigorous financial policy of the Monti Government, and relaunching Italy's stagnating economy, in conformity to EU and Eurozone parameters (deficit below 3% and reduction of Italy's debt, which had reached 130% of the GNP, the highest rate in the EU after Greece)

[37] Claimants have also challenged – unsuccessfully (see Award, paras. 500-506) a provision of *Destinazione Italia,* that which effectively abolished the minimum guaranteed price by equalizing it to the market price (Statement of Claim, para.268 with reference to Art.1(2) of Decree Law 145/2013) and making "*incentive tariffs incompatible with the minimum guarantee price support system*". (Statement of Claim, para.271).

[38] Claimants provided only in English only the text of Art. 26, as converted. CEX-553 (Italian) contains the whole statute.

[39] See REX-31, Ministerial Press Release.

eighty-nine thousand million), of which €1.226 million from measures directly connected with electricity tariffs cuts and changes (*"taglia-bollette"*), including € 420 million from *Spalma-incentivi* proper (that is from the reduction of the incentivized tariff to PV plants), and € 1.466 million from other changes to the electricity production and distribution management.[40]

42. The first of the relevant group of articles, Art. 23, is named "*Reduction of electricity bills in favor of clients supplied with low or medium electricity tension*", a title which explains the purpose of those provisions: the aim was to reduce the costs of the electricity bill for certain classes of consumers, specifically small and medium enterprises, which paid among the highest tariffs in Europe, making them non-competitive.[41] The subsequent provisions were thus meant to "remodulate" or restructure (*"Rimodulazione"*) [42] the various subsidies and discounts granted to certain classes of producers (foremost PV[43]) in order to recover the amounts to be abated to the above beneficiaries

43. *Spalma-incentivi* proper is found in Art. 26 which contains the challenged provisions and is the outcome of substantial changes in the process of conversion of the Decree. The original decree did not offer any options for the PV producers as to the "remodulation" of the incentive tariff. It only provided for the extension of the benefits of the incentive tariffs from 20 to 24 years. According to FTI-RR this entailed a "Reduction in incentives of 17%-25% depending on the residual period"[44]

44. Law 116/2014, incorporating the amendments to the Decree Law as a result of the parliamentary debate leading to the approval of its conversion, provided a change, or "*rimodulazione,*" in the incentive tariffs level and/or duration, according to three options among which each operator had to choose by 30 November 2014. All options implied a reduction of the level of support for the beneficiaries of the 20-year incentive tariff from the date of the option to the end date of the incentive tariff to their plant.

45. The three options, as described at para. 145 of the Award were as follows:

-Option A: Incentive period extended to 24 years, leading to a reduction in incentives of 17-25% depending on the residual period[45]

[40] The list of cuts includes, in an amount of one and a half million euros, even benefits enjoyed by the Vatican for the supply of electricity.

[41] See FTI-RR at 617: "*According to a June 2014 presentation by the Italian Ministry of Economic Development and the Economic and Finance Ministry, SMEs in Italy pay around a third more for energy that the EU average. In the same presentation the Italian Government states its objective to reduce the electricity bills of SMEs by 10% from 2015.*"

Indeed, bolstering the competitiveness of enterprises is another of the decree's stated objectives, as evidenced in its title. Claimants do not deny this purpose, but submit that this does not justify modifying the 20-year guaranteed tariff on which the investors had relied. Claimants challenge also the economic value and choice made by Italy to attain this objective, see Claimants' FTI Regulatory Report 7.1 ff.

[42] FTI-RR translates this term as "re-formulate" at 6.17.

[43] There was also a provision to increase the costs of electricity paid by railways operators (Art.29: *Rimodulazione del sistema tariffario delle Ferrovie dello Stato*).

[44] FTI-RR, Table at 6.12. See also Table at Statement of Claim, para. 307.

[45] See FTI-RR Table 6.1 at 6.5

-Option B: Incentive period remains 20 years but is reduced by 10-31% in the first 10 years and increased symmetrically thereafter[46]

-Option C: Incentive periods remains 20 years; incentive payments are cut by 6%, 7% or 8% yearly, depending on installed capacity.[47]

46. According to Claimants and their Experts, only 180 operators chose Option A (1%); 4,823 chose Option B (37%); 7,904 chose Option C (61%) which was also the default option if no choice was made by 30 November 2014. [48] Only 1% of the operators chose Option A, because it was generally the most burdensome.[49] Option A having been the only solution provided for in the original Legislative Decree (and the only one which can be properly called "*spalma-incentivi*" since it provided for an extension of the 20-year incentive over 24 years) , one must conclude that the final law was more favorable, or less burdensome, for PV operators, due to the intervention in Parliament of opposition parties more favorable to business interests[50]. Greentech chose Option C for all its plants, while Novernergia chose the B option except with regards to one of its plants (Edwards Quantum Report, 3.13).[51]

VII. Conclusions: the tariff reduction of 6-8% introduced by the *Spalma-incentivi* did not breach the Fair and Equitable obligation of Art. 10(1) ECT, first and second sentences.

47. It is now possible to compare the tariff reduction introduced by the *Spalma-incentivi* with the standard of stability contained in the first two sentences of Art. 10(1) ECT, balancing the legitimate expectations of the investors to stability with the reasons, procedures, impact of the reduction.

48. On the one hand, from the point of view of the beneficiaries, the *Conti,* which were regulatory instruments (Ministerial decrees) based on legislation:

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[46] Due to the time value of money, receiving the incentives that were not received in the first years leads to loss, FTI-RR 6.7 and 6.9.

[47] As also explained in more detail at Statement of Claim, para.309, the level of cut depending from the capacity of the plant (the smallest plants were subject to smaller cut)).

[48] Statement of Claim, para. 310, RTI-RR 6.3

[49] Table provided at para. 307 of the Statement of Claim.

[50] Statement of Claim, paras.313 ff cites extensively the criticism of the *Spalma-incentivi* in support of the PV operators by MP Paolo Grimoldi and Giovanni Piccolo of the *Lega Nord* and *Forza Italia* center-right opposition parties, as well as from manufacturers' associations.

[51] It is undisputed that the less damaging option entailed a decrease of 6-8% of the tariff in force for the following years, depending on the size of the plant affected. The choice made by any operator between the options depended on the financial structure of the investment.

[52] One can compare this situation with the one examined by the tribunal in *Antaris v Czech Republic*, cit., where the challenge of the claimants against a reduction of the incentives granted by the Czech Republic to PV electricity production in furtherance of the same EU objectives as for Italy was rejected, considering that the reduction of the incentives was already widely discussed and envisaged at the time of the making of the investment. The *Antaris* tribunal, whose approach I share, stated as follows at para.444: "*The Tribunal accepts that the Respondent had the rational objective of reducing excessive profits and sheltering consumers from excessive electricity price rises, and that its actions were not arbitrary or irrational. There was an appropriate correlation between the Respondent's objectives and the measures it took. There is nothing irrational or unreasonable about the imposition of a charge to regulate what the Respondent reasonably regarded as windfall profits and to reduce the impact on consumers, and the measures, which applied only to the most recent installations and therefore the ones able to earn the profits as a result of the decline in PV costs, were not disproportionate.*"

- provided for fixed 20-year incentivized tariffs for qualifying new PV plants, formalized through letters and contracts with the individual PV plant.
- the legislation and the *Conti* were not specifically addressed to investors and the legislator could change them, while the contracts were specific, though of a "lower" legal force under the Italian legal system.
- at the same time, the incentives were not self-standing subsidies, but were granted for the purpose of Italy reaching certain targets of PV electricity production. It was known or should have been evident to investors in the sector that the target had been met years ahead thanks to the generosity of the incentives which in turn had brought about a rush of investments.
- The scheme was quite onerous for the Italian economy, even more so in times of economic difficulty and lack of growth, making the reduction of the burden desirable,

This context made it therefore prudent for an informed investor to envisage the possibility that some adjustments might be introduced subsequently, thereby affecting the reliance on the stability of the existing scheme.[52] I am thus of the view therefore that, contrary to the conclusion in the Award at para. 448, a prudent investor should have foreseen that a limited tariff modification might have been subsequently enacted, notwithstanding the tariff provisions in place at the making of the investment.[53] The changes were thus not unpredictable.

49. On the other hand, one can list the following elements, to which I referred above, that make in my view the changes reasonable and proportionate as to their aims and results; transparent as to their enactment; balanced and limited as to their impact on the operators[54]:

    - Italy was thereby pursuing, in the general public interest, the legitimate aim of reducing the cost of the benefits in a situation of economic difficulty for the country in order to relaunch the economy through the reduction of the costs of electricity for households and small and medium enterprises. There was hence, in my view, a "valid policy justification" for the measure, contrary to the majority's view in para.454 of the Award.
    - The aim of reducing the total cost of the "electricity bill" was attained; at least the previous constant increase in costs, year after year, was stopped.[55]

[53] As mentioned above at note 4 an investor is expected to take into account also the political, socio-economic, cultural and historical conditions of the host State, see *El Paso v. Argentina* cit, para.359 ff.; *Duke Energy v. Ecuador*, cit., para. 340.

[54] For the consideration of these criteria as relevant see *AES v. Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010, relied upon by Respondent, see Award, para.434.

[55] The Award notes at para. 454, following Claimants arguments that the benefits were very modest (2-4% according to Claimants) and limited to small and medium enterprises. This was however the objective of the provision and resulted from the balancing exercise and the apportionment of the burden between various types of operators (including non-PV and other non-renewable sources) as explained in my above text. It is evident that in order to obtain a bigger impact on the millions of electricity bills of end-users in Italy, the magnitude of the cuts to the incentivized tariff should have been of such a magnitude, as to result possibly in an indirect expropriation in breach of the ECT (and the Italian constitution).

- The total costs of the reductions/savings were distributed fairly among the various producers and other users whose benefits were the origin of the high costs of the electricity bills for end-user.

- The 6-8% reduction only moderately affected PV operators' revenues, whose rate of return was well above the revenues from comparable assets, and did not affect the profitability (fair rate of return) of the PV plants[56]

- The changes of the *Spalma-incentivi* in June 2014 were not unpredictable and sudden. They had been preceded by similar voluntary measures six-months before in the *Destinazione Italia* and their implementation was postponed to January 2015. The original *Spalma-incentivi* Decree was substantially modified so to reduce the impact on the PV operators in the parliamentary process that led to its final adoption in a modified text.

- All the enactment proceedings were fully transparent, with the representatives of the industry involved in lobbying, in part successfully, for limiting the impact of the measures. To "encourage and create...transparent conditions for Investors" does not entail in my view that the initial conditions cannot be changed under any situation even if assurances of stability have been granted when the legal system of the host country allows certain changes, as is the case for Italy.[57]

50. I recall, finally, the margin of discretion recognized to host countries when acting in the public interest with reasonable measures and taking into account the rights and interests of operators and investors (both domestic and foreigners by equally applicable measures, without discrimination as has been the case here). In this respect the standards applied by the Italian Constitutional Court when it found the tariff reduction of the *Spalma-incentivi* legitimate must be considered. It is not lightly to be presumed or accepted that the Italian legal system, which incorporates the relevant protective principles of the European Convention of Human Rights and of the European Union, would afford a level of protection to those who enter into long-term relations with the public sector lower than that stemming from the ECT.[58]

[56] This is confirmed by the fact that the Tribunal has granted in its award compensation for the damages suffered by the Claimants of total €11.9 million, to be compared to a total investment of the Claimants amounting to €306 million (Award, paras. 136, 141). The loss caused by the *Spalma-incentivi* tariff cuts to Claimants amount thus to less than 4% of their investment. An appropriate comment in this respect could be to recall the Latin maxim *"de minimis non curat praetor"*.

[57] See Award, para. 456. By contrast in *Total v. Argentina*, cit. at para. 333, the tribunal found a breach of the FET standard *"through the setting of prices that do not remunerate the investment made nor allow reasonable profit to be gained"*

[58] The Constitutional Court referred to the *Plantanol* case, cit. In fact, the *Plantanol* decision of the CJEU is especially relevant since the acts challenged there were somehow similar: the withdrawal by Germany "only for the future", before the date previously announced, of a tax exemption, which the CJEU examined in the light of "*the principle of legal certainty, the corollary of which is the principle of legitimate expectations*" (at par. 46). The CJEU recalled that "*the principle of legal certainty does not require that there be no legislative amendment, requiring as it does, rather, that the legislature take account of the particular situation of traders and provide, where appropriate, adaptations to the application of the new rules*" (at 49). The CJEU notably stated (at 53) *"It is clear from the Court's settled case-law that an economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, where a prudent and circumspect economic operator could have foreseen that the adoption of a measure is likely to affect his interests, he cannot invoke that principle when the measure is adopted."*

51. In this respect the Constitutional Court in its decision on *Spalma-incentivi,* handed down when these arbitral proceedings were pending, applied principles comparable to those that constitute the international Fair and Equitable standard, where it stated notably: " *The analysis of the rationale and of the content of the challenged provision leads to exclude that the latter impacted on the long-term relationship – resulting from the agreements concluded by the investors with [GSE] – in an unreasonable, arbitrary and unpredictable way, so as to harm...the invoked principle [legitimate expectation].*

Indeed, the regulatory change at hand is justified by a public interest, in terms of a fair balancing of the opposed interests at stake, which is meant to combine the policy of support to the production of energy from renewable sources with a better sustainability of the respective costs borne by the end consumers of electric energy."[59]

VIII. No breach of the non-impairment obligation.

52. As recalled above, Art. 10(1) ECT provides i.a. in its third sentence that *"no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal."* Claimants have submitted that the tariff reduction effected by the *Spalma-incentivi* also constitutes a breach of this obligation. As reported in the Award at para. 421, "Essentially, Claimants contend that the tariff reductions were 'unreasonable' because they contravened various long-term guarantees and assurances by Italy and were not the outcome of a rational decision-making process that balanced Italy's interests with the burdens on investors.[60] Instead, the tariff reductions were [in Claimants' view] the result of 'the political whim of a new administration'".[61]

53. The Award (at para. 461) does not take a position on the debate between the Parties whether "impairment" requires the measures to have a "significant" impact or whether any negative impact or effect" is sufficient. It relies on the term "in any way" to lean towards Claimants and concludes that the negative impact of the tariff reduction was in any case significant in terms of quantum of damages. My colleagues have also found that that the tariff reduction was unreasonable because it did not adequately consider the legitimate expectations and the interests of investors (at para. 462

54. I disagree with the majority for the following reasons. "Impairment" is not inherent to any breach of the FET standard to the prejudice of a protected investor, otherwise the third sentence of Art. 10(1) would be redundant since it would add nothing to the general FET obligation of the first two sentences. The word itself indicates that there must be some undermining of the legal security of the investment and of the regime applicable to it to find impairment. This would be the case if the regulation applicable to PV plants and the incentivized tariff had been completely overhauled (as some tribunals have found in the analysis of incentivizing legislations of other EU countries

[59] Constitutional Court, 24 January 2017, No. 16, 8, 8.2, p.7, REX-58 (my underlining).
[60] Statement of Claim, ¶¶ 378-380.
[61] Statement of Claim, ¶ 380.

that had been radically altered in their principles) besides reducing substantially (such as by 20%) the level of support under which Claimants had invested.[62].

55. *Spalma-incentivi* did not provide for such a fundamental alteration. Every aspect of the *Conto* mechanism has remained in place, except for the tariff reduction: the duration, the role of GSE, and the payment system have remained unaffected since the establishment of the relevant regime. This cannot be defined as an impairment of investments made in Italy's PV plants. Moreover, the absence of impairment is evidenced by the fact that the tariff reduction of the *Spalma-incentivi* was and has been a *una tantum,* an isolated occurrence due to the particular economic situation of Italy in 2013-2014. The tariff structure has remained untouched since, so that the first PV operators under the first *Conto* have by now (the end of 2018) operated under the system for 14 over the 20 years provided by the incentivizing regime. The fact that there is in Italy an active secondary market for PV plants, as is of common knowledge, is a further evidence that there has been no impairment caused to PV operators.

56. I also disagree that the measures that would constitute an impairment were "unreasonable". On the contrary the measures were legitimate, justified by a public purpose, transparent, adopted pursuant to due process, proportionate to their aim. The interests of investor were taken into account in apportioning the costs of the savings sought, as a result of an appropriate balancing exercise, as I have evidenced above. These are elements that according to case law and academic authors exclude a measure from being found to be unreasonable.[63]

57. In conclusion, even if I had agreed with my colleagues that the FET standard had been breached, I would be unable to find, additionally, that the prohibition of impairing an investment "in any way" by unreasonable measures also had been breached.[64]

IX. Umbrella Clause.

58. The Umbrella Clause in the last sentence of Art.10(1) - *Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party* -is patterned after texts found in many BITs, but also presents some material differences. Umbrella clauses in treaties have been

[62] See *Eisner v. Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 363: "*the Tribunal finds that Respondent's obligation under the ECT to afford investors fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance of prior regime. The ECT did not bar Spain from making appropriate changes to the regulatory regime of RD 661/2007. Thus, the Tribunal does not accept Claimants' contention that RD 661/2017 gave them immutable economic rights that could not be altered by changes in the regulatory regime*"

[63] See Christopher Schreuer, *Protection against Arbitrary or Discriminatory Measures*, Catherine Rogers & Roger Alford, (eds), "The Future of Investment Arbitration", Oxford 2009, p. 183- 198; and the review of case law by Ursula Kriebaum, *Arbitrary/Unreasonable Measures*, Marc Bugenberg, Joern Gribel, Stephan Hobe, August Reinisch (eds.), "International Investment Law," Beck-Hart-Nomos 2015, p. 790-806

[64] As to the term "in any way", differently from my colleagues (Award para. 461), I consider that it is synonymous of "by whatever means": it relates to the modalities of the impairment not the quantum of its negative impact. Had this been the case the text should have enjoined "any impairment whatsoever".

intended to ensure, in substance and as to judicial protection, that State contracts (and possibly other "obligations" of the host State [65]) "are lifted out of the domain of the host State's legal system so that, at least, the obligation to perform such obligations is not governed exclusively by the proper law (typically the host State's law) and therefore vulnerable to unilateral variation or termination". [66]

59. First of all, it must be stressed that treaty umbrella clauses, even if found in an article dealing more broadly with FET, afford a specific protection to foreign investors. A breach of the umbrella clause may occur due to the breach by the host country of an obligation under a contract even if this would not represent a breach of the FET standard.[67]

60. Typically, such clauses protect contractual obligations undertaken by States towards foreign investors. As stated by the tribunal in *Noble Ventures v. Romania*, in relation with the umbrella clause contained in Art. II(2)(c) of the US-Romania BIT[68], by virtue of such a clause "*the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other party, the breach of contract being internationalized" i.e. assimilated to a breach of the treaty"*. Thereupon the tribunal considered "*Claimant's claims of breach of contract on the basis that any such breach constitutes a breach of the BIT*"[69]

61. Only the GSE contracts (and possibly the connected GSE letters) qualify therefore as "obligations entered into" by Italy, covered in principle by the Umbrella Clause. Not so the legislative or administrative acts, in particular the various *Conti*, which provide in general a certain regime, including a 20-year fixed tariff to PV investors that would meet the technical conditions laid down therein and the prescribed timeframe, provided that the public funding had not been exhausted[70]. These are provisions of prospective application not addressed to specific investors that do not engender "obligations" to be "observed" by the host State under an Umbrella Clause. They may

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[65] In accordance with its domestic law, a State may sometimes incur "obligations" towards a private party also by effect of a unilateral act which grants specific rights to such party, such as by an administrative act (for example a concession) addressed to a named person who derives an individual actionable right thereby and may therefore invoke an applicable umbrella clause. The applicability of umbrella clauses to unilateral acts is contentious and depends considerably from their texts, Rudolf Dolzer – Christopher Schreuer, "Principles of International Investment Law", 2°, 2012, 177.. This is because, as a rule, as stated by *CMS v. Argentina*, Annulment Decision, cit., par. 95(a), "*commitments covered by an umbrella clause must constitute specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.*" See also, for the same position the award *Continental Casualty v. Argentina* cit, at para. 297, requiring that unilateral commitments assumed with regard to investments "address them with some degree of specificity" to be covered by an umbrella clause. The *Conti* decrees and the legislation supporting them were not specifically directed at (foreign) investors, even less so to Claimants which were not yet investors at the time of their issuance.

[66] Antony Sinclair, *Umbrella Clause*, "International Investment Law", cit. 907. See also Stephan Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 Minn. J. Int'l. Law,16 ff (2009); Anna de Luca, *Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT*, 15 J. World Investment & Trade, at 510-521 (2014), with specific reference to the ECT.

[67] *Eureko v. Poland*, Partial Award, 19 August 2005, para. 250.

[68] "*Each Party shall observe any obligation it may have entered into with regard of investments*"

[69] ICSID Case No. ARB/01/11, Award of 12 October 2005, para.54.

[70] A different issue is the level of protection that these enactments provided to foreign investors in terms of legitimate expectation of stability, discussed above, irrespective of the Umbrella Clause.

however give rise to assurances of stability that may be protected by the FET standard, depending on the circumstances, as my colleagues have concluded in the Award. In view of this necessary distinction, I do not agree therefore with the approach of para. 466 of the Award, where the issue of the (non-) respect by Italy of the Umbrella Clause is examined, and a breach is found, because *"taken as a whole, the combination of the Conto Energia decrees, the GSE letters, and the GSE Agreements", amounted to obligations "entered into with" specific PV operators".*

62. Italy has denied the coverage of the GSE contracts by the Umbrella Clause, pointing out to the regulatory nature of these contracts, that are "*merely accessory contracts, which simply transpose legal provisions that originate from the Conto Energia decrees*" as recognized by the Constitutional Court in its decision 16/2017.[71] It is also noteworthy, even if not decisive (except in order to exclude any discriminatory treatment), that GSE contracts are not individual "state contracts" with foreign investors, but standard contracts entered into with all Italian PV operators that met the conditions of the relevant *Conto*[72]. Italy does not deny in any case that GSE (*Gestore Servizi Energetici*), although set up as a stock-company (which does not operate for profit, however, and all of whose shares are held by the Italian Ministry of Economic Development), was and is state-owned and is entrusted with governmental functions.[73]

63. It is not necessary for me to take a position on this question. I would rather point out that since an umbrella clause "elevates" or "transforms" a contractual obligation into an international obligation, and consequently a breach of a State contract into a breach of international law, without however replacing the applicable domestic law with international law as *lex contractus,* it is preliminarily necessary to determine whether a breach of contract under domestic law has occurred.[74] This is not to say that the host State may escape international liability just by unilaterally modifying a contract. This would run counter the paramount principle that a State cannot escape its treaty obligations by invoking domestic law.[75] Abusive changes of domestic law

[71] See Award, para.442.

[72] As to the protection under international law of foreigners' rights stemming from « state's contracts », even in the absence of a treaty umbrella clause, see generally Prosper Weil, *Problèmes rélatifs aux contrats passés entre un état et un particulier*, RC, 128, 1969-III, 102; Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale*, Milano 1972; Charles Leben, *La théorie du contrat d'état et l'évolution du droit international des investissements* , RC 302, 2003, p. 197-386.

[73] A breach of an international obligation by the GSE is therefore attributable to Italy under the relevant principles of customary international law, as an organ of the State, or in any case because GSE is "*empowered by the law of that State to exercise elements of the governmental authority*" and "*is acting in that capacity in that particular instance*" (Arts 4 and 5 of the ILC Draft Articles on State Responsibility). It is worth noting that the changes of the tariff originally granted to, and agreed with individual operators in each GSE contract were not due to an action by GSE as the contractual counterparty of a PV operator – be it in breach or not of the contract, but were the result of the *Spalma-incentivi* decree itself, without the GSE contracts even being amended. One might refer to Art.1341 of the Italian Civil Code in this respect (which neither party has hinted at): *"The clauses, the prices of goods and services, imposed by law, are automatically* ["di diritto"] *inserted in the contract, even in replacement of the divergent clauses agreed by the parties."*

[74] See James Crawford, *Treaty and Contract in Investment Law,* "Arb. Int'l," 24, p. p.351 (the consensus is that "the umbrella clause does not change the proper law of the contract or its legal incidents"), cited with approval in *Toto v. Lebanon,* ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para.200.

[75] As required by the paramount principle "*Pacta sunt servanda*", enshrined in Art.26 of the VCLT.

by a State to this end or with such an effect have not been condoned by international tribunals and courts.[76]

64. In the present case the Tribunal is faced with a decision of the highest court of Italy that, specifically as a result of protracted litigation on the domestic validity of the *Spalma-incentivi* in respect to the contractual assurance of a given 20-year tariff, has conclusively decided that the tariff reduction effected by the legislator is valid. I believe therefore that the Tribunal should have dealt preliminarily with the daunting issue whether, notwithstanding such domestic validity, established by the Italian Constitutional Court - not only on the basis of Italian constitutional law but also taking into account principles of EU law and the ECHR, Italy would still have breached its international ECT "*obligation ...to observe*" the GSE contracts of the PV operators owned by Claimants.

65. Even if the answer would be that a breach of the ECT Umbrella Clause occurred, as my colleagues have concluded, a further issue to be determined is to which of the GSE contracts held by the several operators owned by Claimants such a finding would apply. This is so due to the specificity of the text of the Umbrella Clause in Art. 10(1) ECT.

66. On the one hand, the clause is more restrictive than similar clauses found in BITs, according to which each Party *"shall observe any obligation it* [the host State] *may have entered into with regard of investments*[77]*,*" while the ECT text refers to observing "*any obligations it has entered into with an Investor...*". The text of the ECT stresses thus that the obligation at issue must have been entered with the Investor; it is not enough that the obligation may concern (regard) the investment of an investor and that its breach affects such investment. On the other hand, the covered obligations are not only those entered into by the host State with the foreign Investor, but also those with "*...an Investment of an Investor of any other Contracting Party"* as defined in Art.1(6) ECT. This specifically comprises at Art.1(6)(b) *"a company or business enterprise...owned or controlled directly or indirectly by an Investor."*

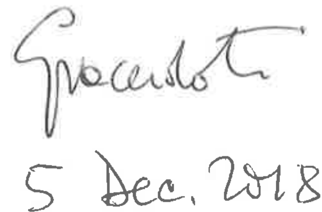
67. As a result, it is clear in my view that, in order to be covered by the obligation of observance in the Umbrella Clause, a GSE contract must have been concluded, stipulated, and entered into by GSE with a PV operator which was owned at that point in time by a foreign Investor of another Contracting Party, here the Claimants. If an Italian (Italian-owned) PV operator had already entered into a GSE contract when it was acquired by Claimants, thereupon becoming an "Investment of an Investor of another Contracting Party", such GSE contract would not have been "entered into with an Investment", that is a foreign-owned Italian operator. As a consequence, in such a case, the subsequent unilateral change of the tariff by Italy, even if in the abstract contrary to the Umbrella Clause, would not have been covered by the Umbrella Clause because of lack of the required subjective requirement, since the

[76] See *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Award 30 June 2009. Cf. also the ILC Draft Articles on State Responsibility, *Commentary to Art.3*, para.7, 8: in analyzing an umbrella clause claim, it must be international law that determines the scope and limits of any reference to internal law.

[77] See the corresponding clause of the US-Romania BIT at issue in the case *Noble Ventures v. Romania* quoted above note 68.

counterparty of the GSE would not have been an "Investment of an Investor of another Contracting Party" at the relevant time. [78]

68. The existence of the above mentioned temporal and synallagmatic requirement would have entailed the obligation for the Tribunal (if it had found a liability of Italy under the Umbrella Clause) to ascertain which of the several Italian PV operators, that Claimants have acquired at various dates and which benefited from incentivized tariffs under a *Conto Energia*, were already owned by them at the moment in which their GSE contract were made.[79] Only in respect of these PV operators, in relation with these post-acquisition GSE contracts, would the tariff reduction effected by the *Spalma-incentivi* have been in breach of the Umbrella Clause.



[78] An alternative approach, as to the relevance of the acquisition date, could be based on the protection of legitimate expectations of the investors as they existed at the moment their investment was made, that is when they acquired each PV operator owning a specific plant. Under such an approach, based on the general FET clause and not the Umbrella Clause, the result would be the opposite. The foreign investor would be entitled to invoke its legitimate expectations of stability only in respect of plants which had already entered into a GSE contract when they had become "*Investments of an Investor of another Contracting Party*". As to plants in respect of which GSE had not yet entered into a contract at the moment of making the investment (basically plants which had not yet entered into operation) no legitimate expectation that the fixed tariff would be granted (and therefore maintained) could be invoked by the foreign Investor.

[79] This would be possible based on the evidence submitted by Claimants to the Tribunal showing at which stage of the development of each plant Claimants acquired the respective Italian PV operators-owners, see Award, paras. 132-142.