School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Sunreserve Luxco Holdings s.à.r.l., Sunreserve Luxco Holdings II s.à.r.l. and Sunreserve Luxco Holdings III s.à.r.l. v. The Italian Republic (SCC Arbitration V – 2016/32), Final Award of 25 March 2020

Case Report by: Luigi Sammartino**, Editor Ignacio Torterola***

Summary: Claimants brought an action for relief against Italy pursuant to the Energy Charter Treaty ('ECT') alleging that Italy breached, *inter alia*, the fair and equitable treatment Standard and Claimant's legitimate expectations, undertook unreasonable and discriminatory measures amounting to a breach of the Impairment Clause, and violated the Umbrella Clause in relation to their investments in several photovoltaic plants in Italy. Nonetheless, the Tribunal decided that the Italian Republic has neither breached its obligations under Part III of the ECT nor under international law with respect to Claimants' investments. Claimants were also ordered to pay all costs of the arbitration proceedings.

Main Issues: jurisdictional issues on to the conformity between EU and International investment law, particularly with reference to the ECJ *Achmea* judgment; frustration of legitimate expectations of the investor through several modifications of energy incentive legislation.

Tribunal: Professor Dr. Albert Jan Van Den Berg (Chairperson), Prof. Dr. Klaus Sachs (Arbitrator), Prof. Andrea Giardina (Arbitrator).

Claimant's Counsel: Mr. Kenneth R. Fleuriet, Ms. Amy Roebuck Frey, Mrs. Héloïse Hervé, Ms. Isabel San Martín (King & Spalding International LLP, Paris); Mr. Reginald M. Smith, Mr. Kevin D. Mohr (King & Spalding LLP, Houston); Mr. Christopher S. Smith (King & Spalding LLP, Atlanta); Ms. Jessica Beess und Chrostin, Mr. Enrique J. Molina (King & Spalding LLP, New York); Mr. Carlo Montella, Ms. Cristina Martorana, Mr. Alberto Tedeschi (Orrick, Herrington & Sutcliffe, Milano); Ms. Pina Lombardi, Ms. Daria Buonfiglio, Ms. Elisabetta Santo, Mr. Milvio Delfini (Orrick, Herrington & Sutcliffe, Roma).

Respondent's Counsel: Vice Avvocato Generale dello Stato Ms. Gabriella Palmieri, Mr. Giacomo Aiello, Mr. Sergio Fiorentino, Mr. Paolo Grasso, Ms. Barbara Tidore, Mr. Andrea Giordano, Mr. Pietro Garofoli, Ms. Laura Delbono **(**Avvocatura Generale dello Stato); Prof. Avv. Ms. Maria Chiara Malaguti (External Counsel to the Legal Service of the Ministry of Foreign Affairs).

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Digest:

1. Relevant Facts

SunReserve Luxco, Sunreserve Luxco II and III ("Claimants") are part of a Luxembourg-based holding company, SunReserve International LP, created as a joint venture between First Reserve Energy Infrastructure Fund, LP and SunEdison LLC, developer of photovoltaic systems (¶ 184 ff.); since 2010, SunReserve and its divisions have started their investments in Italy by acquiring some photovoltaic plants (¶ 186 ff.). The Respondent is the Italian Republic ("Italy" or "Respondent") (¶¶ 3-6). The following dispute stems from the lack of remuneration for the incentives given by Italy to subsidize the diffusion of alternative energy in the area.

With Directive 2003/54 / EC of 26 June 2003, the EU established that States must create specific national authorities to monitor, inter alia, "the terms, conditions and tariffs for connecting new producers of electricity to guarantee that these are objective, transparent and non-discriminatory, in particular taking full account of the costs and benefits of the various renewable energy sources technologies, distributed generation and combined heat and power" (¶ 110, citing Article 23 (1) (f) of the Directive). Italy implemented this Directive by issuing several decrees ("*Conto Energia* Decrees") between 2005 and 2010 relating to the system of incentives for photovoltaic plants (¶ 116). The First and Second *Conto Energia* (respectively, issued on July 28, 2005 and February 19, 2007) established the possibility of accessing the incentives for those plants with individual capacity of 1200 MW (¶¶ 125-126), with a 20-years guarantee incentive tariff (¶¶ 127 ff.). The Third *Conto Energia* decree that was issued on August 6, 2010 further reduced the incentive tariff thresholds due to a decrease in the cost of photovoltaic energy and established a distinction between the different types of plant (¶¶ 135-136).

Italy, in compliance with the EU Directive 2009/28 / EC of April 23 (¶ 141), set as its goal the achievement of 17% of the renewable energy produced by 2020 (¶ 142). To do this, legislative decree no. 28/2011 was issued (the *Romani* Decree), establishing "fair remuneration" of investments and operating costs (¶ 147, citing Articles 23.1 and 24.2 (b) of the Decree). In execution of the *Romani* Decree, the Fourth *Conto Energia* Decree of 5 May 2011 was issued, which applied to the plants beginning to operate between 31 May 2011 and 31 December 2016, and a "national indicative installed capacity target" was introduced, which was set at 23 GW for these plants (¶155); the incentives were to be paid for the total period of 20 years from the date of connection to the grid (¶156). Finally, on July 5, 2012, the Fifth *Conto Energia* decree was issued, establishing two different tariffs for photovoltaic systems: (i) all-inclusive tariff of all costs and the value of incentives for plants with capacity up to 1 MW; (ii) incentives equivalent to the difference between the all-inclusive tariffs and the electricity market price plus the revenues deriving from the sale of energy to the market itself (¶162). This regime was flanked by the additional "off-take" regime, which operated in an alternative or exclusive way with respect to the prices of the free energy market, guaranteeing producers a fixed compensation per kW/h produced (¶168). The operating methods were established with the resolutions of the Italian Electric Energy Authority no. 34/2005 (enacted on 20 October 2005) and 280/2007 (enacted on 4 July 2007), which set, respectively, a minimum price for small photovoltaic plants with capacity up to 1 MW and applicable only for the first two million kWh of electricity produced and injected (¶ 170), and the guarantee of annual review of this guaranteed minimum price by increasing the compensation with the free market price of energy, based on the average daily zonal price (¶¶ 172-173). Another resolution (No. 103/2011) sought to differentiate the minimum guaranteed price between different types of plant (¶ 176), to which was added the price regime set by the *Romani* Decree (¶ 178, citing article 24.8) for integrating revenues deriving from participation in the energy market. Under this regime, a mechanism relating to the imbalance costs between supply and demand for electricity was added.

Between 2012 and 2014, Italy adopted several measures to achieve the target of produced photovoltaic energy and it was thus necessary to review its objectives (¶¶ 212-213):

(i) an additional Administrative Management Fee of EUR 0.0005 for each kWh of incentive energy, contained in the Fifth *Conto Energia* Decree (¶¶ 214-215, citing Articles 10.5 and 10.6) and reaffirmed in the legislative decree 24 June 2014, n. 91 ("*Spalma-Incentivi* decree") (¶ 216, citing Articles 25 (1) and 25 (2) of the same decree), which had the purpose of remodeling the incentive tariff system with a more equitable distribution among energy producers (¶ 258). In doing so, a retroactive change was made, according to the Claimants, in a discriminatory manner towards the producers of renewable energy (¶ 259, and the optional regimes enlisted at ¶ 261). The same *Spalma-Incentivi* decree was subjected to a question of constitutional legitimacy; the Italian Constitutional Court, with decision no. 16 of 24 January 2017 (¶ 271), rejected this question by establishing that "[...] 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 this even if their object are perfect legal rights" (¶ 273, citing 8.1 and 8.2 of the Constitutional Court decision). This also determined that the GSE contracts could not remain unchangeable over time, given both the technological development and the political decisions for incentivizing certain forms of renewable energy compared to others (¶ 274);

(ii) a change in the calculation of the Minimum Guaranteed Price for renewable energy producers (determined on the average operating costs of renewable energy facilities plus 8%, ¶ 221), proposed by the Italian Electric Energy Authority in resolution no. 618/2013 / R / EFR of 19 December (¶ 222), which set the minimum guaranteed price at EUR 39 per kWh for the period 2015-2016, going below the free market price (¶¶ 224-225, citing also the legislative decree *Destinazione Italia* of 23 December 2013, No. 145, which established the equality between minimum price and hourly zonal price);

(iii) the same Authority issued the resolution no. 281/2012/R/EFR of 5 July 2012, according to which the imbalance costs were to be paid also by those photovoltaic plants that did not have an energy schedule for any surplus of 20% of the hourly zonal price compared to the "modified and corrected binding program" (¶ 231, citing p. 12 of Resolution 281). This resolution was challenged before the Italian *Consiglio di Stato*, which established the illegitimacy in the resolution regarding the assimilation between non-programmable renewable energy producers and others (¶ 233, with motivation of decision no. 2936/2014 cited at ¶ 234). Subsequently, a new resolution was issued, the no. 522/2014/R/EFR of 23 October 2014, which established an alternative mechanism for the payment of the imbalance costs (¶¶ 236 ff.);

(iv) the *Robin Hood* Tax (established by means of a legislative decree of 25 June 2008, no. 112, which fixed a tax of 38% on traditional non-renewable energy producers with an annual gross income over EUR 10 million, ¶¶ 239- 240) also applied to renewable energy producers with Law Decree no. 138 of 13 August 2011 (¶ 241), and was subsequently amended by law 9 August 2013, no. 98 (which reduced the original threshold to EUR 3 million with a taxable income of over EUR 300,000) and which applied directly to the Claimants' plants (¶ 242); subsequently, the Italian Constitutional Court, by means of the decision of 11 February 2015, no. 10, declared the constitutional illegitimacy of the tax due to inconsistencies in the regulatory differentiation between taxation of a part of the incoming reddit and the remaining part, as well as a violation of the principle of "contributory capacity" of the companies (¶¶ 244 ff.); the sentence was not considered retroactive by the Court itself (¶ 247);

(v) the modification of the classification of photovoltaic systems from "movable property" to "immovable property" through circular no. 36/E of the Revenue Agency, which established further taxation (namely, the municipal charge on buildings, IMU, and those on services for maintenance of roads and public lighting, TASI, ¶¶ 249 ff.) for several plants, including those of the Claimants.

According to the Claimants, these legal and regulatory events led to a "dramatic impact" on their investments, with a loss of 27% of its value (¶ 275). Following this, all the three Claimants decided to sell the photovoltaic plants in Italy (¶ 276) and to propose an amicable resolution of the dispute with Italy, which failed, paving the way for the arbitration proceedings to commence (¶ 277).

2. Procedural History

On 26 August 2016, Claimants filed a Request for Arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") pursuant to Article 26(4)(c) of the ECT and Article 2 of the Arbitration Rules of the SCC 2010 (¶ 7); Claimants appointed Prof. Dr. Klaus Sachs as their party-appointed arbitrator (¶ 8). On 31 October 2016, Respondent submitted its Answer to Claimants' RfA, together with a Request for Dismissal under Article 10 SCC Rules, on the ground that the SCC manifestly lacked jurisdiction over the dispute (¶ 13). On 7 November 2016, Respondent appointed Prof. Andrea Giardina as its party-appointed arbitrator (¶ 15). By correspondence dated 17 November 2016, the SCC informed the Parties that the SCC Board had decided that it shall proceed to give the two party-appointed arbitrators the opportunity to appoint the Chairperson of the Tribunal (¶ 17). On 13 January 2017, the SCC informed the Parties that the party-appointed arbitrators had jointly appointed Prof. Albert Jan van den Berg as the Chairperson of the Tribunal (¶ 18). By correspondence dated 27 January 2017 to the Tribunal, the European Commission ("EC") filed an Application for leave to intervene as a non-disputing party in the arbitration; the EC invoked the Tribunal's "case-management powers" under Article 19 SCC Rules to grant its request for intervention as a non-disputing party (¶ 20). On 6 March 2018, the Court of Justice of the European Union ("ECJ") rendered its ruling in Case C-284/16, *Slowakische Republik v Achmea BV* (¶ 32). On 8 March 2018, the Tribunal wrote to the Parties in reference to the ECJ Judgment, mentioning that it considered it appropriate to invite the Parties to provide their respective positions on the implications of the ECJ Judgment on the present case, prior to receiving the EC's Written Submission as a non-disputing party scheduled on 10 May 2018 (¶ 33). By correspondence dated 31 May 2018, Claimants informed the Tribunal that the Parties had agreed to hold the Hearing at the hearing facilities of the International Chamber of Commerce in Paris, France (¶ 43); the hearing was conducted from 26 to 29 November 2018 (¶ 60). By email dated 11 March 2020, the Tribunal declared the arbitration proceedings closed, pursuant to Article 34 SCC Rules, asking the SCC Board to determine the costs of the arbitration (¶¶ 89-90).

3. Jurisdictional Issues:

3.1 The Incidence of the Achmea Decision on the Dispute

3.1.1 Respondent Position on Achmea

The Respondent undoubtedly believes that the decision in question is relevant to the dispute, according to which the Tribunal must apply EU law in a principal way and declare its lack of jurisdiction in favour of that of the ECJ (¶ 292). EU law is considered prevalent both under Article 26 ECT and as part of the domestic law of the States involved (Italy as Respondent, Luxembourg as the nation State of the Applicants, Sweden as the seat of arbitration, ¶ 293). This assumption depends on the fact that the dispute between SunReserve Holdings and Italy would be identical to that between the Slovak Republic and Achmea, as it concerns an intra-EU investment (¶¶ 294 ff.); therefore, the arbitration is held in violation of Articles 267 and 344 TFEU and the general principle of autonomy and prevalence of EU law (¶¶ 301 ff.). Finally, Respondent argues that any award non-compliant with EU law could be at risk of a potential annulment based on Articles 33(1) and 33(2) of the Swedish Arbitration Act (¶ 315).

3.1.2 Claimants Position on Achmea

According to the Claimants, EU law is not applicable to the jurisdictional issue, since Article 26(6) ECT considers only the substantive law applicable to the dispute for responsibility of Italy, while it cannot affect the jurisdiction of the same Tribunal (¶ 316). The Claimants also consider the jurisdiction of the arbitral tribunal to be founded, and not affected by EU law. This follows from the fact that: (i) the only law applicable to the dispute is that of the ECT (¶ 326); ii) the practice of the arbitral tribunals in this matter has always excluded the jurisdiction of the ECJ and there have been no substantial changes after the *Achmea* judgement (¶ 327); iii) the jurisdiction of the ECJ is distinguishable from the current one because the former applies only to BITs between Member States (namely, the Slovak-Dutch one, ¶ 330), while it does not affect multilateral investment treaties (to which two Member States are parties, ¶ 329). Finally, the jurisdiction of the arbitral tribunal is not affected by the *Achmea* judgment, especially with regard to the implementation phase of the award, because of its lack of clarity in the judgement itself and for reason of determinacy to be given to the foreign investor. At the same time, this exception is also relevant with reference to Swedish law, which admits the exception for the enforcement of arbitration awards only in certain cases, which does not concern the current dispute (¶ 333). If this were to occur, therefore, the award would be voidable (under Swedish Arbitration Act, Articles 33 (1) and 33 (2), ¶ 335).

3.1.3 European Commission Observations on Tribunal's Jurisdiction

The European Commission has intervened for specifying the following:

(i) *on the applicability of EU law to the dispute in question*: it believes that EU law is part of the "applicable rules and principles of international law" pursuant to Article 26(6) ECT and "relevant rules of international law applicable in the relations between the parties" *ex* article 31(3)(c) VCLT, and finally it would be applicable as part of the national law of the States involved (¶ 337). This in relation with a "systemic coherence" between the ECT and the articles of the TFEU relating to the principle of autonomy of EU law (¶ 339);

(ii) *on the impact of the* Achmea *judgment on the jurisdiction of the Tribunal*: the EC is keen to clarify how this precludes the possibility of initiating intra-EU investment arbitration due to the known principle of autonomy provided in articles 4(3) and 19 TEU and articles 267 and 344 TFEU (¶ 340), as this principle is applicable to this kind of arbitration up to the enforcement phase of the award at national level. National courts have not such a broad power to review the conformity of the arbitration decision with EU law, which applies *ex tunc* also for pending judgments (¶ 341). Finally, the *Achmea* judgment would be considered applicable to the judgments of the international courts of whose Statutes the EU is party;

(iii) *on the interaction between ECT and EU law*: the EC proposes two solutions: 1) on the one hand, a harmonious interpretation of the ECT with EU law, where the EU would have a certain importance as a regional economic integration organization (REIO), and based on the fact that an interpretative statement attached to Article 26(3)(b)(ii) ECT by EU member States will exclude arbitration for them (¶¶ 344-345); this also because of the absence of a disconnection clause in the ECT and the invocation of the "liability follows competence" principle borrowed from the law of liability of international organizations (¶ 346); 2) on the other hand, the conflict clause contained in article 351 TFEU could be invoked, according to which the supremacy and prevalence of EU law over any other multilateral treaty is admitted, hence prevailing over the applicability of the article 26 ECT (¶¶ 347 ff.);

(iv) *on the Tribunal's jurisdiction*: EC contends that the Tribunal lacks jurisdiction with regards to the invoked measures because they constitute state-aid measure and there is an exclusive jurisdiction of ECJ on the matter. This is because the disputes relating to the violation of fair and equitable treatment (FET) would impose a direct assessment of EU state-aid law (¶ 349); in the event that the Tribunal admits its jurisdiction, the EC would offer to propose valid enforcement solutions in compliance with EU law.

3.1.4 Tribunal's Analysis on Incidence of Achmea on its own Jurisdiction

(i) *On outer limits to the jurisdiction*: with reference to article 26 ECT, the Tribunal clarifies that it refers only to matters of a substantial nature relating to the protection of investments, while it does not concern issues of a judicial nature in itself either (¶¶ 357-358). On the question of Swedish law as *lex arbitri*, this forms part of the law applicable by the Tribunal and is considered as an "outer limit" to the jurisdiction (¶ 367). These external limits determine both whether the cause can be decided through arbitration itself, and whether in this case the arbitration agreement can even be considered invalid or unenforceable in the domestic legal system (¶ 372);

(ii) *On the applicability of EU law*: The Tribunal recognizes the nature of source of International law applicable to the dispute (also in the sense indicated by the EC as a treaty source in force between the parties pursuant to article 38 of the ICJ Statute, ¶ 375), and because this is currently an integral part of the law of Member States (¶¶ 376-377). However, also considering the context in which it is inserted (according to Article 31(3)(c) VCLT) and on the basis of the principle of systemic coherence that leads to the harmonious interpretation of article 26 ECT (¶¶ 386 to 392) , together with the difficulty of accepting these rules as having a universal value for International law (393, citing ICJ, *Oil Platform*, 2003, ¶¶ 41-42), the Tribunal determines that EU law, as an integral part of the Swedish law, must be clearly determined in order to establish a limit to the jurisdiction of the Tribunal itself (¶ 398). This is due to a literal and linguistic interpretation of the provisions of Swedish law on the matter (¶ 399), and on the basis of the impossibility of finding clear restrictions on the unconditional consent of the State to submit the dispute to arbitration (¶ 400); therefore, EU law will not be considered *per se*, but only as a possible limit of internal law to *lex arbitri* (¶ 402). The indicated rules of the TFEU and the principle of autonomy of EU law do not in any way constitute a limit to the jurisdiction of the Tribunal. This is because: (1) there is no express limitation on investment arbitration in articles 267 and 344 TFEU (¶¶ 409 and 411), the mechanism of legal protection herein provided does not only pass through a precise application of the rules of the EU treaties, but also through rules external to EU law that can be applied in a consistent manner (¶ 412); the principle of autonomy cannot concern the jurisdiction of an arbitral tribunal, but only the distinction between EU law and international or domestic law (¶ 413); (2) there would not even be any kind of conflict between intra-EU investment arbitration pursuant to Article 26 ECT and the EU rules and principles referred to, which would have nothing to do with jurisdiction (¶¶ 414 ff., citing also *Electrabel SA v. Republic of Hungary*, ICSID case No. ARB / 07/19, award, ¶ 4.166, and *Charanne BV & Construction Investments Sarl v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, Jan. 21, 2016, ¶ 438);

(iii) *On the impact of the* Achmea *judgment*: the Tribunal considers that the judgement does not provide for any further and determined limit outside the jurisdiction (¶ 427): (1) because of the silence of the ECJ conclusion regarding the fact that this principle may also apply to multilateral investment protection treaties (as for the ECT, ¶ 428, ¶ 432); (2) with regard to the Declarations of the Member States of 15 January 2019, because the Tribunal considers that these do not provide any binding interpretative line as far as ECT jurisdiction is concerned, nor are they further clarifying the ECJ judgment (¶¶ 435-436); furthermore, given also the question of prejudice before the ECJ by the Italian *Consiglio di Stato* (¶ 438), it is believed that the application of the *Achmea* judgment should be considered "theoretical and speculative" (¶ 441);

(iv) *On the interpretation of article 26 ECT*: the Tribunal notes that the article itself does not exclude neither the possibility to indicate EU Member States, nor that EU law can coexist with the ECT (¶ 450- i); at the same time, it notes that the possibility of resorting to different dispute resolution mechanisms pursuant to article 16 ECT makes this regime more favourable for the parties themselves (¶ 450-iii); finally, the jurisdiction of ECT arbitration is not excluded on the basis of an interpretative declaration by the EC, which would excessively interpret the scope of Article 26 ECT (¶ 450-iv). In determining this, the Tribunal recognizes that a disconnection clause does not exist and is not mentioned in the ECT, otherwise it would have had the ability to limit the application of the agreement itself (¶¶ 452 ff.); on this way, it is not possible to adopt an interpretation contrary to article 26 ECT (¶¶ 455 ff.).

3.2 Other Issues of Jurisdiction and Admissibility

3.2.1 Respondent's Position

As regards to the other jurisdictional profiles, the Respondent argues that the jurisdiction of the arbitral tribunal should be excluded, since most of the measures contested by the Claimants are to be considered as tax measures pursuant to Article 21(7) ECT (¶¶ 468 ff.). This is based on both a literal definition that distinguishes "taxes", "fees" and "contributions" in the Italian tax system (¶ 470), and on the basis of the classification of photovoltaic systems as "immovable property" (as confirmed by the Italian Constitutional Court decision no. 16/2017, cited at ¶

480). The Tribunal would also have no jurisdiction over GSE contracts, as there would be a jurisdictional clause in favour of the Court of Rome included in all the contracts entered into force for the various plants owned by the Claimants (¶¶ 481-482). With respect to the requirement of prior amicable settlement of disputes pursuant to Article 26(1) ECT, the Respondent believes that this requirement has not been met, because the Claimants had proposed arbitrations on new legal issues in respect of those indicated in the letter of invitation to the friendly solution of May 4, 2016 (¶¶ 486-487); these new issues concerned both the *ex-nunc* application of the decision no. 10/2015 of the Italian Constitutional Court on the illegitimate application of the Robin Hood Tax and the reimbursement of municipal taxes not due.

3.2.2 Claimants' Position

The Complaints contest the qualification of some measures as purely fiscal, since the extensive interpretation made by the Respondent goes beyond the wording of Article 21 ECT; this is because there is an incorrect classification by the Italy of both the Administrative Management Fee and the imbalance costs (¶¶ 490 ff.). With regard to exclusive jurisdiction over GSE contracts, the Complaints argue that these contracts have not been executed by different subjects; at the same time, the termination of these contracts was not requested in the invitation letter, thus it considered a violation of the ECT treaty itself (¶¶ 498-499). Finally, with regard to the preventive amicable resolution of disputes, the Claimants argue that what was reported in the letter of May 4, 2016 expressly concerned the subject matter of the current dispute, i.e. an excessive application of the Robin Hood Tax and the incorrect application of taxation municipal (¶ 501), in addition to the incidence of additional factors in the evolutionary phase of the dispute (¶ 502).

3.2.3 Tribunal's Analysis

(i) *On the classification of taxation measures pursuant to Article 21 ECT*: The Tribunal interprets the text of the article in the sense that there must be a provision of domestic law providing for similar measures and that these measures must be related to taxation (¶ 509). On this basis, the Tribunal notes that the distinction between *tributi* (fiscal measures) and *imposte* (taxation measures) implies that the latter term is broader than the former and therefore includes all kinds of taxes considered under article 21 ECT (¶ 518). In order to adequately identify a tax, the Tribunal recalls the criteria for identification (¶ 520), such as (1) mandatory payment; (2) lack of reciprocal relationship between taxpayer and state authority; (3) purposes of public expenditure or public spending. The first criterion seems decisive for classifying tax measures as taxes (¶ 521). On the basis of these criteria, the Tribunal determined that: (1) the Administrative Management Fee is mandatory, but there is reciprocity between the administrative authorities and the Applicants, given that the beneficiary relationship existed between the GSE and the same (¶¶ 523 ff.), so the nature of taxation measure is excluded (¶ 536); (2) Imbalance Costs are mandatory for photovoltaic energy producers, but also in this case there is a relationship of reciprocity between the imposing authority and the producers (¶¶ 538 ff.). On the contrary, the Robin Hood Tax is to be considered in all respects a taxation measure (¶¶ 551 ff.), and the classification of photovoltaic plants as immovable property also entails the question of derived taxation, thus the jurisdiction of the Tribunal is excluded (¶ 560);

(ii) *On the exclusive jurisdiction of the GSE contracts*: the Tribunal considers that the Claimants were not parties to the contracts and there was no exclusive jurisdiction clause, although the mere presence *per se* would not have affected the jurisdiction of the Tribunal itself (¶ 566) nor that the GSE contracts constituted a special rule with respect to that enucleated in Article

26 ECT (¶ 567); finally, because the object of the appeal is not the specific termination of contracts but the violations made by Italy against the Applicants, the Tribunal believes that in this case the jurisdiction is fully applicable (¶¶ 573 ff.);

(iii) *On the requirement of prior request for amicable resolution of the dispute*: the Tribunal holds that the general requirements of Article 26 ECT (attempt to settle the dispute amicably, coincidence between the disputes amicably settled and those referred to arbitration, the time limit of referring to arbitration not less than three months after the expiring of the time limit established in the letter) are found in part, thus excluding its own jurisdiction on the Robin Hood Tax and on the aforementioned municipal taxes (¶¶ 578 ff.).

4. Respondent's Breach of any Obligations under the ECT or International law

4.1 Fair and Equitable Treatment (FET) under Article 10(1) ECT

4.1.1 Claimants' Position

(i) *On legitimate expectations*: Claimants believe that their protection is an integral part of the FET (¶ 591), implicitly and explicitly intended, but where there is no express reference, the host State will have to conduct a balancing behaviour between the alleged expectations and its own regulatory authority (¶¶ 592-593); in addition, legitimate expectations cannot refer only to rights that have been "crystallized" at the time of the beginning of the investment, but must be adequate over time (¶ 595). On this basis, the Claimants believe that Italy has violated its legitimate expectations by failing to promise to pay incentive tariff for 20 years with the enactment of the *Romani* Decree, and with the loss of any other objective on the advancement of the policies for the promotion of renewable energies (¶ 602); these expectations should be protected regardless of whether the investments for the individual plants took place separately over time (¶¶ 606-607); from a regulatory viewpoint, the Claimants' legitimate expectations would have been frustrated by the legislative provisions which would have derogated from the provisions of the *Conto Energia* decrees, as in the case of the *Spalma-Incentivi* decree, which imposed higher taxation and denied any further possibility of reimbursement of incentive tariffs (¶¶ 610-611), and in the case of the 2017 decision by Italian Constitutional Court (¶ 614);

(ii) *On the transparency requirements of legislative measures and on good faith*: Claimants complain that, given a general principle of non-ambiguity of the enacted measures (¶ 598, referring to the principle as expressed, *inter alia*, in *Metaclad Corp. v. United Mexican States*, ICSID case No. ARB / 96/3, Award, Aug. 30, 2000, ¶ 76), these have been violated through the retroactive application of the Administrative Management Fee, the imposition of the Imbalance Costs and a new modulation of all the *Conto Energia* decrees through the *Spalma-Incentivi* decree (¶¶ 620-621). Finally, they believe that there has also been a violation of good faith by Italy, as an integral obligation of the FET and the legitimate expectations of the investor (¶ 599); this violation materialized with an overall discriminatory conduct towards photovoltaic energy producers (¶¶ 623-624).

4.1.2 Respondent's Position

(i) *On legitimate expectations*: Respondent agrees that the FET is a fundamental obligation of the State, but at the same time believes that there are no preconditions for considering this standard crystallized or defined when a foreign investment is initiated (¶ 629), and contemporary freezing its regulatory activity (citing, *inter alia*, *Electrabel SA v. Republic of Hungary*, ICSID Case no. ARB / 07/19, Award, ¶ 219); therefore, other factors must also be considered such as reasonableness, proportionality and public interest, in addition to the due diligence that must be conducted by a prudent investor when starting his investment, through continuous evaluation and adaptation to national regulations (¶ 630). In consideration of this, the Respondent believes that the Applicants have no legitimacy to invoke the legitimate expectations (¶ 638 ff.) and that the considerations regarding the stabilization over time of the legitimate expectations are to be differentiated for the various plants (namely, for that in Fiumicino, ¶¶ 642 ff.). In this way, the Respondent assumes that it has not frustrated the legitimate expectations of the Claimants, because: (1) the Administrative Management Fee was enacted only to provide compensation for the management, verification and control costs of the electricity grid and plants, with a minimum contribution (¶¶ 645 ff.); (2) the Imbalance Costs could not have invalidated the Claimants' legitimate expectations as "costs and tariffs are two separate factors, and only if the costs imposed were fictitious in nature, could the reallocation of imbalance costs qualify as a disguised reduction of the tariffs"(¶ 648); (3) the *Spalma-Incentivi* decree would follow the normal evolution of technology and the increase in energy needs, leading to an increase in the operating costs of the market (¶ 653); this would have happened while remaining in line both with the provisions of the *Romani* Decree and those of the EU directives (¶ 651); this should have been foreseen by the same investor with the adequate due diligence (¶ 655); (4) the off-take regime is governed by two primary regulations (Article 13 of Legislative Decree no. 387/2003 and Article 1 (41) of Law no. 39/2004), prevailing over any other resolution of the Italian Authority for electric energy (¶¶ 656 ff.) and which therefore could not legitimately found the Claimants' expectations;

(ii) *On transparency and good faith*: Italy maintains that all the contested measures are "reasonable and consistent" (¶ 662); as regards with the *Spalma-Incentivi* decree, this is a "physiological adaptation" measure with respect to the provisions of both the *Romani* decree and the Third and Fourth *Conto Energia* decrees (¶ 663); the Respondent underlines that there was no individual discriminatory intent towards the Claimants, thus the measures aimed at general modification of the tariffs and of modalities of the provision on incentive tariff (¶¶ 664 ff.).

4.1.3 Tribunal's Analysis

(i) *On the FET standard pursuant to Article 10 (1) ECT*: this must be distinguished from that in customary international law, since the former would set a specific and higher standard than the latter (¶ 672). In this regard, the characteristics of this standard are: (1) non-absoluteness of the concept, to be interpreted in the light of different circumstances (¶ 683, citing also *Ioan Micula et al. V. Romania*, ICSID Case No. ARB / 05 / 20, Award, December 11, 2013, ¶ 504, and *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 297); (2) stability and transparency as important components of the FET for the host State (¶ 684); (3) balance of stability with the host State's right to regulate (¶ 685); (4) finally, a high threshold of violation of the obligation, and that "the host State's conduct was manifestly or grossly unfair or unreasonable, was arbitrary or discriminatory, constituted a denial of justice in national proceedings in the host State, or that the host State engaged in a willful neglect of duty or a willful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards" (¶ 688, citing also *AES Summit Generation Ltd. And AES-Tisza Erömü Kft. V. Hungary*, ICSID Case No. ARB / 07/22, Award, Sept. 23, 2010, ¶ 9.3.40). Therefore, not all regulatory changes made by the host State can constitute a violation of the FET, but only those which are "radical or fundamental" (¶ 692);

(ii) *on legitimate expectations*: The Tribunal recognizes how these have been formed in the absence of specific promises or commitments by the host State (¶ 699), but in this case there is no commitment to keep its own unchanged regulatory regime (¶¶ 702-703). As with regards to the "crystallized rights" deriving from legitimate expectations, the Tribunal rejects the interpretation offered by the Claimants of *CEF v. Italian Republic*, SCC Arbitration V (2015/158), 16 January 2019 (¶ 188) due to the limited conception of investments herein interpreted (¶ 705); at the same time, the Tribunal marks a distinction between "hopes" and "knowable expectations", which goes beyond the expectations that a host State can protect regarding an investment (¶ 708, citing, *inter alia*, *Electrabel v. Hungary* cited, ¶ 7.76); therefore, the "crystallized" form of these rights must be "objectively discernible" or "must exist and be enforceable by law" in order to be protected (¶ 709, citing *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB / 02/01, Decision on Liability, Oct. 3, 2006, ¶ 130). As with regards to due diligence, the burden of compliance remains on the investor, who is in charge of knowing the domestic regulations of the host State and implementing them (¶ 713). With regard to the temporal element of the legitimate expectations, the Tribunal agrees that an investment cannot be made in a single moment (¶ 718) and that it can evolve over time, thus generating expectations according to the trend (¶ 720 ff.); but at the same time the Tribunal believes that in the case of multi-stage investments the investor has a duty to determine from which single moment the legitimate expectation is generated for each of them (¶¶ 724-725). As with regards to transparency and good faith, the Tribunal believes that the transparent action of a State should not be taken too literally, otherwise it will be imposed on the State "obligations which would be inappropriate and unrealistic" (¶ 734); good faith cannot be considered as a separate obligation with respect to the FET, but is an integral part of it (¶¶ 737 ff.), while conversely proving bad faith is extremely difficult (¶ 740).

(iii) *on the possibility that Italy has frustrated the legitimate expectations of the Claimants*: The Tribunal holds above all to consider that they did not make different investments in Italy, but these are the result of a single iterated and composite investment over time (¶ 750), and that from a temporal point of view all investments must be traced back to the share acquisitions of the various plants, legally and economically relevant with respect to the date of entitlement to receive incentives (¶¶ 753 ff.); Milestone Payment (or the payment of every single acquisition of the various plants) cannot be considered as a way to differentiate investments in the territory of the State (¶ 763). Among the various factors that determined the emergence of legitimate expectations, the EU directives 2001/77/EC and 2009/28/EC are relevant, on the basis of which the various national regulations and the five *Conto Energia* decrees were issued, in addition to different statements of support for investments in renewable energy made by several national authorities (¶¶ 773 ff.); however, in relation to GSE contracts, the Tribunal notes that these determine a differentiation among the individual plants (¶ 777); this, therefore, leads the Tribunal to consider that every plant have more legitimate expectations to be considered starting from the dates of receipt of the GSE confirmation letter (¶¶ 779 ff.). With respect to the Fiumicino plant, the Tribunal notes that the acquisition took place only after the GSE confirmation letter (¶ 786); in this regard, the Tribunal notes that the simple letter of confirmation from the GSE cannot be considered as a means of asserting investor's legitimate expectations, as opposed to the contract concluded with this subject (¶ 789 ff.). On a normative plan, the *Conto Energia* decrees must be considered in a hierarchical context for being able to generate legitimate expectations (¶¶ 793 ff.). Finally, no mention is made by the primary legislation (being national or EU law) about the 20-year guarantee for receiving incentives and maintaining the tariffs, but only that the legislative decree no. 387/2003 have established methods and ways according to which receive "a specific incentive rate, decreasing amount and duration as to ensure fair remuneration of each investment and operating costs" (¶ 801), although "fair remuneration" must not be interpreted too broadly as done by Claimants (¶¶ 803 ff.). The indication of the 20-year guarantee was to be understood only for the maintenance of exchange rates (¶¶ 808 ff., and the following considerations on possible modifications of the regime by several law enactments, ¶¶ 811 ff.). The only reliable legitimate expectation was provided by Legislative Decree no. 387/2003 on the possibility of obtaining "fair remuneration" for their own plants for a period of 20 years, or an average life span of a plant (¶ 819). With reference to the Fiumicino plant, the Tribunal notes that the expectations generated by the GSE letter were to be considered "accessory" (¶ 821) without the possibility of any contractual right. Since Claimants received the letter from the GSE at a time after the acquisition of the Fiumicino plant, this constituted an objective knowledge of the tariff regime, giving rise to legitimate expectations for the same (¶ 840). With regard to fair remuneration as required by the *Spalma-Incentivi* decree, the Tribunal considers that this must refer to the sustainability requirement of the entire mechanism of incentive tariffs (¶ 847); at the same time, the Tribunal considers that this decree did not interfere with the legitimate expectation of a fair remuneration since: (i) all the plants were part of the mechanism of progressive reduction of the incentive tariffs over time (¶¶ 850 ff.); (ii) in 2014 the parties had negotiated operating and maintenance costs in a reduced way (¶¶ 858 ff.); (iii) with regard to the quantum, the Tribunal does not consider that a 19% reduction in the value of the investments can be derived from the adoption of the *Spalma-Incentivi* decree (¶ 863); (iv) a comparison of incentive tariffs in EU shows that the decree itself was in line with other tariff regimes for the remuneration of photovoltaic systems (¶¶ 866-867): (v) the remodulation of tariffs did not affect the value of investments, nor the expected remuneration;

(iii) *On other measures*: The Tribunal notes that: (i) the Administrative Management Fee and Imbalance Costs cannot be considered as in contrast to the legitimate expectations, because there was no definite expectation on a guaranteed remuneration of 20 years (¶¶ 875 f.), and the incentive tariffs could not be frustrated by the imposition of costs totally unrelated to them (¶ 877 and ¶ 880 on Imbalance Costs); therefore, these measures appeared reasonable and had no great impact on the costs suffered by the plant operator (¶ 884); (ii) the Minimum Guaranteed Price could be modified over time and there was no expectation that it would remain stable, due to the hierarchical subordination of the regime provided by the resolution of the Italian Authority of electric energy no. 280/2007 to the legislative decree no. 387/2003 (¶¶ 892 ff.); therefore, there was no evidence that the Claimants' small photovoltaic plants could survive the application of an off-take regime (¶ 896); finally, no rules (including those of the 2013 *Destinazione Italia* decree) imposed that this price should be applied as unmodified to plants such as those of investors (¶ 903).

4.2 Unreasonable and Discriminatory Treatment (Impairment Clause)

4.2.1 Claimants' Position

Claimants argue that this kind of behaviour can constitute a violation by a low threshold, but at the same time they believe it must be incisive and significant on the investment (¶ 922). This means that any legislative measure is unreasonable if potential negative effects on foreign investors are not considered when enacted (¶ 923). In this sense, they claim that Italy would have damaged them through a retroactive modification of the *Conto Energia* decrees, through a generalization of the photovoltaic plants and through the assimilation of all of them to a lower incentive tariff regime (¶¶ 925 and 926, arguing that the enactment of the *Spalma-Incentivi* decree lacked any reasons or justification).

4.2.2 Respondent's Position

The Respondent argues that there is a substantial overlap between what is established by the FET and the Impairment Clause (¶¶ 927 ff.) and contends that the reasonableness of the policy must be adjudged in terms of the correlation between the measure actually implemented and the policy adopted (¶ 929). Furthermore, Italy refers to what has been reported in terms of FET, sustaining that the *Spalma-Incentivi* decree is justified by the technological advancement in the photovoltaic field, as already underlined by the 2017 Italian Constitutional Court decision (¶¶ 930-931).

4.2.3 Tribunal's Analysis

(i) *On the meaning of "impairment*": The Tribunal holds that "a determination of impairment of the investment precedes an examination of whether the measure resulting in such impairment was unreasonable or discriminatory", as emerges from the text of Art. 10 (1) ECT (¶ 936), while this occurs only when an investment takes place (referring to *AES v. Hungary* as cited above, ¶ 10.3.3). This must be done considering the balance between the expectations of the foreign investor and the host State's right to regulate, together with the recognition that the standard must be guaranteed at a high level (¶ 938). Therefore, not all the negative effects that originate from the State legislation affecting the investment must be considered as qualifying discriminatory behaviour and an impairment (¶ 939 citing *Electrabel v. Hungary*, ¶ 7.152);

(ii) *On the standard of unreasonableness*: Although it acknowledges that the parties to the dispute disagree on the interpretation of the term "unreasonable", it nevertheless believes that it must consider that the measure is unreasonable when "taken for reasons that are different from those put forward by the decision make" (¶ 946, citing *Toto Costruzioni Generali SpA v. Republic of Lebanon*, ICSID case No. ARB / 07/12, Award, June 7, 2012, ¶ 157). Therefore, the Tribunal finds that "the legal standard to satisfy a breach of the Impairment Clause requires establishing (i) a significant impact on the investment by the host State's measure in question; and (ii) that the measure of the host State in question was bereft of a rational policy, or unrelated to the policy objective that the host State desired to achieve, or discriminatory in its application" (¶ 948);

(iii) *On the single measures adopted by Italy*: The Tribunal believes that: (1) the *Spalma-Incentivi* decree has not determined a violation of the Impairment Clause (¶ 951), because of the occurred improvement in technology and consequent adaptation of Italian energy policies; (2) the Administrative Management Fee and the Imbalance costs are not in violation of the Impairment Clause (¶952), as the threshold of proof of unreasonableness of the measures adopted has not been reached; (3) the reduction of the Minimum Guaranteed Price is not in violation of the aforementioned clause (¶953), as the unreasonableness of the measures adopted has not been determined, and at the same time the reduction itself cannot be considered discriminatory in reason of the different energy capabilities of the plants (¶ 956).

4.3 Umbrella Clause

4.3.1 Claimants' Position

According to Claimants, the Umbrella Clause of Article 10 (1) ECT is broad enough to include both the obligations of the host State regardless of the time from which the investment protection is considered, while considering also the contractual and regulatory obligations of the host

State (¶959); in addition, they believe that the current normative and regulatory status of Italy cannot avoid responsibility for the actions taken previously, pursuant to Article 3 DARSIWA and article 27 VCLT (¶ 962). In this way, they argue that Italy has violated this clause by denying the 20-year guarantee remuneration of incentives (¶ 963) through the contested regulatory and legal measures (¶¶ 964 ff.).

4.3.2 Respondent's Position

Italy believes that the text of Article 10 (1) ECT is too broad and also includes the statutory obligations of the State; for this reason, it should be limited only to contractual obligations with the investor (¶ 969); this is based on the literal and contextual interpretation of the rule (¶¶ 970-971), in addition to the fact that the legitimacy of this clause is to be based on Italian law and not in international law *per se* (¶ 972). In this regard, Italy claims that the GSE contracts are beyond the scope of the Umbrella Clause, as they are not real contracts and not involving a synallagmatic and reciprocal performance (¶ 973); even where it is proven that they fall within the scope of the Umbrella Clause, the Respondent contends that the Claimants have failed to prove any type of violation by the GSE, or the real counterparty of the contracts (¶ 974).

4.3.3 Tribunal's Analysis

(i) *On the impact of domestic law on the Umbrella Clauses*: Given the disagreement on the temporal meaning of domestic law, the Tribunal notes that domestic law cannot be invoked to exclude the international liability of a State beyond a certain time limit (¶ 982, citing Articles 3 DARSIWA and 27 VCLT);

(ii) *On the comparison of the internal case law on the expropriation and the existence of an obligation related to the Umbrella Clauses*: The Tribunal considers that there is no similarity between the two institutions, underlining that the regulation before the beginning of the investment cannot be excluded by the scope of the clauses themselves (¶ 985);

(iii) *On the inclusion of legislative and regulatory measures in the clause*: The Tribunal notes that the literal meaning of the expression "any obligation" in Article 10 (1) ECT refers only to those deriving from the contract between the contracting party on behalf of the host State and the investor himself (¶ 989); this is based on the specific requirement of privacy of the obligation while excluding a generic obligation referring to a larger number of recipients (¶ 991). The Tribunal considers that in the specific case none of the measures adopted by Italy were subject to the obligation provided by the Umbrella Clause of Article 10 (1) ECT (¶¶ 998 ff.), both because of a general destination of the various *Conto Energia* decrees (¶ 1000) and of the accessory nature of the contracts concluded between the Claimants and the GSE (¶ 1002).

5. Quantum

Claimants requested the Tribunal for the aforementioned violations a compensation amounting to EUR 40.89 million (¶ 1012). Respondent refused any title to compensation for the Claimants. Since the Tribunal has dismissed all of the Claimants' claims relating to the Respondent's alleged breaches of the FET Obligation, the Impairment Clause and the Umbrella Clause, the Tribunal finds that the Respondent is not under an obligation to pay any compensation to the Claimants (¶ 1013).

6. Costs

The Tribunal ordered the Claimants to bear the full costs and expenses of the arbitration (¶ 1030). Moreover, the Tribunal ordered the Claimants to bear 75% of the full costs and expenses incurred by Respondent for sustaining the arbitration proceedings, as a reasonable request by the same Respondent (¶¶ 1039 ff.).