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

Award Name and Date: Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37) – Award – February 26, 2021

Case Report by: Erin Collins**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against Italy pursuant to the Energy Charter Treaty ('ECT') alleging Italy had breached its fair and equitable treatment, expropriation, and its observance-of-obligations or umbrella clause obligation. Respondent raised jurisdictional objections including, *inter alia*, whether intra-EU arbitration is possible under the ECT. The European Commission ('EC') intervened on Italy's behalf. After rejecting all of Respondent's jurisdictional objections, the Tribunal analysed Claimant's claims and rejected them all.

Main Issues: whether "intra-EU" arbitration was permissible under the ECT; and whether Claimant had an enforceable legitimate expectation at the time of their investment such that subsequent changes to the regulatory framework would be a breach of the State's fair and equitable treatment under Article 10(1) of the ECT

Tribunal: Judge Bruno Simma (President), Judge O. Thomas Johnson (Arbitrator) and Professor Bernardo M. Cremades (Arbitrator)

Claimant's Counsel: Mr Barton Legum, Mr. Heiko Heppner (Dentons Europe LLP), Mr Michele Cicchetti (DWF)

Respondent's Counsel: Avv. Gabriella Palmieri, Avv. Carlo Sica, Avv. Giacomo Aiello, Avv. Pietro Garofoli, Avv. Laura Delbono (Avvocatura dello Stato), Prof. Avv. Maria Chiara Malaguti (External Counsel to the Legal Service of the Ministry of Foreign Affairs)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Erin Collins is an Associate at King & Spalding LLP specializing in international arbitration. IACL´s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Collins can be contacted at ecollins@kslaw.com.

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

Digest:

1. Relevant Facts

Silver Ridge Power BV ('Silver Ridge' or 'Claimant') is a private limited liability company incorporated in the Kingdom of the Netherlands (¶ 2). Claimant indirectly owned and controlled, through a wholly owned Dutch holding company, an Italian company called Silver Ridge Power Italia s.r.l (¶ 107). Silver Ridge Power Italia s.r.l. then owned and controlled ten local Italian development companies which owned and operated 25 photovoltaic plats ('PV plants'), which began operating between September 2010 and May 2012 (¶ 107). Those 25 PV plants are the subject of this dispute.

The Parties' dispute arose out of a series of measures taken by the Italian Republic ('Italy' or 'Respondent') between 2011 and 2014, which impacted the Claimant's PV plants (¶ 5).

Under the Italian regulatory framework, the *Gestore dei Servizi Energetici S.p.A.* ('GSE') entered into agreements known as "GSE conventions" with each PV plant (¶ 109). Under those conventions, the plants received certain benefits (¶ 109). The GSE conventions were a part of the Italian regulatory framework to implement EU legislation aimed to reduce greenhouse gas emissions (¶¶ 113, 115). That framework began with Legislative Decree No. 387/2003 which required Italy to establish a specific incentive tariff, ensure a fair remuneration of investment and operating costs to investors, and entitle eligible producers to sell electricity directly to the GSE (¶¶ 116-117). Following this decree, Italy enacted ministerial decrees known as "*Conti Energia*" or "energy accounts" decrees which set specific terms and conditions for the incentives (¶ 119).

Conto Energia I, adopted 28 July 2005, concerned PV plants with an individual operating capacity between 1kW and 1MW and granted those plants the right to receive a specific incentive tariff for every kWh of electricity produced (¶ 122). None of the 25 PV plants were governed by this regime.

Conto Energia II, adopted 19 February 2007, applied the energy incentives to all energy a PV plant produced. It also granted a FIT for PV plants that went into operation on or before 31 December 2008, and a reduced FIT for those which began operating between 1 January 2009 and 31 December 2010 (¶ 123). Seven of the 25 PV plants were governed by this regime (¶ 123). (*Conto Energia II* was subsequently extended to include plants constructed prior to 31 December 2010 so long as they were connected to the grid by 30 June 2011 (¶ 124))

Conto Energia III, adopted 6 August 2010, granted FIT for all PV plants which began operating between 31 December 2010 and 31 December 2013 (¶ 125). This decree created a mechanism to progressively reduce the FIT (¶ 125). Four of the 25 PV plans were governed by this regime (¶ 125).

Following the first three *Conti Energia* decrees, the EU issued its Second Renewable Directive, which Italy implemented through Legislative Decree No. 28/2011 (the 'Romani Decree'). Under the Romani Decree, the scope of *Conto Energia III* was reduced (¶ 127).

Conto Energia IV, adopted 5 May 2011, regulated PV plants that began operating between 1 June 2011 and 31 December 2016. It distinguished between small plants and large plants, and created a ranking system for which plants would benefit from FIT (*see* ¶ 130). Twelve of the 25 PV plants were governed by this regime (¶ 132).

Conto Energia V, adopted 5 July 2013, provided for two different incentive regimes based on a PV plant's capacity. Smaller plants received an "all-inclusive tariff," which included the price of electricity and the value of the incentive (¶ 135), and larger capacity plants received a tariff equal to the difference between the all-inclusive tariff and the market price of electricity plus revenues received by the PV plant from its energy sales (¶ 134). *Conto Energia V* also required PV producers to begin paying an annual administrative fee (¶ 136). Two of the 25 PV plants were governed by this regime (¶ 135).

Italy then enacted legislation cutting back the *Conti Energia* incentives. On 23 December 2013, Italy enacted Legislative Decree No. 145/2013 (the '*Destinazione Italia* Decree'), which gave PV plant operators two choices: (1) continue with the existing regime for 20 years without any additional benefits; or (2) accept a reduced percentage tariff under the *Conti Energia*, in exchange for an extension of the incentive period by seven years (¶ 137). And on 24 June 2014, Italy enacted Legislative Decree No. 91/2014 (the '*Spalma-incentivi* Decree'), which "sought to 'remodulate' or 'reformulate' the incentive payments under the energy accounts … and to provide for altered modalities for disbursement of the FIT starting from 1 January 2015" (¶ 138). The *Spalma-incentivi* Decree affected all 25 PV plants, and each plant's FIT was reduced by between 6% and 8% (¶¶ 139-141).

Claimant brought an action for relief against Italy, pursuant to the Energy Charter Treaty ('ECT') alleging that Italy had breached, *inter alia*, fair and equitable treatment (Article 10(1), first and second sentences), the observance-of-obligations or umbrella clause obligation (Article 10(1), last sentence), and expropriation protection (Article 13(1)) (¶ 145).

2. Procedural History

Claimant filed a Request for Arbitration on 29 July 2015, which was registered by ICSID on 11 August 2015 (¶¶ 6-7). The Tribunal was constituted on 2 May 2017 (¶ 17). The first session was held by means of a telephone conference on 19 June 2017 (¶ 20). Claimant's Memorial was filed on 29 September 2017 and Respondent filed its Counter-Memorial (¶ 22). Respondent's Counter-Memorial included a request for bifurcation and a request that the Tribunal suspend the arbitration pending the Court of Justice of the European Union ('CJEU') decision in Case C-284/16, *Slovak Republic v. Achmea BV* ('*Achmea*'), on 2 February 2018 (¶ 23). The Tribunal determined that it would wait to rule on Respondent's bifurcation request until after the *Achmea* decision was rendered (¶ 26).[1] The parties were invited to comment on *Achmea* prior to the Tribunal's bifurcation decision (¶ 27).

The Tribunal granted Respondent's request for bifurcation on 19 April 2018 (¶ 30), and the parties' hearing on jurisdiction was scheduled for 1-2 November 2018 (*see* ¶ 42).

On 1 October 2018, before the hearing on jurisdiction, the European Commission ('EC') filed an application to intervene as a non-disputing party (¶ 44), which the Tribunal granted (¶ 47).

[1] In *Achmea*, the CJEU assessed whether the arbitration provision in the 1991 Netherlands-Slovakia bilateral investment treaty was compatible with EU law.

Following the jurisdictional hearing on 1 November 2018, the Tribunal joined the jurisdiction and merits phases of the case (¶ 57).

The hearing on the merits then took place from 23 to 26 September 2019 (¶ 82). The parties then submitted two rounds of post-hearing briefs (¶ 86) and additional legal authorities and awards (¶¶ 87, 91-103). The proceeding was not closed until 9 February 2021 (¶ 104).

3. Positions of the Parties on Jurisdiction

3.1 Respondent's position on jurisdiction

Respondent raised four jurisdictional objections: (1) the ECT does not apply to disputes between investors of one Member State of the European Union ('EU Member State') and another EU Member State (the 'intra-EU objection'); (2) Italy did not consent to arbitration because the GSE conventions contain an exclusive jurisdiction clause; (3) Claimant failed to seek an amicable resolution of its Romani Decree-based claim (as required by Article 26(1) and (2) of the ECT); and (4) the administrative fee imposed by *Conto Energia V* is a taxation measure and falls under the "carve out" provided in Article 21 of the ECT (¶ 151).

3.1.1 The "intra-EU" objection

Respondent argued that the Tribunal should find it lacks jurisdiction over intra-EU disputes, or otherwise deem the case inadmissible (¶ 169), because Article 26(1) of the ECT which applies to disputes "between a Contracting Party and an Investor of another Contracting Party," precludes adjudication between an investor of one EU Member State and another EU Member State (¶ 153) (The Tribunal could also decline to exercise its jurisdiction consistent with the principles of international comity and *forum non conveniens* (¶ 169)).

First, Respondent, argued that Article 26(6) of the ECT requires the tribunal to "decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law," so, the Tribunal should apply applicable rules and principles of EU law which form a part of those applicable rules and principles (¶ 154). And consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT') concerning the duty of consistent interpretation, the Tribunal should consider itself bound by EU law and CJEU decisions, including the *Achmea* judgment (¶ 155).

Under EU law, EU Member States lack the competence to conclude bilateral or multilateral international agreements concerning the protection of intra-EU investments (¶ 156). EU law governs investment protections concerning EU investors with investments in other EU Member States, and EU law similarly proscribes EU Member States from concluding agreements which might affect EU law or alter the scope of EU law (¶ 156). So, EU institutions have sole jurisdiction over intra-EU disputes. (For support, Respondent relied on Articles 267 and 344 of the Treaty on the Functioning of the European Union ('TFEU') and the *Achmea* judgment (¶ 157)). Further, the Tribunal cannot submit questions of EU law to the CJEU for interpretation, so retaining jurisdiction over an intra-EU dispute would risk violating the primacy of EU law (¶ 157). Respondent argued that *Achmea* supports its position and applies to the ECT (¶ 166), and that the EC and several EU Member States issued statements confirming that the intra-EU objection applies to the ECT (¶ 167).

Second, Respondent argued that the Contracting Parties to the ECT recognized that there could be overlapping competencies between the ECT and regional organizations. Article 1 of the ECT defines a Regional Economic Integration Organization ('REIO') as "an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters" (¶ 158). So, according to Respondent, the ECT acknowledged that the EU had competence over some matters regulated by the ECT and that includes the power to issue binding decisions on the members of the ECT and, by extension, tribunals constituted by them (¶ 159).

EU law "represents a more developed and articulated legal system which is without doubt more favourable and offers more articulated forms of protection to the investors and their investments than a multilateral treaty such as the ECT" so, EU law mechanisms for adjudicating the dispute are preferable to ECT arbitration (¶ 163). And, even if they were not, the Lisbon Treaty is later in time and supersedes the ECT (¶ 164).

Respondent also argued that any award rendered by the Tribunal would be unenforceable and subject to non-recognition duties (¶ 169).

3.1.2 The GSE conventions' exclusive jurisdiction clause precludes arbitration

Respondent's argued that Claimant failed to satisfy Article 26 of the ECT's requirement for unconditional consent. The GSE conventions include a provision for exclusive jurisdiction in favour of the courts of Rome (¶ 239). So, Respondent argued it had not given unconditional consent since under the GSE conventions, the parties had opted for an alternative exclusive dispute settlement procedure (¶ 240).

3.1.3 Failure to request an amical solution regarding the Romani Decree

Respondent's argued that none of Claimant's notice letters referred specifically to the Romani Decree, and so Claimant failed to request an amical solution to its Romani Decree-based claim prior to its request for arbitration (¶ 265). Claimant's reference to "acts and omissions of Italy since at least 2011" is not sufficient to encompass the Romani Decree, especially considering the fact that Claimant's 5 May 2015 letter actually sought to praise Italy's pre-2012 measures – which includes the Romani Decree (¶¶ 266-267).

The principle of good faith requires investors to clearly lay out their claims and not *ex post* construe them, and so the claim relating to the Romani Decree should be dismissed seeing as no attempt to settle that dispute had been made (¶¶ 267-269).

3.1.4 The Taxation "carve-out" regarding Conto Energia V

Respondent argued that *Conto Energia V* is a taxation measure within the meaning of Article 21 of the ECT and is excluded from the application of the ECT (¶ 284).

This decree satisfied the ECT's definition of a taxation measure because: (1) the source of the measure is found in domestic legislation; and (2) it relates to a fiscal measure (¶¶ 285-288). Respondent also explained that the *CEF Energia v. Italy* tribunal found the very same measures to be a taxation measure within the meaning of Article 21 (¶ 290). Respondent rejected Claimant's assertion that the most-favoured nation and national treatment principles in the ECT preclude the taxation exception from applying to Italy (since Italy has other investment treaties which contain no such exception), because Claimant did not rely on the most-favoured nation or national treatment provisions of the ECT in the present case (¶ 291).

3.2 Claimant's positions on jurisdiction

Claimant argued that the Tribunal had jurisdiction over the dispute and that all requirements of Article 26 of the ECT and Article 25 of the ICSID Convention were met (¶ 150).

3.2.1 The "intra-EU" objection does not apply

Claimant argued that the text, context, and object and purpose of the ECT confirms that the Tribunal has jurisdiction over the Dispute (¶ 170). First, the text of Article 26 states that the ECT permits "[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former" to be submitted to ICSID arbitration – and provides no carve out for intra-EU disputes (¶ 171).

Second, nothing in Article 16 supports Respondent's allegation that EU law prevails over the ECT (¶ 172). The ECT provides protections that the investors do not otherwise have, inter alia, investor-State arbitration, and Respondent failed to establish that intra-EU relations deserve special treatment, or that EU law otherwise prevails over the ECT (¶ 172).

Claimant argued that Article 1, defining an REIO, does not support Respondent's intra-EU objection. Where the Contracting Parties intended to permit other agreements to supersede the ECT, they included a disconnection clause for that agreement (¶ 173). There is no such an exception for the EU Treaties, so the Contracting Parties did not intend for the EU Treaties to prevail over the ECT (¶ 173). (Indeed, a disconnection clause for the EU Treaties was proposed, and after Contracting Parties rejected this proposal and it was withdrawn (¶ 176)).

Third, the object and purpose of the ECT creating a broader European energy market is consistent with applying the ECT to all Contracting Parties and investors without exception (¶ 174). Respondent's submissions on subsequent practice do not support its intra-EU objection. Those submissions recount the positions of a minority of ECT Contracting States; and Italy itself has not consistently raised the intra-EU objection (¶ 175). (In *Blusun v. Italy*, only the EC raised the intra-EU objection (Italy itself, did not) (¶ 175)).

Respondent was incorrect that EU law was part of the "applicable rules and principles of international law" governing jurisdiction (¶ 177). Article 26(6) concerns substantive law governing the merits of the case and so, even if Respondent were correct that EU law was a part of the "applicable rules and principles of international law" it has no role in determining the Court's jurisdiction (¶ 177). EU cases, including *Achmea*, are not pertinent to this dispute (¶ 182). *Achmea* concerned a different type of treaty (a bilateral investment treaty) and so, unlike the ECT (a multilateral treaty of which the EU is a party), the policy and constitutional concerns underlying *Achmea* do not apply to intra-EU arbitration under the ECT – especially considering the governing law is the ECT and international law (not EU law) (¶ 182).

Claimant finally objected to Respondent's argument that EU law takes priority over, or otherwise modifies the ECT. The ECT and the EU Treaties relate to different subject matters, so, the two can coexist and be applied harmoniously (¶ 178). The pertinent provisions of EU law Respondent relies upon also pre-date the ECT and are not later in time, nor do they otherwise modify the ECT (¶¶ 179-180). Any incompatibility between the ECT and the EU Treaties is governed by Article 16, which resolves the conflict in favour of the treaty offering the most favourable protections (¶ 179). The ECT is that treaty, as it provides for investor-State arbitration (¶ 179).

Finally, the Tribunal should not decline to exercise its jurisdiction on potential enforcement grounds. Since, even if it were true that EU Member States would not enforce the award, they represent a fraction of ICSID Convention Member States, and the award could be enforced in any one of those states (¶ 185).

3.2.2 The GSE conventions do not vitiate Italy's consent to arbitrate

Claimant argued that Respondent's GSE convention objection was inconsistent with the text, context and the object and purpose of the ECT (¶ 245). Article 26(2) of the ECT clarifies that an investor "may choose" any of the for a listed in sub-paragraphs (a) to (c) (¶ 246). As a result, Respondent's position that Claimant *must choose* sub-paragraph (b), a dispute resolution mechanism the parties previously agreed to under a contract, is flawed (¶ 246).

3.2.3 Clamant provided notice of a dispute concerning the Romani Decree

Claimant argued it fully satisfied the procedural requirements in Article 26(1) and (2) of the ECT (¶ 271). Claimant put Respondent on notice regarding Project Vega (which was based on the Romani Decree), so Respondent had clear notice of Claimant's claim (¶ 271). Claimant also argued that because Respondent failed to acknowledge all but one of its letters requesting amicable settlement, and made no effort to resolve the dispute, that there is no evidence that Claimant's Romani Decree claim was capable of amicable resolution (¶ 272).

3.2.4 Conto Energia V is not a taxation measure

Claimant argued that *Conto Energia V* was not a taxation measure. The administrative fee introduced in that decree was a charge for specific services provided to solar producers as a part of an incentive scheme that benefits those producers (¶ 294). Respondent's practice of charging a value-added tax on the fee supports Claimant's position that the administrative fee is not a tax (¶ 295).

The taxation carve out in the ECT should not apply because the Claimant should be granted most favourable treatment (¶ 296). Other Italian investment treaties did not include such a carve out, and so to ensure that Claimant received treatment no less favourable than that accorded to other investors, such a carve out should not apply (¶ 296).

3.3 The European Commission's Position

The EC Submission exclusively addressed the intra-EU objection. Like Respondent, the EC argued that Contracting Parties were aware of the special features of the EU legal order and the transfer of certain competencies to REIOs (as recognized in Article 1 of the ECT) (¶ 187). EU Member States transferred the competency to adjudicate intra-EU disputes to EU courts and tribunals and so EU Member States, like Italy, could not offer to arbitrate disputes involving investors from other EU Member States (¶ 187).

The EC also alleged that EU law is the applicable law governing the arbitration (¶ 188). And, since the ECT and EU Treaties relate to the same subject matter (with the TFEU being later in time), as a matter of interpretation, the Tribunal should find EU law takes primacy over the ECT and militates against intra-EU arbitration (¶ 189). (The EC also criticized another intra-EU ECT ICSID award and argued that the tribunal incorrectly interpreted *Achmea* (¶ 190))

4. Tribunal's Analysis Regarding Jurisdiction

The Tribunal rejected all of Respondent's jurisdictional objections.

4.1 The Intra-EU Objection

The Tribunal found intra-EU claims are permitted under the ECT. It focused on Article 16, which prevents prior or subsequent agreements from restricting the investors' and their investments' protections. It found that the issue of whether the ECT and the EU Treaties are on the "same subject matter" was irrelevant for purposes of Article 16 (unlike Article 30 of the VCLT) (¶ 208) (The Tribunal also explained that Article 30 of the VCLT is inapplicable where one of the treaties has a supremacy clause, such as Article 16 of the ECT (¶¶ 206, 208)). The Tribunal agreed with Claimant that the ECT is more favourable to investors and investments than EU law, at least in some respects since it grants access to investor-State arbitration (¶ 211). It also found it unnecessary to determine whether EU law is part of the law to be applied at a jurisdictional level, since Article 16 gives preference to the ECT in either case (¶ 213).

The Tribunal found that *Achmea* had no impact on its jurisdiction. The ECT must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, and in light of its object and purpose (¶ 215). The Tribunal agreed with Claimant and other intra-EU ECT tribunals that the ECT did not have an implicit carve-out or disconnection clause prohibiting intra-EU disputes (¶¶ 216-219).

The Tribunal also rejected Respondent's argument that the EU Treaties modified EU Member States ECT obligations and introduced an implicit disconnection clause. The ECT prohibit amendments and Respondent position was inconsistent with Article 41 of the VCLT. Article 41 prohibits modifications that affect the enjoyment of other parties' rights (¶ 229). Since Respondent's interpretation effects investors access to the ECT's dispute settlement provision, the EU Treaties could not have modified the ECT (¶¶ 229-230). The Tribunal also agreed with Claimant that EC and EU Member States declarations cannot alter the clear terms of the ECT and preclude intra-EU arbitration (¶ 223).

Finally, the Tribunal found it had a duty to issue an Award on the merits so long as it has jurisdiction over the claims submitted to it, and rejected Respondent's comity and *forum non conveniens* arguments (¶ 236).

4.2 The GSE Convention Objection

The Tribunal rejected Respondent's objection that the GSE conventions' dispute resolution clause precluded arbitration. Italy's declaration in Annex ID of the ECT explained Respondent's interpretation of the ECT's fork-in-the-road clause: Italy "does not allow the dispute between an Investor and a Contracting Party to be submitted for international arbitration … provided that an Investor *has already submitted the dispute*…" (¶ 257, emphasis added). Consistent with Italy's declaration, Italy's consent would only be withdrawn had Clamant *already submitted* the dispute, which it had not (¶ 258).

4.3 Seeking Amicable Resolution of the Romani Decree Claim

The Tribunal rejected Respondent's third jurisdictional objection (¶ 283). Article 26 of the ECT does not define the form or level of specificity investor must use when placing the host State on notice in order to attempt to reach an amicable settlement of the dispute (¶ 278). And, if Respondent were correct that the principle of good faith required Claimant to specify its claims, Respondent had a reciprocal duty to seek clarification from Claimant as to its claims – which it did not do (¶¶ 279-280). Finally, the Tribunal found that the requirement to seek an amicable settlement states is not absolute but requires investors to seek an amicable settlement "if possible" (¶ 281). Given Respondent's lack of reaction to any of Claimant's five notice letters, the Tribunal found it highly doubtful that Claimant's claims – including those based on the Romani Decree – could have been settled (¶ 281).

4.4 The Taxation Exception and Conto Energia V

The Tribunal found that the fees established by *Conto Energia V* qualify as a fee rather than a tax (¶ 306). The decisive point for the Tribunal was that a fee charged by the government can be distinguished from a tax when it is charged as a payment for a particular service (¶¶ 304-305). Here, the fee established by *Conto Energia V* is charged to PV plants so that they may benefit from the FIT regime (¶ 306), confirming that this fee was in fact a "fee" and not a "tax". The Tribunal found the fact that the fee is subject to value-added tax to be a "significant indicator of the non-tax character of the fee in question" (¶ 310).

5. Positions of the Parties on the Merits

5.1 Claimant's Position

Claimant challenged three measures adopted by Respondent between 2011 and 2014 which constitute violations of Respondent's Article 10 and Article 13 ECT obligations (¶ 144).

5.1.1 The Spalma-incentivi Decree reduced the FTI for the 25 PV plants and raised the administrative management fee breaching Article 10(1)

Claimant argued that the *Spalma-incentivi* Decree affected the 25 PV plants because it reduced the amount of FIT and deferred payment of the incentives, causing substantial economic losses to Claimant (¶ 318). This decree harmed Claimant's subsidiaries ability to meet certain project financing obligations that had been entered into on reliance of the FIT Respondent promised (¶ 322). Without FIT, Claimant's subsidiaries did not distribute dividends – since all revenues coming from the PV plants were required to be used to pay loans and plant operating costs (¶ 323). Three of Claimant's Special Purpose Vehicles ('SPV') also went into 'technical default' forcing Claimant to renegotiate certain loans and restructure its operations (¶¶ 323-324).

Claimant argued Respondent' breached two of its ECT obligations through the *Spalma-incentivi* Decree: its umbrella clause (Article 10(1) last sentence); and fair and equitable treatment (Article 10(1) first and second sentences).

5.1.1.1 Umbrella Clause

Claimant argued that Respondent's *Spalma-incentivi* Decree changed its obligations under the GSE conventions (¶ 326). The GSE is a State-owned entity and acted on behalf of Respondent when entering into each of the GSE conventions (¶ 328). Through the *Spalma-incentivi* Decree, Respondent unilaterally altered the parties' GSE conventions when it imposed a retroactive reduction of FIT and modified the payment terms (¶ 329).

5.1.1.2 Fair and Equitable Treatment

Claimant argued that the *Spalma-incentivi* Decree also breached the fair and equitable treatment clause of Article 10(1) because it violated Claimant's legitimate expectations and failed to ensure the stability and transparency of the Italian legal framework (¶ 334). Respondent made specific representations that it would maintain a stable legal framework, including the levels of FIT, which were memorialized in the GSE conventions (¶ 335). Claimant relied on these representations (found it both the GSE conventions and the *Conti Energia*, when it invested in PV plants in Italy (¶ 336).

5.1.2 The Romani Decree forced Claimant to abandon Project Vega, breaching Article 10(1) regarding fair and equitable treatment

Claimant's also argued that when Italy enacted the Romani Decree, it was forced to abandon its "Project Vega" – which concerned the construction of a single 123 MW solar plant in northern Italy (¶ 478). That plant was designed to benefit from the FIT under *Conto Energia III* (¶ 481), but the Romani Decree and *Conto Energia IV* altered the conditions to access FIT and made it impossible for Claimant to secure the financing required for Project Vega (¶ 484), and making the project economically unviable (¶ 492). The changes in Italy's regulatory framework were also not stable, equitable, favourable or transparent, breaching Respondent's Article 10(1) FET obligation (¶ 493).

5.1.3 Conto Energia V resulted in the "non-accessibility" of Conto Energia IV for the Frosinone plants, breaching ECT Articles 10(1) and 13(1)

Claimant argued that it decided to invest in the Frosinone plants in late September/early October 2011 based on *Conto Energia IV* (¶¶ 533-534). The Frosinone plants were set to be complete in time to qualify for, at least, the 2013 FIT (¶ 537). But, following *Conto Energia V*, FIT for plants (like Frosinone) was altered such that Claimants now only received a guaranteed minimum price for electricity fed into the grid, and also now had to pay an administrative fee (¶¶ 541-542). This resulted in the Frosinone plants providing no financial benefit to Claimant (¶ 543). Respondent's actions breached its Article 10(1) FET obligation, because the change from the *Conto Energia IV* to *Conto Energia V* was not foreseeable or transparent (*see* ¶ 546).

Conto Energia V's provisions also nationalized or expropriated the Frosinone plants in breach of ECT Article 13(1) (¶ 549). Respondent's measures made it impossible for the Frosinone plants to generate revenues sufficient to offset the costs of acquiring, constructing, and putting them into service were an expropriatory measure (¶ 549).

Conto Energia V also unilaterally reduced the incentive payments to 23 of the 25 plants to compensate for the newly invented GSE administrative fee, modifying the GSE conventions under the Second, Third and Fourth Energy Accounts (¶ 552). This violated Claimant's legitimate expectation that Respondent would pay precisely the stated rate in each of the GSE conventions, and breached its Article 10(1) umbrella clause obligation (¶ 552).

5.2 Respondent's Positions on the Merits

5.2.1 The Spalma-incentivi Decree was necessary and did not violate ECT Article 10(1)

Respondent argued that the *Spalma-incentivi* Decree, like the prior *Destinazione Italia* Decree, was designed to avoid overburdening consumers who pay the main share of expenses for renewable energy expenses through their electricity bills (¶ 341).

5.2.1.1 Umbrella clause

Respondent argued that the *Spalma-incentivi* Decree is not covered by the ECT's umbrella clause because that clause does not apply to legislation or regulatory obligations (¶ 344). The GSE conventions are also not like as private contracts because they do not result from free negotiations between the parties since they are unilateral contracts established by, and subject to, the Italian regulatory framework (¶¶ 345-346). The Italian Constitutional Court also confirmed the GSE conventions are regulatory in nature and not private law contracts (¶ 349).

5.2.1.2 Fair and equitable treatment

Respondent argued that changes to its regulatory regime should not be a basis for a fair and equitable treatment claim because the investor must consider the State's fundamental prerogative in legislating – including its power to regulate (¶ 351). The stability and transparency prongs of the fair and equitable treatment obligation do not require a State to freeze its regulatory regime (¶¶ 351, 356-360). Instead, States may make a reasonable degree of modifications (¶ 351). As a sophisticated investor, Claimant should have been aware of potential market dynamics that would require further regulation by Respondent (¶¶ 352-354).

5.2.2 Project Vega's failure is not Respondent's fault

Respondent explained that the difficulties Claimant faced in implementing Project Vega did not result directly from the adoption of the Romani Decree – recalling that other PV projects in the same time period were able to obtain financing (¶ 502). Thus, Claimant failed to satisfy its causation burden that Respondent's legislation caused Project Vega's failure (¶ 502). Respondent also argued it was within its regulatory right to modify its energy incentive regime and Claimant could not have reasonably expected to benefit from FIT under a certain energy account (¶¶ 507-508).

Project Vega was also now on track and set to receive FIT under *Conto Energia V*, and so if the Tribunal did not reject Claimant's claim based on Project Vega, at a minimum it should reduce damages in a way that acknowledges Project Vega's current status (¶ 509).

5.2.3 Conto Energia V was consistent with Respondent's right to regulate

Respondent argued that changes to its regulatory regime, including *Conto Energia V*, were foreseeable to reasonable investors (¶ 543). Under the terms of *Conto Energia IV*, Claimant was aware that PV plants might not be included in the register in a position high enough to qualify for incentive payments, so Claimant had invested in the Frosinone plants despite knowing there was a risk that they would not receive energy tariffs (¶ 544). Claimant could not have a legitimate expectation that the Frosinone plants would benefit from the FIT under *Conto Energia IV* (¶ 555).

Claimant also failed to establish any expropriation of the Frosinone plants (¶ 560). Reducing expected income is not sufficient, and the fact that Claimant sold the Frosinone plants proves that the plants can be profitable (¶ 560). At most, *Conto Energia V* could be considered a regulatory taking which, because it was non-discriminatory, did not require Respondent to compensate Claimant (¶ 561).

Finally, introducing the GSE administrative fees did not violate Claimant's legitimate expectations. Claimant could not reasonably assume Respondent would never impose new fiscal measures, fees or costs as part of its regulatory framework (¶ 563). The GSE administrative fees were paid by off-setting PV producers' incentives – which was a mode to collect GSE fees, not a change in the contractual terms of GSE conventions (¶ 562).

6. Tribunal's Analysis Regarding the Merits

The Tribunal rejected all of Claimant's claims.

6.1 Claims Regarding the Spalma-incentivi Decree

First, the Tribunal analysed Claimant's arguments regarding the impact the *Spalma-incentivi* Decree had on the GSE conventions, and whether Respondent breached its umbrella clause obligation. It agreed with Claimant that the ECT's umbrella clause covers obligations entered into with the investor and with the investment (¶ 368), and accepted Claimant's position that actions of the GSE, including the conclusion of the GSE conventions, are attributable to Respondent (¶ 370). But, the Tribunal agreed with Respondent that the GSE conventions are not mere private law contracts (¶ 373). Under the ECT's umbrella clause, an obligation can only be deemed "entered into" if it is a self-standing agreement as compared to any general legislative and regulatory acts (¶ 379). The GSE conventions lacked the necessary autonomy, and so they did not fall within the umbrella clause (¶ 380).

The Tribunal also rejected Claimant's umbrella clause claims related to the Italian regulatory framework. Claimant could only rely on specific commitments "entered into" by the Respondent and, to the extent that those commitments were regulatory acts which gave rise to legitimate expectations, these claims were duplicative of Claimant's FET claim, and so the Tribunal did not reach a conclusion on a potential breach of the umbrella clause (¶ 387).

Second, the Tribunal analysed whether the *Spalma-incentivi* Decree breached Respondent's FET obligations, and found by majority that it did not (¶ 476). It agreed with Respondent that an investor in a highly regulated market, like electricity, must recognize that a host State may make policy adjustments to that market (¶ 457). It found, by majority (¶ 639(2)), that the *Spalma-incentivi* Decree, while modifying the incentive regime, was essentially the kind of modification that Claimant could expect within the energy market (¶ 464). And, given the relatively high threshold for a FET breach, this modification was not excessive or disproportionate enough to constitute a breach of Respondent's obligation (¶¶ 469-475).

6.2 Claims Regarding the Romani Decree and Project Vega

The Tribunal found that at the time the Romani Decree and *Conto Energia IV* were adopted, Project Vega had only been partially realized, and many aspects of that project remained outstanding (¶ 519). Claimant's choice to abandon the project, rather than seek to modify Project Vega by, *inter alia*, accelerating its timeline for development so that Project Vega could obtain FIT under *Conto Energia IV*, suggest that the Romani Decree and *Conto Energia IV* were not the proximate cause of Project Vega's abandonment, or Claimant's harm (¶¶ 522-523). Without this causal nexus, the Tribunal found Respondent could not be responsible for Project Vega's failure (¶ 526).

6.3 Claims Regarding the Conto Energia V and the Frosinone Plants

First, the Tribunal rejected Claimant's fair and equitable treatment arguments concerning *Conto Energia V*. Claimant could not have assumed a static regulatory framework (¶ 595), and modifications to the Italian energy market as a result of *Conto Energia V* were reasonable and foreseeable (¶¶ 572, 596), including the introduction of the GSE fee (¶ 602). These changes, while reducing the overall profits for PV plants, maintained the overall structure and essential elements of the Italian incentivization regime for solar energy (¶ 606).

Second, the Tribunal found that *Conto Energia V* did not expropriate Claimant's investment in the Frosinone plants (¶ 612). Claimant did not have a "right" to expect to benefit from the 2013 tariff under *Conto Energia IV*, and so withdrawing the plants' possibility of benefiting from that tariff was not an expropriation (¶¶ 610, 612).

Finally, the Tribunal analysed whether GSE administrative management fees (introduced by *Conto Energia V* and amended by the *Spalma-incentivi* Decree) constituted a breach of Respondent's Article 10(1) obligation. It found that the GSE administrative management fee was reasonable, foreseeable and proportionate because PV producers should have been prepared for certain modifications to the amount of incentives a plant received (¶ 619), and the economic burden on Claimant from the modification in the administrative management fee was low (not exceeding half of a percent of the incentives Claimant received) (¶ 624).

7. Costs

The Tribunal found both parties prevailed to a significant extent (Claimant with respect to jurisdiction, and Respondent with respect to merits), and so each party should each bear half of the costs of the arbitration, and bear its own direct costs (¶ 636).

8. Dissenting Opinion of Judge O. Thomas Johnson

Judge Johnson issued a dissent, limited to the Tribunal's finding that Respondent's *Spalma-incentivi* Decree did not breach Article 10(1) of the ECT. He explained that the *Conti Energia* set specific rates that PV plants would be paid for electricity produced for a period of 20 years (Dissent, ¶ 5). Those terms were later modified by the *Spalma-incentivi* decree (Dissent, ¶ 5).

Judge Johnson concluded that it was inconsequential that Respondent did not separately promise not to break its original promise to provide PV plants specific rates for the energy produced (Dissent ¶¶ 8-10). He further argued that to the extent the Majority considered the issue to be that the modifications were 'minor' – such reasoning should not lead to a dismissal of Claimant's FET claim, but instead to a reduction in the damage awarded to Claimant (¶¶ 11-12).