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FINAL AWARD

Date: 25 March 2020

Seat of the Arbitration: Stockholm, Sweden

Arbitration No.: SCC ARBITRATION V (2016/32)

CLAIMANTS: **SUNRESERVE LUXCO HOLDINGS S.À.R.L. (LUXEMBOURG);**
SUNRESERVE LUXCO HOLDINGS II S.À.R.L. (LUXEMBOURG);
SUNRESERVE LUXCO HOLDINGS III S.À.R.L. (LUXEMBOURG)

RESPONDENT: **THE ITALIAN REPUBLIC**

MEMBERS OF THE ARBITRAL TRIBUNAL:

Professor Dr. Albert Jan VAN DEN BERG (Chairperson)
Prof. Dr. Klaus SACHS
Prof. Andrea GIARDINA

SECRETARY OF THE ARBITRAL TRIBUNAL:

Mr. Pratyush PANJWANI

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

AG Opinion	Opinion of the Advocate General Wathelet dated 19 September 2017 in Case C-284/16, *Slowakische Republik v Achmea BV*
Answer and Request for Dismissal	Respondent's Answer to Claimants' RfA, together with a Request for Dismissal under Article 10 SCC Rules dated 31 October 2016
BITs	Bilateral Investment Treaties
Campania	A 20.41 MW plant located in the Municipality of Gugliano (Province of Naples) acquired by First Claimant
C-CS	Claimants' Costs Submission dated 1 March 2019
Claimants	First Claimant, Second Claimant and Third Claimant (collectively)
Constitutional Court Decision	Italian Constitutional Court's Decision No. 16/2017 dated 24 January 2017
C-PHB	Claimants' Post-Hearing Brief dated 25 January 2019
C-RPHB	Claimants' Reply Post-Hearing Brief dated 1 March 2019
C-SoRj	Claimants' Rejoinder on Jurisdiction dated 3 August 2018
Decision No. 10/2015	Italian Constitutional Court's Decision No. 10/2015 dated 11 February 2015
Destinazione Italia	Legislative Decree No. 145/2013 dated 23 December 2013
EC	European Commission
EC Communication	EC Communication to the Parliament and the Council, bearing number COM(2018) 547/2, dated 19 July 2018
EC Intervention Application	EC's Application for leave to intervene as a non-disputing party in this arbitration dated 27 January 2017
EC NDP Submission	EC's *Amicus Curiae* Brief dated 9 May 2018
ECJ	Court of Justice of the European Union
ECJ Judgment	ECJ's Judgment dated 6 March 2018 in Case C-284/16,

	Slowakische Republik v Achmea BV
ECT	Energy Charter Treaty 1994
EIA	Economic Integration Agreement
EU	European Union
EU Treaties	Treaty of the European Union and Treaty of the Functioning of the European Union (collectively)
FET	Fair and Equitable Treatment
Fifth *Conto Energia*	Decree dated 5 July 2012 enacted by the Ministry for Economic Development in consultation with the Ministry for Environment
First Claimant	SunReserve Luxco Holdings S.À.R.L
First *Conto Energia*	Decree dated 28 July 2005 enacted by the Ministry for Productive Activities in consultation with the Ministry for Environment
First Reserve	First Reserve Energy Infrastructure Fund, LP
Fiumicino	A 2.97 MW plant located in the Municipality of Fiumicino, Lazio Region acquired by Third Claimant
Florian First Witness Statement	First Witness Statement of Mr. Mark Florian dated 28 July 2017
Fourth *Conto Energia*	Decree dated 5 May 2011 enacted by the Ministry for Economic Development in consultation with the Ministry for Environment
FR Holdings	FREI Sun Holdings (Cayman) Ltd
Framework Agreement	Framework Agreement by And among Sun Edison LLC, FREI Sun Holdings (Cayman) Ltd., FREI Sun Holdings (US) LLC, SunEdison Reserve US, L.P., and SunEdison Reserve Internaitonal, L.P.
GRTN	*Gestore della rete di transmission nazionale Spa*
GSE	*Gestore dei Servizi Energetici*
Hearing	Hearing conducted from 26 to 29 November 2018 in Paris, France
IMU Charge	A municipal charge on buildings

January 2019 Declarations	Declarations of the Representatives of the Governments of the European Union Member States dated 15-16 January 2019
Lenare	A 997.92 kW plant located in the Municipality of Lequile acquired by First Claimant
Milana	A 1.66 MW plant located in Sicily acquired by First Claimant
Monaci	A 998.13 kW plant located in the Municipality of Lequile acquired by First Claimant
OECD	Organisation for Economic Co-operation and Development
Parties	Claimants and Respondent (collectively)
PHOM	Pre-Hearing Organizational Meeting conducted on 8 November 2018
PO 1	Procedural Order No. 1 (By Consent) issued on 16 March 2017
PO 2	Procedural Order No. 2 issued on 3 August 2018
PO 3	Procedural Order No. 3 (By Consent) issued on 22 November 2018
PO 4	Procedural Order No. 4 issued on 7 February 2019
PO 5	Procedural Order No. 5 issued on 4 July 2019
PTC	Preparatory Telephone Conference conducted on 22 February 2017
R-CS	Respondent's Costs Submission dated 8 March 2019
REIO	Regional Economic Integration Organisations
Request for Suspension	Respondent's Request for Suspension dated 18 July 2019
Request for Termination	Respondent's Request for Termination dated 25 January 2019
Resolution 111/06	Resolution dated 9 June 2006 issued by the Italian Electrical Energy Authority
Resolution 281	Resolution 281/2012/R/EFR dated 5 July 2012 issued by the Italian Electrical Energy Authority

Resolution 493	Resolution 493/2012/R/EFR dated 22 November 2012 issued by the Italian Electrical Energy Authority
Resolution 522`	Resolution 522/2014/R/EEL dated 23 October 2014 issued by the Italian Electrical Energy Authority
Resolution 618	Resolution No. 618/2013/R/EFR dated 19 December 2013 issued by the Italian Electrical Energy Authority
Respondent/Italy	The Italian Republic
RfA	Request for Arbitration dated 26 August 2016
Romani Decree	Legislative Decree No. 28/2011 dated 3 March 2011
Rovigo	A 70.5 MW plant located in the Municipality of San Bellino, Veneto Region acquired by Second Claimant
R-PHB	Respondent's Post-Hearing Brief dated 25 January 2019
R-RPHB	Respondent's Reply Post-Hearing Brief dated 1 March 2019
R-SoRj	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 6 July 2018
Rustico	A 1.8 MW plant located in Sicily acquired by First Claimant
San Marco	A 985.71 kW plant located in the Municipality of Lequile acquired by First Claimant
Santoro	A 968.31 kW plant located in the Municipality of Soleto acquired by First Claimant
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Board	SCC's Board of Directors
SCC Rules	Arbitration Rules of the SCC 2010
Second Claimant	SunReserve Luxco Holdings II S.À.R.L
Second *Conto Energia*	Decree dated 19 February 2007 enacted by the Ministry for Economic Development in consultation with the Ministry for Environment
Shockley Witness	Witness Statement of Mr. Ryan Shockley dated 28 July 2017

Statement	
SoC	Claimants' Statement of Claim dated 28 July 2017
SoD	Respondent's Statement of Defence dated 22 December 2017
SoRy	Claimants' Reply Memorial on the Merits and Counter-Memorial on Jurisdiction dated 30 March 2018
***Spalma-incentivi* Decree**	Legislative Decree No. 91/2014 dated 24 June 2014 converted into Law No. 116/2014 dated 11 August 2014
SPV	Special Purpose Vehicle
SunEdison	SunEdison LLC
Swedish Arbitration Act	Swedish Arbitration Act (SFS 1999:116)
TASI Charge	A charge on municipal services such as road maintenance and public lighting
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
Third Claimant	SunReserve Luxco Holdings III S.À.R.L
Third *Conto Energia*	Decree dated 6 August 2010 enacted by the Ministry for Economic Development in consultation with the Ministry for Environment
***Vattenfall* Decision**	*Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue
VCLT	Vienna Convention on the Law of Treaties 1969

I. INTRODUCTION

1. This is a Final Award concerning a dispute between SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L, on the one hand, and the Italian Republic, on the other hand.

2. These proceedings were instituted pursuant to the Energy Charter Treaty 1994 ("**ECT**"). It is not disputed that the the ECT entered into force for the home State of the three Claimants, i.e., the Grand Duchy of Luxembourg, on 16 April 1998.[1] It is also not disputed that the ECT had entered into force for the Italian Republic also on 16 April 1998.[2]

II. PARTIES

A. Claimants

3. The claimants in these proceedings are SunReserve Luxco Holdings S.À.R.L ("**First Claimant**"), SunReserve Luxco Holdings II S.À.R.L ("**Second Claimant**") and SunReserve Luxco Holdings III S.À.R.L ("**Third Claimant**"), all of which are limited liability companies duly established under the laws of the Grand Duchy of Luxembourg.[3] Their corporate structure is explained in detail in Section IV.E(1) below. Together, First Claimant, Second Claimant and Third Claimant are referred to as "**Claimants**".

4. The corporate address of Claimants is:

   6, rue Eugène Ruppert
   L-2453 Luxembourg

B. Respondent

5. The respondent in these proceedings is The Italian Republic ("**Italy**" or "**Respondent**").

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[1] **CEX-6**, Excerpt from the Energy Charter website – Luxembourg.

[2] **CEX-5**, Excerpt from the Energy Charter website – Italy. Although the Italian Republic has since withdrawn from the ECT, pursuant to Article 47(3) ECT, the provisions of the ECT continue to apply to investments made in the territory of the Italian Republic as of the date when the said withdrawal took effect for a period of 20 years.

[3] SoC, ¶ 19; **CEX-2**, Claimants' Registration Certificates in the Luxembourg Commercial Register and Board Resolutions on Subsequent Name Changes.

6. Claimants and Respondent are hereinafter collectively referred to as the "**Parties**". The Parties' respective representatives and their addresses are listed above on page 2.

III. PROCEDURAL HISTORY

7. On 26 August 2016, Claimants filed a Request for Arbitration ("**RfA**") 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 ("**SCC Rules**"). The SCC confirmed receipt of the RfA by correspondence of the same date.

8. In its RfA, Claimants proposed that the Tribunal should consist of three arbitrators. Claimants appointed Prof. Dr. Klaus Sachs as their party-appointed arbitrator pursuant to Article 13 SCC Rules. Further, Claimants proposed that the Chairperson of the Tribunal be selected by the two party-appointed arbitrators, with agreement of the parties. In addition, Claimants proposed Geneva, Switzerland as the seat of arbitration, and English as the procedural language for the arbitration.[4]

9. By correspondence dated 29 August 2016, the SCC sent a copy of the RfA to Respondent, inviting it to submit its Answer by 29 September 2016.

10. By correspondence dated 8 September 2016, Respondent acknowledged receipt of the RfA and requested the SCC to extend the deadline for submission of its Answer to 30 November 2016.

11. Upon being invited by the SCC to comment on Respondent's request for extension, on 15 September 2016, Claimants informed the SCC that they considered Respondent's request for a two-month extension to be unreasonable, and were instead prepared to agree to an extension until 31 October 2016.

12. On 16 September 2016, the SCC granted Respondent an extension of time until 31 October 2016 to submit its Answer, stating that the Answer may be brief.

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[4] RfA, ¶¶ 79-83.

13. 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 ("**Answer and Request for Dismissal**").[5]

14. In its Answer and Request for Dismissal, Respondent stated that in the event the case was not dismissed under Article 10 SCC Rules, it would agree with Claimants' proposals that the Tribunal be composed to three arbitrators, and that the Chairperson of the Tribunal be selected by the two party-appointed arbitrators with agreement of the parties (see ¶ 8 above). Respondent requested until 7 November 2016 to indicate its party-appointed arbitrator. In addition, Respondent proposed Rome, Italy as the seat of arbitration, and Italian as the procedural language.[6]

15. On 7 November 2016, Respondent appointed Prof. Andrea Giardina as its party-appointed arbitrator pursuant to Article 13 SCC Rules.

16. On 9 November 2016, Claimants provided their comments to Respondent's Answer and Request for Dismissal, requesting that the SCC Board of Directors ("**SCC Board**") dismiss Respondent's Request for Dismissal under Article 10 SCC Rules. Further, Claimants rejected Respondent's proposal of Rome, Italy as the seat of arbitration and Italian as the procedural language.

17. By correspondence dated 17 November 2016, the SCC informed the Parties that the SCC Board had decided that (i) the SCC did not manifestly lack jurisdiction under Article 10 SCC Rules; and (ii) the seat of arbitration shall be Stockholm, Sweden. In the same correspondence, the SCC stated that it shall proceed to give the two party-appointed arbitrators the opportunity to appoint the Chairperson of the Tribunal. The SCC wrote to the party-appointed, in this regard, on 17 November 2016, requesting them to provide the SCC with the selected Chairperson's name by 2 December 2016.

18. 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, and that the SCC shall refer the case to the Tribunal shortly.

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5 Answer and Request for Dismissal, ¶¶ 5-12.

6 Answer and Request for Dismissal, ¶¶ 15-17.

19. Pursuant to Article 18 SCC Rules, the SCC referred the case to the Tribunal on 16 January 2017.

20. 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 this arbitration ("**EC Intervention Application**"). In the EC Intervention Application, it questioned the Tribunal's jurisdiction to arbitrate the present case, *inter alia,* on the ground that the case pertains to obligations of European Union ("**EU**") Member States *inter se*, which cannot be resolved by way of investor-State dispute settlement under the ECT.[7] 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.[8] On this basis, it requested the Tribunal to (i) set a deadline for the EC to file a written submission; (iii) allow the EC access to the documents filed in the case, to the extent necessary for its intervention; and (iv) grant the EC leave to present its views at an oral hearing, if any takes place.[9]

21. By correspondence dated 31 January 2017, the Tribunal wrote the Parties (i) proposing to hold a Preparatory Telephone Conference ("**PTC**") to consult the Parties on the preliminary procedural issues and a procedural calendar for the case; (ii) circulating a draft Agenda for the PTC; (iii) transmitting the EC Intervention Application to the Parties; and (iv) inviting the Parties to provide any comments on the draft Agenda for the PTC and the EC Intervention Application.

22. On 10 February 2017, Claimants submitted their Response to the EC Intervention Application, in which they requested the Tribunal to (i) not grant the EC Intervention Application, on the ground that the EC does not meet the standard for intervention and that its submissions were meritless; or (ii) alternatively, to restrict the EC's role in the proceedings, if the EC Intervention Application is granted.

23. On 13 February 2017, Respondent submitted its position on the EC Intervention Application, in which it requested the Tribunal to (i) admit the EC as a non-disputing party in these proceedings and to allow adequate time for discussing the issues raised by the EC;

7 EC Intervention Application, ¶¶ 1-6, 16-26.

8 EC Intervention Application, ¶ 10.

9 EC Intervention Application, ¶ 27.

and (ii) permit the EC to access the relevant documents and to participate in the hearing (as limited to the jurisdiction issue that the EC raised).

24. Further to the Tribunal's correspondence of 31 January 2017 (see ¶ 21 above), the PTC was conducted between the Parties and the Tribunal on 22 February 2017. In light of the discussions that ensued during the PTC, the Tribunal circulated to the Parties a draft Timetable for the proceedings on 22 February 2017 itself. Thereafter, on 3 March 2017, the Tribunal circulated a draft Procedural Order No. 1 to the Parties, which was also based on the discussions that ensued during the PTC concerning the procedural rules applicable to these proceedings. The Parties were invited to provide any comments on the draft Timetable and the draft Procedural Order No. 1 by 14 March 2017.

25. After having received and taking into account the Parties' respective comments on the draft Timetable and the draft Procedural Order No. 1, the Tribunal issued the final Procedural Order No. 1 (By Consent), together with the Timetable attached as Annex A, on 16 March 2017 ("**PO 1**").

26. Notably, in PO 1, the Tribunal decided to (i) grant the EC Intervention Application, in part, fixing 10 May 2018 as the date for the EC to file a Written Submission as a non-disputing party; and (ii) determine at a subsequent date, after consultation with the Parties, whether and to what extent the EC shall be given access to the documents filed in these proceedings.[10] The Tribunal informed the EC of its decision to partially grant the EC Intervention Application by correspondence dated 17 March 2017.

27. Thereafter, by correspondence dated 21 March 2017, the Tribunal, pursuant to Article 37 SCC Rules, requested the SCC Board to extend the time limit for rendering the Final Award, in light of the fact that the Timetable for these proceedings, established with the Parties' consent, extended at least until mid-2019.

28. On the same date, i.e., 21 March 2017, the SCC granted the Parties an opportunity to submit any comments on the Tribunal's request for extension of the time limit for rendering the Final Award. By correspondences of the same date, Claimants and Respondent confirmed that they had no objection to the Tribunal's request.

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10 PO 1, ¶ 6.

29. Accordingly, by correspondence dated 22 March 2017, the SCC fixed 1 July 2019 as the time limit for rendering the Final Award.

30. In accordance with the Timetable established in PO 1, albeit with an eight-day extension agreed to by Respondent, Claimants submitted their Statement of Claim on 28 July 2017 ("**SoC**").

31. In accordance with the Timetable established in PO 1, Respondent submitted its Statement of Defence on 22 December 2017 ("**SoD**").

32. 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* ("**ECJ Judgment**").[11]

33. On 8 March 2018, the Tribunal wrote to the Parties in reference to the ECJ Judgment. In particular, in this correspondence, the Tribunal (i) mentioned 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 (see ¶ 26 above); (ii) invited Claimants to include in their Reply Memorial, due on 27 March 2018, any comments on the implications of the ECJ Judgment on the present case; and (iii) invited Respondent to provide any comments, limited to the implications of the ECJ Judgment on the present case, by 3 April 2018, without prejudice to Respondent's right to submit the Rejoinder Memorial due on 2 July 2018. The Parties' comments were invited by the Tribunal, explicitly without making any amendments to the other deadlines provided in the Timetable established in PO 1.

34. By correspondences dated 22 and 23 March 2018, the Parties agreed to modify the above prescribed deadlines and the Timetable established in PO 1, in the following manner, while confirming that the other deadlines mentioned in the Timetable established in PO 1 shall remain unaltered:

    (i) Claimants' Reply Memorial on the Merits and Counter-Memorial on Jurisdiction to be filed on 30 March 2018 (previously 27 March 2018);

11 **CL-125**, *Slowakische Republik v. Achmea B.V.*, ECJ Case C-284/16, Preliminary Ruling, Mar. 6, 2018.

(ii) Respondent's comments on the implications of the ECJ Judgement to be filed on 6 April 2018 (previously 3 April 2018);

(iii) Respondent's Rejoinder on the Merits and Reply on Jurisdiction to be filed on 5 July 2018 (previously 2 July 2018).

35. On 23 March 2018, the Tribunal approved the Parties' agreed modifications to the Timetable established in PO 1.

36. In accordance with the Timetable established in PO 1, as modified by the Parties' agreement on 23 March 2018 (see ¶¶ 34-35 above), Claimants submitted their Reply on the Merits and Counter-Memorial on Jurisdiction on 30 March 2018 ("**SoRy**").

37. On 6 April 2018, Respondent submitted its comments on the implications of the ECJ Judgement on the present case ("**Respondent's Comments on ECJ Judgment**").

38. On 9 April 2018, the Parties informed the Tribunal that, further to the Tribunal's directions in PO 1 (see ¶ 26 above),[12] the Parties had consulted amongst each other and agreed to provide to the EC certain relevant documents filed in this arbitration, prior to the EC's Written Submission as a non-disputing party scheduled on 10 May 2018.

39. By correspondence dated 9 April 2018, the Tribunal (i) informed the Parties that it considered it appropriate that the EC receive the relevant documents from the Tribunal itself, as opposed to the Parties; and (ii) requested the Parties to prepare one consolidated bundle of the relevant documents in a PDF format, and provide the same to the Tribunal by email, no later than 12 April 2018.

40. Having received the consolidated bundle of the relevant documents from the Parties, the Tribunal transmitted these documents to the EC on 13 April 2018.

41. In accordance with the Timetable established in PO 1, the EC submitted an "*Amicus Curiae* Brief" on 9 May 2018 ("**EC NDP Submission**"), which the Tribunal transmitted to the Parties on 14 May 2018.

42. Thereafter, on 23 May 2018, the Tribunal invited the Parties to (i) consult amongst each other and reach an agreement in respect of their preferred location and venue for the

[12] PO 1, ¶ 6.

Hearing scheduled in the week of 26-30 November 2018 as per the Timetable established in PO 1; and (ii) approve, or provide any comments on the engagement of Mr. Trevor McGowan as court reporter for the hearing.

43. 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. Further, Claimants confirmed their approval of Mr. Trevor McGowan's engagement as court reporter for the hearing.

44. The Tribunal granted Respondent until 7 June 2018 to provide its approval of, or comments on, Mr. Trevor McGowan's engagement as court reporter for the hearing, absent which, the Tribunal would confirm the appointment of Mr. McGowan as court reporter.

45. Having received no objection from Respondent until 7 June 2018, and in light of Claimants' express approval, the Tribunal confirmed the appointment of Mr. McGowan as court reporter on 8 June 2018.

46. In accordance with the Timetable established in PO 1, as modified by the Parties' agreement on 23 March 2018 (see ¶¶ 34-35 above), and with a further extension agreed to by Claimants, Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction on 6 July 2018 ("**R-SoRj**").

47. Thereafter, on 24 July 2018, Respondent submitted to the Tribunal, pursuant to ¶ 10.10 of PO 1, a request to introduce into the record a new document, which was released after the submission of its R-SoRj ("**Respondent's Request to Supplement the Record**"). This new document was the EC Communication to the Parliament and the Council, bearing number COM(2018) 547/2, dated 19 July 2018 ("**EC Communication 2018**").

48. The Tribunal invited Claimants to provide any comments on Respondent's Request to Supplement the Record by 26 July 2018. Claimants provided their comments on the said date, objecting to Respondent's Request to Supplement the Record.

49. On 30 July 2018, the Tribunal issued Procedural Order No. 2, in which the Tribunal (i) granted Respondent's Request to Supplement the Record; (ii) granted Claimants liberty to provide any comments on the EC Communication 2018, in Claimants' Rejoinder on

Jurisdiction; and (iii) granted Claimants a two-day extension to file their Rejoinder on Jurisdiction, which was originally scheduled for 1 August 2018 ("**PO 2**").

50. In accordance with the Timetable established in PO 1, as modified by the Tribunal in PO 2, Claimants submitted their Rejoinder on Jurisdiction on 3 August 2018 ("**C-SoRj**").

51. In accordance with the Timetable established in PO 1, on 1 October 2018, Claimants and Respondent notified the Tribunal of the other side's witnesses and experts they wished to cross-examine at the Hearing.

52. Thereafter, pursuant to ¶ 20.1 of PO 1, on 9 October 2018, the Tribunal submitted a proposal to the SCC to appoint Mr. Pratyush Panjwani, one of the Chairperson's law firm's associates, as the Arbitral Secretary in this case. The Tribunal also provided a proposed stipulation containing a description of the functions that it envisaged the Arbitral Secretary to perform under the Tribunal's supervision. The Tribunal requested the SCC to transmit the Tribunal's proposal to the Parties, and invite their comments on the same.

53. The SCC transmitted the Tribunal's proposal concerning the appointment and functions of the Arbitral Secretary to the Parties on 10 October 2018.

54. By correspondences dated 15 October 2018, Claimants and Respondent confirmed that they had no objections to the appointment of Mr. Pratyush Panjwani as Arbitral Secretary in this case.

55. By the same correspondences, and in accordance with the Timetable established in PO 1, the Parties submitted a Joint Chronological List of Exhibits.

56. Subsequently, by correspondence dated 20 October 2018, the Tribunal sent to the Parties a draft Agenda for the Pre-Hearing Organizational Meeting ("**PHOM**") scheduled to be conducted between the Tribunal and the Parties on 8 November 2018. The Parties were invited to confer on the Draft Agenda for the PHOM and to provide their joint or individual comments on the same by 29 October 2018.

57. By correspondence dated 29 October 2018, Claimants sent to the Tribunal their comments on the draft Agenda for the PHOM, including on points where the Parties had reached agreement.

58. On 8 November 2018, the PHOM was conducted between the Tribunal and the Parties. Further to the PHOM, the Tribunal circulated a draft of the Procedural Order No. 3 to the Parties for their comments. This draft Procedural Order No. 3 recorded the discussions that ensued during the PHOM.

59. By their respective correspondences dated 22 November 2018, Claimants and Respondent confirmed that they had no comments on draft Procedural Order No. 3. Accordingly, on 22 November 2018, the Tribunal issued Procedural Order No. 3 (By Consent) ("**PO 3**"). In PO 3, it was, *inter alia*, determined that the Parties shall make corrections to the trancripts of the hearing in consultation with each other one month after the hearing ends, i.e., by 31 December 2018.[13]

60. The hearing was conducted from 26 to 29 November 2018 in Paris, France ("**Hearing**"), in accordance with the Parties' agreement (see ¶ 43 above). The following witnesses were examined during the Hearing:

(i) Mr. Mark Florian (Claimants' fact witness);

(ii) Mr. Ryan Shockley (Claimants' fact witness);

(iii) Mr. Adi Blum (Claimants' fact witness);

(iv) Mr. Robert Hanna (Claimants' fact witness);

(v) Mr. Daniele Bacchiocchi (Respondent's fact witness);

(vi) Mr. Luca Miraglia (Respondent's fact witness);

(vii) Prof. Antonio D'Atena (Claimants' legal expert on Italian law);

(viii) Prof. Anna Romano (Respondent's legal expert on Italian law);

(ix) Dr. Boaz Moselle and Dr. Dora Grunwald (Claimants' regulatory experts);

(x) Mr. Richard Edwards (Claimants' quantum expert); and

(xi) Prof. Cesare Pozzi, Prof. Giuseppe Melis, Prof. Umberto Monarca and Prof. Ernesto Cassetta (Respondent's quantum experts).

13 PO 3, ¶ 8(e).

61. During the Hearing, the Parties agreed to the procedure and timetable for submitting post-hearing briefs. In particular, it was determined, with the agreement of the Parties, that the post-hearing briefs shall be simultaneously submitted by the Parties on 25 January 2019, followed by reply post-hearing briefs to be simultaneously submitted on 1 March 2019. Further, the cost submissions were scheduled for submission on 8 March 2019, and it was agreed that the Parties shall not submit Reply Cost Submissions.[14]

62. By Claimants' email dated 28 December 2018, the Parties jointly requeted for an extension of the deadline to provide corrections to the transcripts of the Hearing until 15 January 2019. On 1 January 2019, the Tribunal approved the Parties' joint request for extension.

63. Accordingly, on 15 January 2019, the Parties provided the revised transcripts of the Hearing, having agreed upon the corrections to the transcripts of Day 1 to 3 of the Hearing. With respect to Day 4 of the Hearing, Claimants pointed out that they disagreed with certain edits made by Respondent, but did not believe that the disagreements were material or would interfere with the Tribunal's general understanding of the transcript.

64. In accordance with the procedure and timetable for the submission of post-hearing briefs agreed upon during the Hearing (see ¶ 61 above), Claimants and Respondent simultaneously submitted their respective Post-Hearing Briefs on 25 January 2019 ("**C-PHB**" and "**R-PHB**" respectively).

65. Together with the R-PHB, Respondent also submitted a Request for Termination of these proceedings ("**Request for Termination**"), in light of the Declarations of the Representatives of the Governments of the European Union Member States dated 15-16 January 2019 ("**January 2019 Declarations**"). In its Request for Termination, Respondent also alternatively requested the Tribunal to suspend these arbitration proceedings.

66. By email dated 28 January 2019, the Tribunal invited Claimants to provide any comments on Respondent's Request for Termination by 4 February 2019. Accordingly, Claimants provided their comments on the Request for Termination on 4 February 2019, wherein they requested the Tribunal to reject Respondent's primary request for termination and the alternative request for suspension of the proceedings.

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14 Hr. Tr. Day 4, pp. 222:14-224:4.

67. On 7 February 2019, the Tribunal issued Procedural Order No. 4, in which the Tribunal rejected Respondent's Request for Termination in its entirety, including the alternative request for suspension of the proceedings ("**PO 4**").

68. In accordance with the procedure and timetable for the submission of post-hearing briefs agreed upon during the Hearing (see ¶ 61 above), Claimants and Respondent simultaneously submitted their respective Reply Post-Hearing Briefs on 1 March 2019 ("**C-RPHB**" and "**R-RPHB**" respectively).

69. Together with the C-RPHB, Claimants also submitted their Costs Submission on 1 March 2019 ("**C-CS**"). Respondent submitted its Costs Submission subsequently on 8 March 2019 ("**R-CS**").

70. In the meantime, on 7 March 2019, Claimants submitted a letter requesting for an opportunity to submit brief comments on the award in *CEF Energia B.V. v. Italy* (SCC Arbitration No. 2015/158), or alternatively, strike it from the record, on the ground that Respondent had submitted the said confidential award inti the record with the R-RPHB, and had also made submissions in respect of the same therein ("**Claimants' Letter on CEF Award**").

71. By email dated 7 March 2019, the Tribunal invited Respondent to provide any comments on Claimants' Letter on CEF Award by 8 March 2019. Accordingly, on 8 March 2019, Respondent provided its comments on Claimants' Letter on CEF Award, wherein it objected to Claimants' request for an opportunity to submit brief comments on the award in *CEF Energia B.V. v. Italy* (SCC Arbitration No. 2015/158).

72. By email dated 8 March 2019, the Tribunal granted Claimants until 15 March 2019 to submit brief comments on the award in *CEF Energia B.V. v. Italy* (SCC Arbitration No. 2015/158).

73. By email dated 14 March 2019, Claimants requested the Tribunal for an extension to submit their comments on the award in *CEF Energia B.V. v. Italy* (SCC Arbitration No. 2015/158). The Tribunal granted Claimants the requested extension until 20 March 2019.

74. By email dated 20 March 2019, Claimants submitted their comments on the award in *CEF Energia B.V. v. Italy* (SCC Arbitration No. 2015/158).

75. Thereafter, by its email dated 5 June 2019, the Tribunal requested the SCC Board for an extension of the time limit to render the award, pursuant to Article 37 of the SCC Rules, due to, *inter alia,* the intervening procedural developments in the case. This request was transmitted to the Parties by the SCC's letter dated 5 June 2019, wherein the Parties were invited to provide their comments by 12 June 2019. After having consulted the Parties, the SCC Board, on 13 June 2019, granted the Tribunal's request for an extension of the time limit to render the award, and extended the same until 1 October 2019.

76. On 18 June 2019, Respondent submitted a Request for Suspension, requesting the Tribunal to suspend these arbitration proceedings on the ground that the *Tribunale Amministrativo Regionale per il Lazio* in Italy had referred certain preliminary questions to the ECJ in two consolidated proceedings initiated by certain investors, which related to issues involved in the present arbitration ("**Request for Suspension**").

77. By email dated 19 June 2019, the Tribunal invited Claimants to provide any comments on Respondent's Request for Suspensionby 24 June 2019. Accordingly, on 24 June 2019, Claimants submitted their comments, wherein they objected to the Request for Suspension for being belated, inaccurate and unwarranted.

78. On 4 July 2019, the Tribunal issued Procedural Order No. 5, in which the Tribunal rejected Respondent's Request for Suspension ("**PO 5**").

79. Thereafter, on 9 August 2019, Respondent requested to introduce the award rendered in *Belenergia S.A. v. Italy* (ICSID Case No. ARB/15/40) into the record.

80. By email dated 12 August 2019, the Tribunal invited Claimants to provide any comments on Respondent's request to introduce the award rendered in *Belenergia S.A. v. Italy* (ICSID Case No. ARB/15/40) into the record. Accordingly, on 14 August 2019, Claimants confirmed that they had no objection to the introduction of the said award into the record, but requested that the Parties be granted the opportunity to submit their comments on the award by 30 August 2019.

81. By email dated 14 August 2019, Respondent confirmed that they had no objection to Claimants' request to submit comments on the award in *Belenergia S.A. v. Italy* (ICSID

Case No. ARB/15/40), but requested that the Parties be granted time until mid-September 2019 to submit such comments.

82. By email dated 14 August 2019, the Tribunal endorsed the Parties' agreement, and directed them to file simultaneous submissions on the award in *Belenergia S.A. v. Italy* (ICSID Case No. ARB/15/40) by 13 September 2019. Accordingly, Claimants and Respondent filed their submissions on this matter on 13 September 2019.

83. Thereafter, by its email dated 17 September 2019, the Tribunal requested the SCC Board for an extension of the time limit to render the award, pursuant to Article 37 of the SCC Rules, due to, *inter alia,* the intervening procedural developments in the case. This request was transmitted to the Parties by the SCC's letter dated 19 September 2019, wherein the Parties were invited to provide their comments by 23 September 2019. After having consulted the Parties, the SCC Board, on 24 September 2019, granted the Tribunal's request for an extension of the time limit to render the award, and extended the same until 31 March 2020.

84. By emails dated 6 December 2019, Respondent requested to introduce the awards rendered in *Baywa R.E. v. Spain* (ICSID Case No. ARB/15/16) and *Stadtwerke München GmbH v. Spain* (ICSID Case No. ARB/15/1) into the record.

85. By email dated 10 December 2019, the Tribunal forwarded Respondent's emails dated 6 December 2019 to all counsel and also invited Claimants to provide any comments on Respondent's emails.

86. Accordingly, by email dated 13 December 2019, Claimants informed the Tribunal that they had no objection to Respondent's request to introduce the awards rendered in *BayWa R.E. v. Spain* (ICSID Case No. ARB/15/16) and *Stadtwerke München GmbH v. Spain* (ICSID Case No. ARB/15/1) into the record. Simultanously, Claimants also requested that the following additional awards, decisions and dissenting opinions relating to Spain's feed-in tariff program be included into the record:

(i) the Dissenting Opinions of Prof. Kaj Hobér in *Stadtwerke München GmbH v. Spain* and of Prof. Horacio Grigera Naón in *BayWa R.E. v. Spain*;

(ii) *RREEF Infra. (G.P.) Ltd. & RREEF Pan-European Infra. Two Lux S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30), Decision on Responsibility and Principles of Quantum and Dissenting Opinion;

(iii) *Cube Infra. Fund SICAV et al. v. Kingdom of Spain* (ICSID Case No. ARB/15/20), Award;

(iv) *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Decision on Jurisdiction, Liability and Quantum Principles;

(v) *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Final Award;

(vi) *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38), Award;

(vii) *InfraRed Environmental Infrastructure GP Ltd et al. v. Spain* (ICSID Case No. ARB/14/12), Award and Dissenting Opinion (not public, see Tom Jones, Spain Liable Again in Solar Cases, Global Arbitration Review, Aug. 5, 2019); and

(viii) *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36), Award and Dissenting Opinion.

87. By email dated 16 December 2019, the Tribunal invited Respondent to provide any comments on Claimants' email of 13 December 2019. Accordingly, by email dated 17 December 2019, Respondent informed the Tribunal that it had no objection to Claimants' request to introduce the above listed awards, decisions and dissenting opinions into the record.

88. In light of the agreement between the Parties, the Tribunal, by its email dated 19 December 2019, admitted the awards, decisions and dissenting opinions identified in Respondent's emails of 6 December 2019 (see ¶ 84 above) and Claimants' email of 13 December 2019 (see ¶ 86 above) into the record. The Parties were directed to file these documents into the record by 23 December 2019. By emails dated 21 and 22 December 2019, Respondent and Claimants filed the said awards, decisions and dissenting opinions into the record.

89. On 10 March 2020, the Tribunal requested the SCC Board to finally determine the Costs of the Arbitration, pursuant to Article 43(2) SCC Rules.

90. By email dated 11 March 2020, the Tribunal declared these arbitration proceedings closed, pursuant to Article 34 SCC Rules.

91. On 24 March 2020, the SCC Board finally determined the Costs of the Arbitration, pursuant to the Tribunal's request under Article 43(2) SCC Rules (see ¶ 89 above).

IV. FACTUAL BACKGROUND

A. EVOLUTION OF ITALY'S GENERAL POLICIES ON RENEWABLE ENERGY

92. Italy started taking steps towards promoting energy consumption through non-fuel energy sources in the 1980s and 1990s. This was motivated, at least in part, by the EU's objective to move towards harmonizing the energy market of its Member States, while simultaneously endorsing production of electricity through renewable energy. This evolution of Italy's and the EU's initial polices relating to renewable energy shall be discussed in Sections (1) and (2) below, respectively.

(1) Italy's Policies through 1980s and Early 1990s

93. In 1982, Italy enacted the Law No. 308/1982, which aimed to promote, "consistently with the European Community energy policy, the limitation of energy consumptions and the use of renewable energy sources".[15] To this end, Italy committed to provide certain capital contributions and other financial incentives to promote renewable energy.[16] In this connection, Law No. 308/1982 also envisaged the sale, trade and dispatch of the electricity generated by renewable energy plants under the capacity of 3000 kW shall be "regulated by *ad hoc* agreements" with the National Entity for Electricity, which was a state-owned company then. The sale price of electricity was to be established by an Inter-Ministerial Committee of Prices.[17]

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15 **CEX-9**, Law No. 308/1982, 29 May 1982, article 1.

16 **CEX-9**, Law No. 308/1982, 29 May 1982, articles 6-12; *see* SoC, ¶ 39.

17 **CEX-9**, Law No. 308/1982, 29 May 1982, article 4; *see* SoC, ¶ 39.

94. The general framework contained in Law No. 308/1982 was followed by the National Energy Plan of 1988 in Italy ("**1988 Energy Plan**"). The 1988 Energy Plan laid out specific aims and strategies concerning Italy's energy plan until the year 2000.[18] In particular, the 1988 Energy Plan laid out five primary objectives for Italy's energy policy. These were (i) energy savings; (ii) environmental protection; (iii) development of natural resources; (iv) diversification in the use of the various import sources and the geographic and political diversification of procurement areas; and (v) the competitiveness of the production system.[19]

95. Thereafter, Italy introduced the first specific incentive regime in support of renewable energy facilities by way of Law No. 9/1991.[20] Law No. 9/1991 crucially removed the capacity limit of the Law No. 308/1982 of 3000 kW (see ¶ 93 above), so that the competitive pricing of electricity established by the Inter-Ministerial Committee of Prices could benefit all renewable energy facilities in the country.[21]

96. Further to this, the Inter-Ministerial Committee of Prices established a new price regime on 29 April 1992.[22] This price regime of 1992 specifically provided for a three-fold incentive scheme for renewable energy facilities as well as for the "assimilated" sources including thermal and gas facilities. First, these facilities were entitled to the so-called "avoided costs" for a period of 15 years since the entry into operation.[23] Second, they were entitled to an incentivizing component for a period of eight years differentiated based on the source

18 **CEX-10**, National Energy Plan 1988, ¶ 12.

19 **CEX-10**, National Energy Plan 1988, ¶ 3; *see* SoC, ¶ 40; *see also* **CEX-11**, Italian Chamber of Representatives, *La programmazione energetica in ambito nazionale.*

20 **CEX-12**, Law No. 9/1991, 9 January 1991; SoC, ¶ 41.

21 SoC, ¶ 41.

22 **CEX-18**, The National Agency for New Technologies, Energy, and Sustainable Economic Development ("**ENEA**") website research communication *"Italia - Meccanismi di incentivazione"*.

23 **CEX-13**, CIP Measure n. 6/1992, § II, article 2; *see* SoC, ¶ 42; *see also* **CEX-17**, AEEG website, *"Analisi e valutazioni relative al provvedimento Cip n. 6/92, come successivamente modificato e integrato"*.

of energy.[24] Third, there was an entitlement of a bonus for new plants that were constructed after 30 January 1991 for a period of eight years.[25]

(2) EC's Directives and Italy's Policies through 1990s and Early 2000s

97. Italy's early steps towards safer and environmentally friendly energy sources in the 1980s and early 1990s was followed by the EU taking steps towards the harmonization and liberalisation of the electricity market of EU Member States.

98. In 1996, the EC issued the EC Directive 96/92/EC, which entered into force in February 1997.[26] The EC Directive 96/92/EC primarily aimed at liberalising the common electricity market of the EU, but it also mentioned that "priority may be given to the production of electricity from renewable sources" by EU Member States for reasons of environmental protection.[27]

99. In February 1998, the EC prepared a report in relation to this EC Directive 96/92/EC, specifically concerning renewable energy and the EU's targets under the Kyoto Protocol, which had been adopted in December 1997.[28] In this connection, the EC's report, *inter alia*, stated that pursuant to "[t]he 'Third Conference of the Parties to the United Nations framework on Climate Change' . . . held in Kyoto in December 1997 . . . the [EC] agreed to a commitment of an 8% reduction of greenhouse gas emissions for the period 2008 to 2012 compared to 1990." This would require "[m]ajor energy policy decisions, focusing on reducing energy and carbon intensity", and "[a]ccelerating the penetration of renewable energy sources in the production of electricity".[29]

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24 **CEX-13**, CIP Measure n. 6/1992, § III, article 2; *see* SoC, ¶ 42; *see also* **CEX-14**, Ministerial Decree of 25 September 1992; **CEX-20**, First Report to Directive 96/92/EC.

25 **CEX-13**, CIP Measure n. 6/1992, § II, articles 1-2; *see* SoC, ¶ 43; *see also* **CEX-15**, *Camera dei deputati XVI Legislatura Dossier di documentazione, Incentivi CIP6 Energie rinnovabili ed assimilate*, n. 41 of 13 January 2009; **CEX-20**, First Report to Directive 96/92/EC.

26 **CEX-19**, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity ("**EC Directive 96/92/EC**").

27 **CEX-19**, EC Directive 96/92/EC, recital 28, articles 8 and 11; *see* SoC, ¶¶ 45 *et seq*.

28 **CEX-20**, First Report to Directive 96/92/EC; *see* SoC, ¶¶ 46-47.

29 **CEX-20**, First Report to Directive 96/92/EC, p. 2; *see* SoC, ¶¶ 46-47.

100. Italy signed the Kyoto Protocol in 1998.[30] Shortly thereafter, in April 1999, Italy's National Agency for New Technologies, Energy and Sustainable Economic Development issued a White Paper for the development of renewable energy sources.[31] The White Paper considered numerous principle and strategy matters relating to the growth of renewable energy in Italy, while recognizing the EU's targets as well.

101. Pertinently, the White Paper laid out a target of "additional contribution of renewables of approximately 8.6 Mtoe running from 11.7 Mtoe to 20.3 Mtoe for 2008-2012 in terms of substituted conventional fuel".[32] Further, in respect of photovoltaic solar energy, while recognizing that significant research is required in this field, which was still in its "young" stage, the White Paper, *inter alia*, stated the following:

> At this time in fact, the cost of electric energy from photovoltaic plants connected to the network is comprised between 500 and 1000 L/kWh, and the margins for further reductions seem limited if we take into account only scale economies. Therefore, for the time being, it is not appropriate to build other large plants with public intervention.[33]
>
> . . . .
>
> Photovoltaic is, in principle, the most attractive renewable energy.
>
> . . . .
>
> Considering its own characteristics and the great potential, even in the absence of sure prospects on cost reduction, we believe that photovoltaic must be developed to the highest levels possible, if anything so as to pre-establish a "reserve" option, in order to face undesirable environmental and energetic emergencies, always possible for the decades to come.[34]

102. Thus, during this time, Italy was moving towards the objectives of enhancing energy security through independence and liberalization of the market, while simultaneously achieving environmental targets.[35] In this connection, Italy also implemented the EC

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30 SoC, ¶ 48.

31 **CEX-21**, ENEA's White Paper on the valorization of renewable energy sources; *see* **CEX-22**, National Energy and Environment Conference, Final Document, 1998; *see also* SoC, ¶¶ 48-49.

32 **CEX-21**, ENEA's White Paper on the valorization of renewable energy sources, p. 21.

33 **CEX-21**, ENEA's White Paper on the valorization of renewable energy sources, ¶ 3.6.1, p. 25.

34 **CEX-21**, ENEA's White Paper on the valorization of renewable energy sources, ¶ 5.6.2, pp. 61-62.

35 **CEX-22**, National Energy and Environment Conference, Final Document, 1998; *see* SoC, ¶ 49.

Directive 96/92/EC in March 1999, by way of the Legislative Decree No. 79/1999.[36] This was motivated towards the above-mentioned two objectives. First, the Legislative Decree No. 79/1999 liberalized the electricity market by implementing anti-monopoly rules and requiring the National Entity for Electricity, the state-owned electricity company in Italy monopolizing electricity generation until then, to sell off 15,000 MW of its capacity in the year 2000.[37] On a related note, the Decree established a state-owned company, i.e., *Gestore della rete di transmission nazionale Spa* ("**GRTN**"), for dealings with renewable energy producers.[38]

103. The second important step taken under this Legislative Decree No. 79/1999 was to give renewable energy facilities priority access to the grid.[39] Further, to support renewable energy, the Legislative Decree No. 79/1999 also provided for what was called a green certificate incentive program. This program, *inter alia*, required the importers and producers of energy in Italy, who produce more than 100 GWh per year from non-renewable sources of energy, to introduce into the national electric grid a certain percentage of electricity produced by renewable sources.[40]

104. With the advent of the new millennium, on 27 September 2001, the European Parliament and Council issued EC Directive 2001/77/EC. This EC Directive, for the first time, dealt specifically and in detail with production of electricity through renewable energy sources in order to meet the international targets set by the Kyoto Protocol.[41] Thus, it formed a significant component of the EU's overall attitude towards renewable energy. Some of the principal objectives pursued by this EC Directive 2001/77/EC were laid down in the preamble, *inter alia,* in the following terms:

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36 **CEX-23**, Legislative Decree 79/1999, 16 March 1999; *see* SoC, ¶ 50.

37 **CEX-23**, Legislative Decree 79/1999, 16 March 1999, articles 8 and 13.

38 **CEX-23**, Legislative Decree 79/1999, 16 March 1999, article 3(12).

39 **CEX-23**, Legislative Decree 79/1999, 16 March 1999, article 11(4).

40 **CEX-23**, Legislative Decree 79/1999, 16 March 1999, articles 11(1) and 11(2). The percentage was fixed at 2% until 2002, after which it was increased annually; *see* SoC, ¶¶ 50-52.

41 **CEX-24**, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market ("**EC Directive 2001/77/EC**"); *see* SoC, ¶¶ 54-55.

> The Community recognises the need to promote renewable energy sources as a priority measure given that their exploitation contributes to environmental protection and sustainable development.
>
> . . . .
>
> Member States operate different mechanisms of support for renewable energy sources at the national level, including green certificates, investment aid, tax exemptions or reductions, tax refunds and direct price support schemes. One important means to achieve the aim of this Directive is to guarantee the proper functioning of these mechanisms, until a Community framework is put into operation, in order to maintain investor confidence.
>
> It is too early to decide on a Community-wide framework regarding support schemes, in view of the limited experience with national schemes and the current relatively low share of price supported electricity produced from renewable energy sources in the Community all Member States should be required to set national indicative targets for the consumption of electricity produced from renewable sources.[42]

105. The EC Directive 2001/77/EC also spoke about setting "national indicative targets" for each of the Member States for consumption of energy through renewable sources, keeping in mind the global target of 12% of consumption through renewable sources by 2010, with which the EU's target aligned. The EC envisaged the possibility of setting mandatory targets in future based on the extent of progress made by Member States.[43] In this connection, the Member States were required to set national indicative targets by 27 October 2002 (and then every five years) for future consumption of energy produced from renewable sources in terms of a percentage, by taking into account, *inter alia,* reference values set in the Annex to the EC Directive 2001/77/EC. Italy was ascribed the reference value for a national indicative target of 25% of the total energy consumption from renewable sources.[44]

106. Thereafter, the EC was to assess by 2004-2005, *inter alia,* (i) the progress made by the Member States in achieving their national indicative targets; (ii) whether the national indicative targets were still consistent with the global indicative target of 12% of

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42 **CEX-24**, EC Directive 2001/77/EC, recitals (1), (14) and (15); *see* SoC, ¶ 54; SoRy, ¶ 213; SoD, ¶ 221.

43 **CEX-24**, EC Directive 2001/77/EC, recitals (5), (6) and (7); *see* SoD, ¶ 222.

44 **CEX-24**, EC Directive 2001/77/EC, Annex; *see* SoC, ¶ 55; SoRy ¶ 211.

consumption through renewable sources of energy;[45] and (iii) the overall experience gained with the application and coexistence of the different support schemes for renewable energy, "including cost-effectiveness, of the support systems . . . in promoting the consumption of electricity produced from renewable energy sources".[46]

107. On 1 March 2002, Italy enacted Law No. 39/2002, wherein it took steps towards implementing EC Directive 2001/77/EC. In Law No. 39/2002, it was, *inter alia,* envisaged that within the following 18 months, the government will issue one or more legislative decrees that would provide incentive policies for renewable energy. In this regard, Law No. 39/2002 specifically provided that these incentives should (i) be based on mechanisms that promoted both competitiveness and cost reduction; and (ii) not create greater or new burdens on the State budget.[47]

108. Also in 2002, Italy enacted Law No. 120/2002 for the ratification and implementation of the Kyoto Protocol in Italy, which it had signed in 1998 (see ¶ 100 above).[48]

109. On 26 June 2003, the EC replaced its earlier EC Directive 96/92/EC (see ¶¶ 98-99 above) with EC Directive 2003/54/EC containing new rules on the internal electricity market of the EU.[49] In this connection, the EC Directive 2003/54/EC mentioned that:

> Experience in implementing [EC Directive 96/92/EC] shows the benefits that may result from the internal market in electricity, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness. However, important shortcomings and possibilities for improving the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field in generation and to reduce the risks of market dominance and predatory behaviour, ensuring non-discriminatory transmission and distribution tariffs, through access to the network on the basis of tariffs published prior to their entry into force, and ensuring that the rights of small and vulnerable customers are protected and that information on energy sources

45 **CEX-24**, EC Directive 2001/77/EC, article 3(4).

46 **CEX-24**, EC Directive 2001/77/EC, article 4(2); *see* SoD, ¶ 223.

47 SoC, ¶ 56.

48 **CEX-25**, Law No. 120/2002, 1 June 2002; *see* SoC, ¶ 56.

49 **CEX-26**, Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC ("**EC Directive 2003/54/EC**"); *see* SoC, ¶ 57.

for electricity generation is disclosed, as well as reference to sources, where available, giving information on their environmental impact.[50]

110. To this end, the EC Directive 2003/54/EC required Member States to designate regulatory authority(s) 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".[51]

111. The EC Directive 2003/54/EC and the Law No. 39/2002 laid the foundation for many specific regulatory decrees passed by the concerned Ministries in Italy regulating the incentive tariff regime for renewable energy facilities, and in particular photovoltaic/solar facilities.

B. *CONTO ENERGIA* DECREES REGARDING PHOTOVOLTAIC ENERGY FROM 2005 TO 2013

112. Further to Law No. 39/2002, on 29 December 2003, Italy enacted the Legislative Decree No. 387/2003 implementing the EC Directive 2001/77/EC (see ¶¶ 104-105 above). In this Legislative Decree, instructions were issued to the Ministry of Productive Activities to work with the Ministry of the Environment to establish specific criteria to incentivize electricity produced from photovoltaic/solar energy, which was to be done by the adoption of one or more decrees within six months of the date of entry into force of Legislative Decree No. 387/2003. These new decrees were required to take into account many enlisted criteria, including to "provide a specific incentive rate, decreasing amount and duration as

[50] **CEX-26**, EC Directive 2003/54/EC, recital (2); *see* R-SoRj, ¶¶ 261-262; *see also* REX-059, Commission Staff Working Document, European Commission guidance for the design of renewables support schemes, accompanying the document "Communication from the Commission Delivering the internal market in electricity and making the most of public intervention" ("While such measures are necessary to correct market failures and achieve the desired level of renewables, public interventions need to be well designed and proportionate to avoid additional market distortions. With growing renewables shares, poor design and implementation of public intervention has led to unnecessary distortions with regards to energy production, trade and investment in renewables. This raises the cost of the promotion of renewables and risks hampering both the further growth of renewables and the completion of the internal electricity market.")

[51] **CEX-26**, EC Directive 2003/54/EC, article 23(1)(f).

to ensure fair remuneration of each investment and operating costs" for solar energy facilities.[52]

113. As mentioned in Law No. 39/2002, this Legislative Decree No. 387/2003 reiterated that no incentive scheme could create greater or new burdens on the state budget.[53]

114. Contemporaneously, the Productive Activities Committee affirmed the Legislative Decree No. 387/2003 at the Parliament by stating, *inter alia,* that increasing the production of electricity from renewable sources was an "absolute priority" in Italy, and that the same would require a "stability of the regulatory framework which the investors shall rely on in the medium to long term period".[54]

115. Thereafter, on 18 April 2005, the Italian Parliament directed the implementation of the EC Directive 2003/54/EC (see ¶¶ 109-111 above) by way of Law No. 62/2005, which, *inter alia,* provided for the introduction of incentive mechanisms in the renewable energy sector "based on tenders for the promotion of the most advanced technological solutions that are still far from being commercially competitive".[55]

116. These Legislative Decrees implementing the EC Directives were followed by the enactment of the five Ministerial Decrees, known as "***Conto Energia***" or "Energy Accounts", which established the terms and conditions for the incentive tariff regime specifically for photovoltaic facilities. These *Conto Energia* Decrees are discussed individually in this Section, and shall progressively be referred to as "**First *Conto Energia***", "**Second *Conto Energia***", "**Third *Conto Energia***", "**Fourth *Conto Energia***", and "**Fifth *Conto Energia***".

117. The First, Second and Third *Conto Energia* Decrees were enacted by Italy's the Ministry for Productive Activities or the Ministry for Economic Development in consultation with

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52 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 7; *see* SoD, ¶¶ 231-233 (Notably, Respondent's translation of article 7 of the Legislative Decree No. 387/2003 varies from Claimants'. Specifically, Respondent uses the term "fair return" instead of "fair remuneration", which usage is disputed between the Parties); *see also* SoRy, ¶ 258.

53 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, articles 1, 7 and 20; *see* SoC, ¶¶ 64-65.

54 **CEX-28**, Favorable opinion of the Productive Activities Committee (Commission X) on the scheme of Legislative Decree no. 387/2003 of 11 November 2003; *see* SoRy, ¶¶ 231, 258.

55 **CEX-29**, Law No. 62/2005, 18 April 2005, article 15.1(f); *see* SoC, ¶ 66.

the Ministry for Environment, as per the principles and standards established in Legislative Decree No. 387/2003.[56]

118. Subsequently, the Fourth and Fifth *Conto Energia* Decrees were enacted by the concerned ministries pursuant to the principles and standards established under the Romani Decree, which was enacted to implement the EC Directive 2009/28/EC that replaced the EC Directive 2003/54/EC (discussed in Section (4) below).[57]

(1) First *Conto Energia* Decree

119. The First *Conto Energia* Decree contained the first incentive tariff program and was enacted on 28 July 2005 in furtherance of the Legislative Decree No. 387/2003 and Law No. 62/2005.[58] It was directed towards photovoltaic facilities with individual capacity between 1 kW and 1 MW, granting them the right to receive specific incentive tariff for every kilowatt-hour of electricity produced.[59] The cumulative threshold for granting incentive tariffs under the First *Conto Energia* was initially set at 100 MW.[60]

120. The incentive tariff rates established by the First *Conto Energia* ranged between 0.445-0.490 EUR/kWh, subject to the nominal capacity of the plants.[61] These tariffs were to reduce on an annual basis by 2% after 2006 based on the date of entry into operation of a plant. Further, the duration for which these tariff rates would apply was twenty years, subject to any adjustments based on the ISTAT inflation index.[62]

121. In order to qualify for the incentive tariffs under the First *Conto Energia* Decree, the photovoltaic plants had to provide preliminary project proposals for the plant in question, including, *inter alia*, technical specifications, capacity and a commitment to obtain the

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56 SoD, ¶¶ 235, 254; SoRy, ¶ 262.

57 SoD, ¶ 254; SoRy, ¶¶ 259-261; *see* **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 7; *see also* **CEX-158**, Legislative Decree 28/2011, 3 March 2011, article 25(10).

58 **CEX-31**, Ministerial Decree No. 18908 from the Ministry for Productive Activities, 28 July 2005 ("**First *Conto Energia* Decree**"), recitals (1) and (3).

59 **CEX-31**, First *Conto Energia* Decree, articles 5.2, 6.2 and 6.3; *see* SoC, ¶¶ 69-70.

60 **CEX-31**, First *Conto Energia* Decree, article 12.1.

61 **CEX-31**, First *Conto Energia* Decree, articles 5.2(a), 6.2(a) and 6.3(a); *see* SoC, ¶ 71; *see also* SoD, ¶ 237.

62 **CEX-31**, First *Conto Energia* Decree, articles 5.2(b), 6.2(b), 6.3(b) and 6.6; *see* SoC, ¶ 71; *see also* SoRy, ¶¶ 230-231.

necessary authorizations relating to construction and operation of the plant.[63] Thereafter, the "implementing body", which was a company called the *Gestore dei Servizi Energetici* ("**GSE**"), i.e., the successor of GRTN,[64] had 90 days to communicate the outcome of the plant operators' preliminary project proposal by way of a formal letter.[65] After the letter from GSE, the plant operators had the authorization to commence construction within 6-12 months and connect the plant to the grid within 12-24 months.[66] GSE also entered into contracts with the photovoltaic plants that qualified for the incentive tariffs based on a sample agreement prescribed in this regard.[67]

122. After the enactment of the First *Conto Energia* Decree, there was an increase in investments and number of photovoltaic facilities overall, such that the "cumulative capacity for all plants in respect of which an application has been submitted for the purpose of obtaining incentive tariffs under the [First *Conto Energia* Decree was] in excess of 100 MW".[68] Thus, on 6 February 2006, Italy amended the First *Conto Energia* Decree to raise the overall threshold of 100 MW to 500 MW.[69] This enhanced threshold capacity of 500 MW was exhausted in July 2006, after which Italy accepted another 387 MW of photovoltaic capacity into the program of the First *Conto Energia.* This was followed by the Second *Conto Energia* Decree.[70]

63 **CEX-31**, First *Conto Energia* Decree, articles 7.1 and 7.2.

64 **CEX-30**, Italian Electrical Energy Authority ("**AEEG**") Resolution no. 188/05, 14 September 2005; *see* SoC, ¶ 68.

65 **CEX-31**, First *Conto Energia* Decree, articles 7.7 and 8.6; *see* SoC, ¶ 73; *see also* SoD, ¶ 234.

66 **CEX-31**, First *Conto Energia* Decree, articles 8.3 and 8.6; *see* SoC, ¶ 72.

67 **CEX-32**, Sample GSE agreement under the First *Conto Energia* Decree, articles 8 and 10; *see* SoC, ¶ 73 (The value of these contracts entered into by GSE is disputed by Respondent, on the ground that they were not private law instruments and were instead accessory instruments of regulation entered into by a supporting authority of public administration) see, *inter alia*, **REX-064**, Court of Cassation Order No. 10795/2017; **REX-032**, Italian Constitutional Court Decision No. 16/2017 of 7 December 2016; R-SoRj, ¶¶ 15, 318; First Opinion of Prof. Anna Romano, 22 December 2017 ("**First Romano Opinion**").

68 **CEX-31B**, Ministerial Decree No. 20998 from the Ministry for Productive Activities of 6 February 2006, recital (2).

69 **CEX-31B**, Ministerial Decree No. 20998 from the Ministry for Productive Activities of 6 February 2006, recital (2), article 2; *see* SoC, ¶ 74

70 **CEX-49**, GSE Report "*Le attività del Gestore dei Servizi Elettrici – Rapporto* 2006"; *see* **CEX-53**, GSE press release, "*Esaurita la Potenza icentivabile per l'anno* 2006"; *see also* SoC, ¶ 80.

(2) **Second *Conto Energia* Decree**

123. On 19 February 2007, the Second *Conto Energia* Decree was enacted by the Ministry for Economic Development, in consultation with the Ministry for Environment. It entered into force on 13 April 2007 with the Italian Electrical Energy Authority's Resolution No. 90/07.[71]

124. The Second *Conto Energia* was also enacted in furtherance of, *inter alia*, the Legislative Decree No. 387/2003, which had implemented the EC Directive 2001/77/EC.[72] The Second *Conto Energia* altered the regime under the First *Conto Energia* in a few major respects.

125. First, the preliminary authorization phase, which authorized GSE to qualify photovoltaic plants for incentive tariff prior to their entry into operation (see ¶ 121 above), was eliminated, and authorization for incentive tariff was granted only after the facility's entry into operation.[73] Now, the implementing body, i.e., GSE, was to "verify compliance with the provisions of this [D]ecree" after the preliminary project proposal was made by a plant operator, and not already communicate the outcome concerning the tariff awarded, which was done after the entry into operation of a plant.[74]

126. Second, while the minimum threshold of individual capacity of a plant to be entitled to the incentive tariff was maintained at 1 kW by the Second *Conto Energia* Decree,[75] the upper limit of 1 MW prescribed in the First *Conto Energia* (see ¶ 119 above) was removed. Further, the cumulative capacity threshold was increased from 500 MW to 1200 MW, with a possibility for facilities that were connected to the grid 14 months after the date on which Italy reached the 1200 MW threshold to also receive incentive tariffs under the Second *Conto Energia*.[76]

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[71] **CEX-54**, Decree from the Ministry for Economic Development and the Ministry for Environment, Land and Sea, 19 February 2007 ("**Second *Conto Energia* Decree**"); *see* SoC, ¶ 82; *see also* SoD, ¶ 238.

[72] **CEX-54**, Second *Conto Energia* Decree, recital (1).

[73] **CEX-55**, Press Release, *"In sei anni di Conto Energia installati 480,000 impianti"*; SoC, ¶ 82.

[74] **CEX-54**, Second *Conto Energia* Decree, article 5.5.

[75] **CEX-54**, Second *Conto Energia* Decree, article 4.2.

[76] **CEX-54**, Second *Conto Energia* Decree, articles 13.1 and 13.2; *see* SoC, ¶¶ 83-84.

127. Third, the Second *Conto Energia* Decree introduced multiple criteria for affixing tariff rates for any eligible photovoltaic plant facility, including the facility's nominal capacity, the plant's size and architectural integration, and whether it was partially or totally integrated into the grid.[77] Such criteria did not exist under the First *Conto Energia* Decree, which considered only capacity of the plant (see ¶ 120 above).

128. Fourth, the tariff rates were reduced in comparison to the First *Conto Energia* Decree. The new tariff rates ranged between 0.346-0.490 EUR/kWh, which would be reduced on an annual basis based on the date of entry into operation of a plant.[78]

129. The above aside, with respect to the duration of the incentive tariffs, the Second *Conto Energia* Decree stated that "[t]he tariff identified . . . is awarded for a period of twenty years commencing from the date of entry into operation of the plant and shall remain constant in current currency for the entire twenty year period".[79] This was also mentioned in the confirmation letter to be sent by the GSE to notify the plant operator of the tariff it was awarded,[80] and in the contracts to be entered into between GSE and the photovoltaic plant operators, as was evident from the sample agreement also prescribed under the Second *Conto Energia* Decree.[81]

130. The Second *Conto Energia* envisaged the enactment of another decree revising the incentive tariffs for photovoltaic plants connected to the grid after 2010.[82] However, in the interim, Legislative Decree No. 3/2010 was enacted on 25 January 2010 ("***Salva Alcoa* Decree**"), and converted into Law No. 129/2010 on 22 March 2010. The *Salva Alcoa* Decree extended the Second *Conto Energia* tariffs to the plants that were built by 31 December 2010, but connected to the grid later, i.e., until 30 June 2011.[83] The Second

[77] **CEX-54**, Second *Conto Energia* Decree, articles 2.1(b) and 6.1; *see* SoC, ¶ 83; *see also* SoD, ¶ 238.

[78] **CEX-54**, Second *Conto Energia* Decree, article 6.1; *see* SoC, ¶ 83; *see also* SoRy, ¶¶ 219-220.

[79] **CEX-54**, Second *Conto Energia* Decree, articles 6.1 and 6.2; *see* SoRy, ¶¶ 230-231. This 20 year period has been interpreted by the Italian Federation for Rational Use of Energy to mean that it "shall not be updated with the inflation rate"; see **CEX-123**, Publication *"Le tariffe incentivanti per la produzione di energia elettrica da fonte rinnovabile"*; *see also* SoD, fn 97.

[80] **CEX-54**, Second *Conto Energia* Decree, article 5.5; *see* SoRy, ¶¶ 225-226.

[81] **CEX-57**, Sample GSE Agreement under the Second *Conto Energia* Decree, articles 1 and 2; SoC, ¶ 86

[82] **CEX-54**, Second *Conto Energia* Decree, article 6.3.

[83] SoC, ¶ 85, fn 157; SoD, fn 94; *see* **CEX-390**, Law No. 129/2010, 13 August 2010.

Conto Energia subjected the grid manager to penalties in the event plants were not connected to the grid in a timely manner.[84] This context behind the enactment of the *Salva Alcoa* Decree is reflected in the legislative history and also endorsed in Decision No. 51/2017 of the Italian Constitutional Court.[85]

131. This was followed by GSE explaining, in a report on "Operating Procedure for Managing Communication to GSE for Works Completion", the various steps that photovoltaic plant operators had to take from their end in order to ensure that there were no gaps in respect of connection of new plants to the grid. This included the procedure for a specific request by a plant operator for grid connection to be made to grid operators, in order to have a starting point for the deadline for grid operators and/or manager to connect a plant to the grid.[86]

132. In 2009, the installed capacity of photovoltaic facilities was double of the capacity added in 2008, and by then, Italy became the second largest photovoltaic market in the world as per GSE's estimate.[87]

133. This, together, with further expected growth in the installed capacity, lead to the GSE Managing Director, Mr. Nando Pasquali, stating in an interview in May 2010 that 2010 will be a "record breaking year" in the photovoltaic sector in Italy, requiring a new *Conto Energia* Decree to be enacted, which will reduce the incentive tariffs further.[88]

134. In June 2010, the target of 1200 MW capacity under the Second *Conto Energia* Decree was reached, as mentioned in a GSE presentation of 7 July 2010.[89]

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84 **CEX-54**, Second *Conto Energia* Decree, article 5.2.

85 **CEX-389**, Stenographic and Partial Record, House of Deputies, Session no. 364 (Parliamentary Debate on *Salva Alcoa*); **CEX-391**, EcodalleCittà, press article, *"Conto Energia: approvata in via definitiva la proroga al 30 giugno 2011"*; **CEX-392**, Italian Constitutional Court Decision No. 51/2017, dated 10 March 2017; *see also* SoRy, ¶¶ 428-430.

86 **CEX-393**, GSE, "Technical Procedure for Managing Communications to GSE of Works Completion for PV Plants (Law No. 129 of 13/8/2010); *see* SoRy, ¶ 433.

87 **CEX-113**, GSE Presentation *"II Progetto di un nuovo conto energia II regime fiscale del Fotovoltaico"*, slides 15 and 19; **CEX-114**, GSE Presentation *"II conto energia. Risultati e prospettive"*; *see* SoC, ¶¶ 93, 96.

88 SoC, ¶¶ 97-99; *see* **CEX-129**, *Economy: il business magazine di Mondadori, Interview with N. Pasquali, "In 2010, photovoltaics could double"*; *see also* SoRy, ¶ 231.

89 **CEX-131**, GSE Press Release *"Raggiunti i 1.200 MW di potenza incentivabile prevista dal Nuovo Conto Energia"*; *see* SoC, ¶101.

(3) **Third *Conto Energia* Decree**

135. On 6 August 2010, the Italian Ministry for Economic Development jointly with the Ministry for Environment enacted the Third *Conto Energia* Decree. The Third *Conto Energia* Decree reduced the existing tariff rates due to a corresponding reduction in the costs of photovoltaic technology since the entry into force of the Second *Conto Energia.* The new tariff rates ranged between 0.251-0.402 EUR/kWh,[90] which were to now be reduced on a tri-annual basis based on the date of entry into operation of a plant,[91] as opposed to the earlier annual revision provided in the Second *Conto Energia* (see ¶ 128 above). This change in tariff regime was motivated, according to Respondent, by "the evolution of photovoltaic technology recorded . . . and in particular the significant reduction of costs components and photovoltaic systems . . . in order to respect the principle of fair return on the costs" established by Legislative Decree No. 387/2003.[92]

136. The Third *Conto Energia* Decree also introduced nuanced categories of photovoltaic plants in order to diversify the incentive tariffs available to them. These categories included (i) photovoltaic plants, further divided into (a) works on buildings and (b) other photovoltaic systems; (ii) integrated photovoltaic systems with innovative features; and (iii) concentrated photovoltaic plants, photovoltaic systems with technological innovation.[93]

137. The cumulative threshold of the capacity of photovoltaic plants admitted to the program was increased from 1200 MW in the Second *Conto Energia* Decree to 3,000 MW in the Third *Conto Energia*, extendable to the plants that were connected to the grid within 14 months of the date on which this threshold was reached by Italy.[94]

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90 **CEX-132**, Decree from the Ministry for Economic Development and the Ministry for Environment, Land and Sea, 6 August 2010 ("**Third *Conto Energia* Decree**"), article 8.2.

91 **CEX-132**, Third *Conto Energia* Decree, preamble, at 29-30, ¶¶ first, second, fifth, fourteenth-seventeenth; SoC, ¶ 102; *see* SoD, ¶ 239; *see also* SoRy, ¶ 219.

92 SoD, ¶ 239.

93 SoD, ¶ 240.

94 **CEX-132**, Third *Conto Energia* Decree, articles 3.2 and 3.6; *see* SoC, ¶ 103.

138. Similar to the previous two *Conto Energia* Decrees, the 20 year duration for the incentive tariffs remained,[95] as did the regime for GSE to enter into contracts with the producers of the facilities accepted under the Third *Conto Energia.*[96]

139. The Third *Conto Energia* Decree was originally intended to apply to facilities that entered into operation from 2011 to 2013, with the tariffs reducing by 6% for plants that entered into operation in 2012 and 2013. The Third *Conto Energia* envisaged the enactment of a subsequent decree establishing the rate for incentive tariffs for plants that would enter the grid after 2013.[97]

140. In January 2011, it was reported that Italy had already achieved 4.5 GW in new photovoltaic installations in the year 2010.[98] Its overall normalised electricity production through renewable energy sources in 2010 was 69 TWh.[99]

(4) **EC Directive 2009/28/EC and the Romani Decree**

141. In the interregnum between the Second and the Third *Conto Energia* Decrees, the EC issued another significant Directive, being EC Directive 2009/28/EC on 23 April 2009 for the promotion of use of energy from renewable sources. The EC Directive 2009/28/EC repealed its predecessor EC Directive 2001/77/EC with effect from 1 January 2012.[100]

142. The national indicative targets (see ¶¶ 104-105 above) set by the EC Directive 2001/77/EC were thus replaced with "mandatory national overall targets" for electricity consumption based on renewable energy in the new EC Directive 2009/28/EC.[101] Italy's mandatory

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95 **CEX-132**, Third *Conto Energia* Decree, articles 1.2, 7.2 and 8 ; *see* **CEX-133**, GSE website, "*II Conto Energia 2011/2013"*; **CEX-134**, AEEG, Deliberazione 20 ottobre 2010 – ARG/ELT 181/10; **CEX-135**, AEEG Investigation, *"Indagine Conoscitiva sulla strategia energética nazionale"*.

96 **CEX-270**, Sample GSE Agreement under the Third *Conto Energia* Decree, articles 1-2, 10, 15; *see* SoC, ¶ 104; *see also* SoRy, ¶¶ 230-231.

97 **CEX-132**, Third *Conto Energia* Decree, articles 8.2 and 8.3; *see* SoC, ¶ 103.

98 **CEX-157**, Ernst&Young Press Report, "Renewable energy county attractiveness indices"; *see* SoC, ¶ 106.

99 **CEX-176**, GSE Report "Statistical report 2011 – Renewable energy power plants in Italy", p. 7; *see* SoRy, ¶ 287.

100 **CEX-115**, EC Directive 2009/28/EC, 23 April 2009, article 26.3; *see* SoD, ¶ 224.

101 **CEX-115**, EC Directive 2009/28/EC, article 3.

target was to have a gross consumption of 17% through energy produced from renewable sources by 2020.[102]

143. Further, the EU's overall target was revised from 12% to 20% of gross energy consumption to be achieved through renewable sources by 2020, together with 10% of transport fuels to be sourced from renewable energy. This came to be known as the EU's 20-20-20 plan.[103] In this connection, the notable recitals of the EC Directive 2009/28/EC, stated the following:

> The Commission communication of 10 January 2007 entitled 'Renewable Energy Roadmap – Renewable energies in the 21st century: building a more sustainable future' demonstrated that a 20% target for the overall share of energy from renewable sources and a 10% target for energy from renewable sources in transport would be appropriate and achievable objectives, and that a framework that includes mandatory targets should provide the business community with the long-term stability it needs to make rational, sustainable investments in the renewable energy sector which are capable of reducing dependence on imported fossil fuels and boosting the use of new energy technologies. Those targets exist in the context of the 20 % improvement in energy efficiency by 2020.
>
> . . . .
>
> For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes, as under Directive 2001/77/EC, in order to maintain investor confidence and allow Member States to design effective national measures for target compliance.[104]

144. While calling upon the EU Member States to adopt national renewable energy plans, the EC Directive 2009/28/EC required the Member States to take into account, *inter alia*, "the effects of other policy measures relating to energy efficiency on final consumption of energy" and "energy saving".[105]

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102 **CEX-115**, EC Directive 2009/28/EC, article 3 and Annex I; *see* SoC, ¶ 94.

103 The EU Member States have already agreed to new renewable energy target of 27% of overall electricity consumption through renewable energy sources by 2030; *see* SoD, ¶ 218.

104 **CEX-115**, EC Directive 2009/28/EC, recitals (8), (14) and (25); *see* SoD, ¶¶ 224, 229; *see also* SoRy, ¶¶ 213, 309.

105 **CEX-115**, EC Directive 2009/28/EC, articles 3.1 and 4.1; *see* SoD, ¶ 225.

145. Like its predecessor EC Directive 2001/77/EC, the Directive 2009/28/EC also envisaged the possibility of "support schemes" to be established by Member States in order to achieve their renewable energy targets.[106] By definition, these "support schemes" could include "any instrument, scheme or mechanism applied by a Member State . . . that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments."[107]

146. In June 2010, pursuant to the EC Directive 2009/28/EC, Italy finalized a National Action Plan to reach the EU's revised renewable energy targets.[108] The National Action Plan shared the burden of renewable energy consumption between the electricity, hearing, cooling and transport sectors. Specifically for the electricity sector, the target was equal to 26.4% consumption by 2020, which would require a normalized generation of 99 TWh per year.[109] In the National Action Plan, Italy further stated, *inter alia*, the following:

> The current incentive systems . . . represent consolidated instruments of the national energy system, which one can also take into consideration, with the necessary adjustments, for the upcoming period as an important element of continuity for the achievement of the new EU objectives.[110]
>
> . . . .
>
> Compared with the current situation, the introduction is envisaged of certain corrections to the existing framework, in a logic aimed at increasing energy production, but making the support tools more efficient, in order to avoid a parallel growth of production and of burden of the incentives.[111]
>
> . . . .

106 **CEX-115**, EC Directive 2009/28/EC, article 3.3; *see* SoD, ¶¶ 226-231.

107 **CEX-115**, EC Directive 2009/28/EC, article 2.2; *see* SoD, ¶ 227.

108 **CEX-130**, National Action Plan for Renewables of Italy; *see* SoC, ¶ 100.

109 **CEX-176**, GSE Report "Statistical report 2011 – Renewable energy power plants in Italy", p. 15; *see* SoRy, ¶ 284.

110 **CEX-130**, National Action Plan for Renewables of Italy, p. 7.

111 **CEX-130**, National Action Plan for Renewables of Italy, p. 98.

> The feed-in tariff [*Conto Energia*] is a support scheme which guarantees constant remuneration at current currency values for the electricity produced by plants for a set period of time . . . Moreover, the scheme is subject to regular adjustments which take into account the trends in the prices of energy products and components for photovoltaic plants . . ., with the intention of limiting the medium- and long-term costs to the community. In any case, the incentive tariff paid when the plant becomes operation[al] remains fixed for the whole entitlement period.[112]

147. On 3 March 2011, Italy implemented the EC Directive 2009/28/EC by way of the Legislative Decree No. 28/2011 ("**Romani Decree**"). The Romani Decree specifically envisaged the maintenance of the incentives for renewable energy, which had the purpose of ensuring a fair remuneration or return of the investment and operating costs.[113] In this connection, Article 24 of the Romani Decree is worth quoting, in its relevant part:

> **Article 24 Incentive mechanisms**
>
> (1) The production of electricity from plants using renewable sources that enter into operation after December 31, 2012, will be promoted through the instruments and according to the general criteria set out in paragraph 2 and the specific criteria set out in paragraphs 3 and 4. The safeguard of non-incentivized plants is ensured through the mechanisms under art. 8 hereof.
>
> (2) The production of electricity by the plants referred to in paragraph 1 is supported on the basis of the following general criteria:
>
> a) the incentive has the purpose of ensuring a fair remuneration of the investment and operating costs;
>
> b) the period one is entitled to receive the incentive all through is equal to the average conventional lifecycle of specific kind of plant, and starts from the date of entry into operation thereof;
>
> c) the incentive remains constant throughout the support period to which one is entitled under the law and may take into consideration the economic value of energy produced;
>
> . . . .[114]

[112] **CEX-130**, National Action Plan for Renewables of Italy, p. 102.

[113] **CEX-158**, Legislative Decree No. 28/2011, 3 March 2011 ("**Romani Decree**"), articles 23.1 and 24.2(b); *see* SoC, ¶ 108.

[114] **CEX-158**, Romani Decree, article 24; *see also* **CEX-158**, Romani Decree, article 23. Notably, the Parties produce different translations of the above provision, which is a disputed issue between them. While Respondent uses the phrase "fair return" in Article 24(2)(a), Claimants use "fair remuneration" instead (*see* SoC, ¶ 108; SoD, ¶¶ 242-243; *see also* SoRy, ¶¶ 263-273; *see also* R-SoRj, ¶¶ 267-278)

148. With respect to the remunerations and the rate of incentives, the Romani Decree specifically mentioned that "the period one is entitled to receive the incentive all through is equal to the average conventional lifecycle of specific kind of plant, and starts from the date of entry into operation thereof."[115]

149. Like the Legislative Decree 387/2003, which had implemented the previous EC Directive 2001/77/EC in Italy (see ¶¶ 112-116 above), the Romani Decree also tasked certain ministries, i.e., the Ministry for Economic Development and the Ministry for Environment an Sea Protection, to determine the incentive regime for renewable energy investments by way of specific legislative decrees.[116] Notably, while Legislative Decree 387/2003 tasked the Ministry for Productive Activities in this regard, to, *inter alia*, "provide a specific incentive tariff, decreasing amount and duration as to ensure fair remuneration of each investment and operating costs",[117] the Romani Decree required the concerned Ministries to promote renewable energy on the basis of incentives that have "the purpose of ensuring a fair remuneration of the investment and operating costs".[118]

150. Further, the Romani Decree also contained other specific provisions relating to photovoltaic energy. In this connection, the Romani Decree limited the applicability of the Third *Conto Energia* to plants that were connected to the grid by 31 May 2011, as opposed to the originally envisaged end-date of 31 December 2013. Also, the Romani Decree added further conditions to the eligibility of plants receiving incentive tariffs, based on size, organization, and zoning of land.[119]

151. Moreover, the Romani Decree added provisions relating to sanctions for investors that submitted false declarations to GSE regarding their eligibility to receive the *Conto Energia* incentive tariffs, and also generally empowered the GSE to control and monitor facilities operating under this regime.[120]

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115 **CEX-158**, Romani Decree, article 24, article 24.2; *see* SoD, ¶ 464.

116 **CEX-158**, Romani Decree, article 24, articles 24 and 25(10); *see* SoRy, ¶¶ 260-261.

117 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 7(2)(d).

118 **CEX-158**, Romani Decree, article 24, article 24; see SoD, ¶¶ 233 *et seq.*, 254, 256, 462, 480; *see also* SoRy, ¶¶ 263 *et seq.*

119 **CEX-158**, Romani Decree, article 24, article 25.9; *see* SoC, ¶ 109.

120 **CEX-158**, Romani Decree, article 24, articles 23.3, 42 and 43; *see* SoC, ¶ 110.

152. Lastly, the Romani Decree envisaged the enactment of a new decree by the Ministry for Economic Development establishing revised incentive tariffs for plants connected to the grid after 31 May 2011. In this connection, it further prescribed the establishment of annual limits for installed capacities that could benefit from the incentive tariffs, and adjustment of tariff values based on reductions in cost of technology and equipment as well as incentives applied in other EU Member States.[121]

153. It is worth noting that some photovoltaic plant operators who were unable to obtain benefits under the Third *Conto Energia* Decree as a result of the Romani Decree, instituted complaints in Italian courts against the Romani Decree and its prescription of a new tariff regime with effect from 31 May 2011.[122] In one of these cases, the *Consiglio di Stato* decided against one such renewable energy producer, who had intended to register its photovoltaic facilities under the Third *Conto Energia* Decree, but had not yet received a written confirmation of the incentive tariffs it was entitled to from the GSE when the Romani Decree was enacted.[123] The *Consiglio di Stato* made certain relevant findings, relating to the EC Directive 2009/28/EC and the general regulatory regime concerning the electricity market. In particular, it found, *inter alia*, that "the sector of renewable energies in general and photovoltaics in particular is not a free or liberalized market, but subject to programming, planning, targets compatible with burdens upon the users to be in fact reduced, decreasing profitability commensurate to actual overhead and technology costs as applied internationally." It further noted that the EC Directive 2009/28/EC did not rule out that "the interest in the promotion of energy production" needs to be reconciled with "the preservation of other values of obvious internal constitutional relevance (purposes of the national plan, respect of quotas between the various energy components, installed power, size of the achieved flows, protection of the territory, environment and landscape."[124]

121 **CEX-158**, Romani Decree, article 24, articles 25.10; *see* SoC, ¶ 111.

122 SoD, ¶¶ 269 *et seq.*

123 SoRy, fn 164.

124 **REX-024**, *Consiglio di Stato*, decision of 8 August 2014 n 4233/2014, point 4; *see* SoD, ¶¶ 270-272.

(5) Fourth *Conto Energia* Decree

154. Pursuant to the stipulations of the Romani Decree, on 5 May 2011, the Ministry for Economic Development enacted the Fourth *Conto Energia* Decree.[125] The preamble of the Fourth *Conto Energia* Decree mentioned that within a few years Italy would achieve "grid parity", i.e., a situation where generation of power through photovoltaic plants would be at an equal or lower cost than the price of purchasing power form the electricity grid.[126]

155. The Fourth *Conto Energia* Decree applied to plants that would be connected to the grid between 31 May 2011 and 31 December 2016.[127] Further, for the first time, a "national indicative installed capacity target" for photovoltaic plants was introduced, which was set at 23 GW. The installed capacity target corresponded to a yearly indicative cumulative cost of incentives between EUR 6 to 7 billion.[128] The incentive regime was thus tied to this yearly cumulative cost threshold, and the Ministry for Economic Development was now entitled to revise the incentive tariffs for future plants when Italy reached the lower end of this yearly threshold, i.e., EUR 6 billion.[129] Respondent attributes this realignment of tariff rates to the rise in the costs of maintaining the incentive regimes under the first three *Conto Energia* Decree, due to the rise in "producability" of solar energy, resulting in "excess remuneration" being received by photovoltaic plants.[130]

156. Akin to its predecessors, the Fourth *Conto Energia* Decree also stated that the incentive tariffs granted to qualifying photovoltaic plants would be constant for a 20 year period starting from the date of the plant's connection to the grid.[131] The regime relating to the

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[125] **CEX-161**, Decree from the Ministry for Economic Development and the Ministry for Environment, Land and Sea, 5 May 2011 ("**Fourth *Conto Energia* Decree**"), preamble at 103-104; *see* SoC, ¶ 112.

[126] **CEX-161**, Fourth *Conto Energia* Decree, p. 3; *see* SoC, ¶ 113.

[127] **CEX-161**, Fourth *Conto Energia* Decree, articles 1.2, 12.1 and 12.2.

[128] **CEX-161**, Fourth *Conto Energia* Decree, articles 1.2; *see* SoC, ¶ 115; *see also* SoRy, ¶ 211.

[129] **CEX-161**, Fourth *Conto Energia* Decree, article 2.3; *see* SoC, ¶ 115.

[130] First Witness Statement of Mr. Luca Miraglia, 22 December 2017 ("**Miraglia First Witness Statement**"), ¶¶ 22-24; Report GRIF, *Gruppo di Ricerche Industriali e Finanziarie "Fabio Gobbo"*, 18 December 2017 ("**GRIF Economic Report**"), pp. 10-11.

[131] **CEX-161**, Fourth *Conto Energia* Decree, articles 1.2, 12.1 and 12.2; *see* SoD, ¶¶ 255-256.

contracts entered into between GSE and producers whose plants qualified for incentives was also maintained under the Fourth *Conto Energia* Decree.[132]

157. The above aside, the Fourth *Conto Energia* Decree was different from the previous three in certain respects. For instance, the Fourth *Conto Energia* built on the nuanced distinctions created in the Third *Conto Energia* Decree between different kinds of photovoltaic plants (see ¶ 136 above) and created a further demarcation between "small plants" and "large plants". "Small plants" were defined as "photovoltaic plants realised on buildings with capacity no greater than 1000 kW, any other photovoltaic plants with capacity no greater than 200 kW, operating according to the net-metering scheme (*regime di scambio sul posto*), and photovoltaic plants with any capacity realised on buildings and in areas owned by the Public Administrations under article 1 (2) of [L]egislative [D]ecree [N]o. 165, 2001".[133] "Large plants" were any photovoltaic plant other than the ones which were "small plants".[134]

158. In this regard, the Fourth *Conto Energia* Decree established other checks and controls on the entitlement of incentive tariffs in order to regulate the costs. For instance, a registry for "large plants" was established, which was to be maintained by the GSE.[135] Further, photovoltaic plant operators were now required to "notify GSE about completion of works for the realisation of the plant, enclosing a certified expert report certifying compliance with" certain requirements contained in Annex 3-B to this *Conto Energia*.[136] If a plant enrolled in the register fell with the cost threshold envisaged under the Fourth *Conto Energia*, but had not provided such a certificate of completion of works, its registration was considered forfeited.[137] Also, the Fourth *Conto Energia* Decree established different

[132] **CEX-164**, Sample GSE Agreement under the Fourth *Conto Energia* Decree, articles 1-2, 10 and 15; *see* SoC, ¶ 116; *see also* SoRy, ¶¶ 230-231.

[133] **CEX-161**, Fourth *Conto Energia* Decree, article 1(u); *see* SoD, ¶ 248.

[134] **CEX-161**, Fourth *Conto Energia* Decree, article 1(v); *see* SoD, ¶ 248.

[135] **CEX-161**, Fourth *Conto Energia* Decree, articles 8 and 12.2 and Annex 5; *see* SoC, ¶ 114.

[136] **CEX-161**, Fourth *Conto Energia* Decree, article 9; *see* SoD, ¶ 248.

[137] **CEX-161**, Fourth *Conto Energia* Decree, article 8.4.

tariff limits for the "large plants" for every semester, beyond which limit the incentive tariffs would no longer be available for new facilities during that semester.[138]

159. The Fourth *Conto Energia* Decree had foreseen that the total cost would likely reach EUR 3.5 billion *per annum* by 2011.[139] By the end of 2011, Italy had reportedly added over 4.3 GW of additional installed photovoltaic capacity under the Fourth *Conto Energia*,[140] and by early 2012, Italy was approaching the cost threshold of the Fourth *Conto Energia*, i.e., EUR 6 billion.[141] In light of the cost threshold being reached, Italy was entitled by the Fourth *Conto Energia* Decree to revise incentive tariffs, and this was done by the enactment of the Fifth *Conto Energia* Decree.

(6) **Fifth *Conto Energia* Decree**

160. On 5 July 2012, the Italian Ministry for Economic Development enacted the Fifth and last *Conto Energia* Decree, which was to enter into force 45 days after a resolution by the Italian Electrical Energy Authority that the cost threshold of EUR 6 billion for incentive tariffs under the Fourth *Conto Energia* Decree was reached.[142] That resolution was issued on 12 July 2012.[143]

161. In light of the technological progress and decrease in cost of photovoltaic plants and a corresponding increase in the number of plants connected to the grid, the renewable energy production, by the end of 2011, was at 94 TWh, i.e., only 6 TWh short of the 2020 target

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138 **CEX-161**, Fourth *Conto Energia* Decree, article 4; *see* SoC, ¶ 115.

139 **CEX-161**, Fourth *Conto Energia* Decree, p. 3.

140 **CEX-186**, GSE, PV Support Results, "Plants that Begin Operating in 2011 (Fourth *Conto Energia*); SoC, ¶ 119.

141 **CEX-188**, Decree from the Minister of Economic Development and the Minister of the Environment, Land and Sea, 5 July 2012 ("**Fifth *Conto Energia* Decree**"); **CEX-189**, GSE website, Article *"Contatore fotovoltaico, raggiunti i 6 miliardi de euro"*; **REX-026**, Assoelettrica, Presentation at the 10th hearing of the Senate Industry Commission, 25 September 2013; *see* SoC, ¶ 120; *see also* SoD, ¶¶ 249, 282.

142 **CEX-188**, Fifth *Conto Energia* Decree, articles 1.1-1.3; *see* SoC, ¶ 121; *see also* SoD, ¶ 250.

143 **CEX-190**, AEEG Resolution no. 292/2012/r/efr.

set by the EU.[144] Accordingly, the Fifth *Conto Energia* Decree reduced the cost threshold of incentive tariffs to EUR 700 million per year.[145]

162. In this connection, the Fifth *Conto Energia* Decree provided for two different incentive regimes based on the photovoltaic plants' capacities. The first regime applied to plants up to the 1 MW capacity, and awarded them an "all-inclusive tariff", which included the price of the electricity and the value of the incentive.[146] The second regime applied to plants of capacity exceeding 1 MW, and awarded them an amount equal to the difference between the all-inclusive tariff and the market price of electricity plus the revenues deriving from the sale of the energy to the market.[147] In addition, all plants, regardless of their capacity were entitled to a bonus tariff on the electricity produced and consumed by them.[148]

163. The Fifth *Conto Energia* Decree was similar to its predecessors inasmuch as the incentive tariffs therein also applied for a period of 20 years. The contracts to be executed between the GSE and the producers also retained a similar form, except in respect of a specific stipulation entitling GSE to unilaterally modify the contracts.[149]

164. Lastly, the Fifth *Conto Energia* Decree stated that it would cease to apply to new photovoltaic plants 30 days after a resolution by the Italian Electrical Energy Authority that the cost threshold of EUR 700 million (bringing the total cost to EUR 6.7 billion per year) for incentive tariffs was reached.[150] This resolution was passed on 6 June 2013, and after 6 June 2013, no incentive tariffs were made available by Italy to any new photovoltaic plant installed and connected to the grid.[151] The rise towards this total cost threshold of EUR 6.7

[144] **CEX-188**, Fifth *Conto Energia* Decree, preamble, at 2; *see* SoC, ¶ 120.

[145] **CEX-191**, Ministry of Economic Development website, *"Rinnovabili, al via nuovi incentive per sviluppo settore oltre obiettive UE 2020"*; *see* SoC, ¶¶ 122 *et seq.*

[146] **CEX-188**, Fifth *Conto Energia* Decree, articles 5.1 and 5.4; *see* SoC, ¶ 123.

[147] **CEX-188**, Fifth *Conto Energia* Decree, articles 5.1 and 5.4; *see* SoC, ¶ 123.

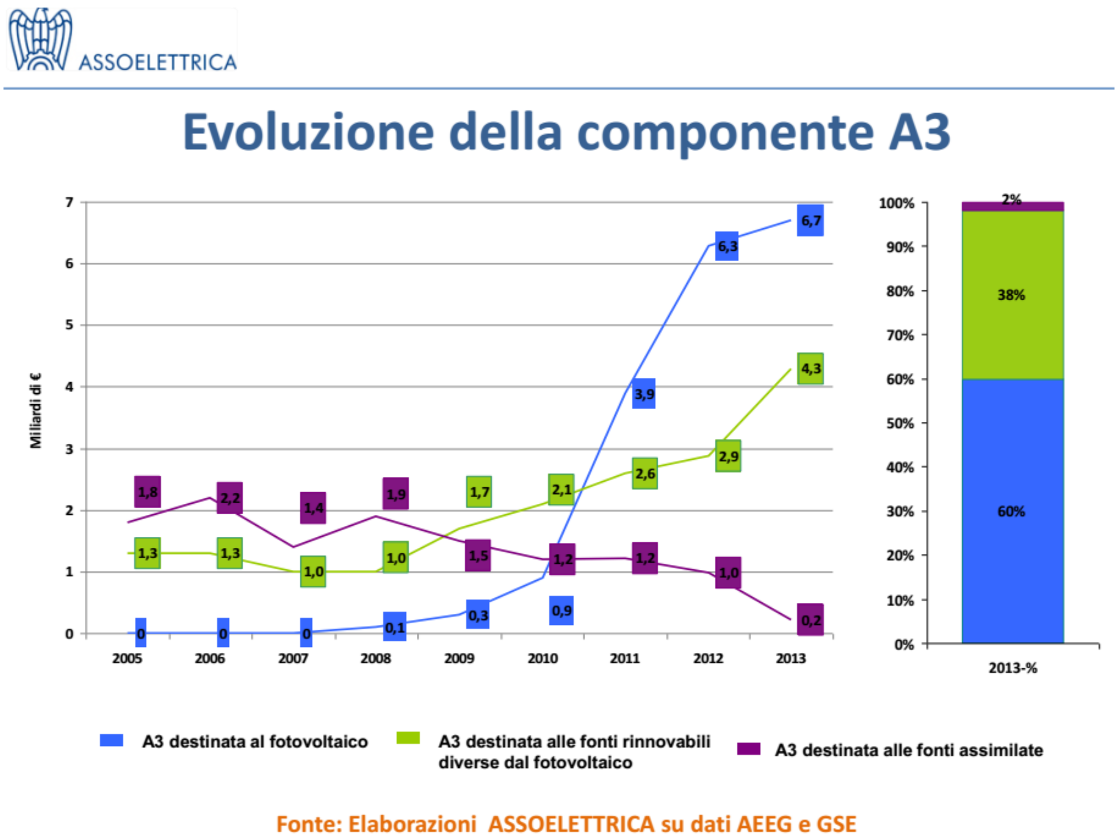
[148] **CEX-188**, Fifth *Conto Energia* Decree, articles 5.1 and 5.4; *see* SoC, ¶ 124; *see also* SoD, ¶ 251.

[149] **CEX-194**, Sample GSE Agreement under Fifth *Conto Energia* Decree, articles 2 and 4.1; *see* SoC, ¶ 126; *see also* SoRy, ¶¶ 230-231.

[150] **CEX-188**, Fifth *Conto Energia* Decree, article 1.5; *see also* CEX-195.

[151] **CEX-209**, AEEG Resolution 250/2013; *see* SoC, ¶ 130.

billion is evidenced in the following graph, which was part of the *Assoelettrica* presentation at the Senate Industry Commission on 25 September 2013:[152]



165. The blue graph in the above slide is representative of the rise from 2005 until 2013 in the total costs relating to incentives provided to photovoltaic plants. These costs constituted a component (Component A3) of the general revenue charges, which were ultimately borne by the end consumers.

166. On a separate note, a speech by the Minister of Environment in September 2012 lauded the *Conto Energia* regime for having been a "healthy part of the Italian economy" and for having created around 120,000 jobs between 2009 and 2011.[153]

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[152] **REX-026**, Assoelettrica, Presentation at the 10th hearing of the Senate Industry Commission, 25 September 2013, slide 11; SoD, ¶¶ 282-283.

[153] **CEX-187**, Greenstyle website, *"Rinnovabili elettriche, Clini: obbiettivo al 30%. Ma siamo già al 27%"*; *see* SoRy, ¶ 291.

C. OFF-TAKE REGIME AND MINIMUM GUARANTEED PRICE

167. In addition to the *Conto Energia* based incentive regime, Italy created another regime, through Legislative Decree No. 387/2003, by virtue of which grid managers and GSE were required to purchase all electricity injected into the grid by renewable energy producers, if the producers so requested.[154]

168. This regime, categorized by the Parties as the "off-take regime", operated in the alternative to or to the exclusion of the free market prices.[155] It entitled eligible producers, specifically renewable energy producers with capacity under 10 MW, to benefit from a fixed price per kilowatt at which they could sell their electricity to grid managers and/or the GSE.[156]

169. The Italian Electrical Energy Authority was tasked with establishing the modalities of this regime,[157] and further to this, it laid down principles for this regime primarily in Resolutions No. 34/2005 and 280/2007.[158] Each of these Resolutions was preceded by a consultation process initiated through Consultative Documents dated 20 October 2005 and 4 July 2007 respectively, by which comments of the stakeholders were invited.[159]

170. By way of Resolution No. 34/2005, a minimum price was guaranteed for small photovoltaic plants (together with hydroelectric plants and other renewable energy plants) with the capacity up to 1 MW to ensure the coverage of their production costs.[160] This Resolution applied only to the first two million kWh of electricity produced and injected into the grid by such plants.

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154 **CEX-210**, AEEG Consultation for consultation proposing a regime for the "ritiro", § 1, ¶ 1.1; *see* **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003; *see also* **CEX-211/REX-033**, Law No. 239/2004, 20 October 2004, article 1(41); SoD, ¶ 342.

155 SoD, ¶¶ 342-343.

156 SoC, ¶ 132; *see* **CEX-211/REX-033**, Law No. 239/2004, 20 October 2004.

157 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, articles 13(3) and 13(4).

158 **CEX-212/REX-035**, AEEG Resolution No. 34/2005; **CEX-213/REX-034**, AEEG Resolution No. 280/2007; *see* SoC, ¶ 133.

159 **REX-039**, Consultative doc. of 20 October 2004, *Modalità di ritiro dell'energia elettrica;* **REX-040**, Consultative doc. 26/07 OF 4 July 2007, *Revisione delle modalità e delle condizioni economiche per il ritiro dell'energia elettrica*; *see* SoD, fn 147.

160 **CEX-210**, AEEG Consultation for consultation proposing a regime for the "ritiro"; **CEX-212/REX-035**, AEEG Resolution No. 34/2005, Annex A; *see* SoC, ¶ 135; *see also* SoD, ¶ 352.

171. Thereafter, in the interim, Resolution No. 317/2006 was passed by the Italian Electrical Energy Authority, which sought to propose revised values of minimum guaranteed prices, based, *inter alia,* on consultations with some producer groups in relation to factors such as production costs of electricity from renewable sources, the implementation of the incentive tariff regime etc.[161]

172. This was followed by Resolution 280/2007, which replaced Resolution 34/2005. Resolution 280/2007 confirmed this minimum guaranteed price regime for photovoltaic plants contained in its predecessor. In particular, Resolution 280/2007 provided that from 2008 onwards, the minimum guaranteed price would be revised each year and distinguished based on the source of the renewable energy, so as to account for the peculiarities of each kind of renewable energy facility.[162]

173. Further, Resolution 280/2007 implemented the compensation regime for situations where the free market price of the electricity rose higher than the minimum guaranteed price, in which case GSE was obliged to pay the difference between the two to the producers.[163] Accordingly, the minimum guaranteed price was the hourly zonal price that was determined on a daily basis further to negotiations within the Italian Power Exchange.[164] Respondent categorizes GSE's role in this regime as that of a "commercial broker between the producer and the other operators within the electricity system".[165]

174. The motivation behind this minimum guaranteed price regime was "to ensure the economic survival of the smaller plants . . . even if market prices were to fall significantly", and to "provide dedicated simplifications" of the market by virtue of guaranteed remunerations.[166]

175. In furtherance of Resolution 280/2007, GSE entered into agreements with each qualifying photovoltaic plant producer that opted for this minimum guaranteed price regime, which

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161 **REX-036**, AEEG Resolution No. 317/06; *see* SoD, ¶¶ 353-354, fn 141.

162 SoC, ¶ 137; SoD, ¶ 350; for the minimum guaranteed prices for photovoltaic plants from 2008 to 2013, *see* **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices for years 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016.

163 **CEX-212/REX-035**, AEEG Resolution No. 34/2005, article 7.4 of Annex A.

164 SoC, ¶ 134; SoD, fn 143.

165 SoD, ¶¶ 344-345.

166 **CEX-213/REX-034**, AEEG Resolution No. 280/2007, article 7; *see* SoD, ¶ 349, fn 138; *see also* SoRy, ¶ 447.

agreements were valid for one-year terms renewable automatically unless the producers indicated otherwise.[167]

176. In 2011, this Italian Electrical Energy Authority issued Resolution No. 103/2011, which was preceded by a consultation process similar to the ones conducted for Resolutions No. 34/2005 and 280/2007.[168] Resolution No. 103/2011 sought to differentiate the minimum guaranteed prices between different power plants based on the source of renewable energy with effect from 2012.[169]

177. For the interim period, Resolution No. 103/2011 fixed a "basic" minimum guaranteed price of EUR 76.2/MWh.[170] This "basic" minimum guaranteed price was the price for electricity purchased after the first 25,000 kWh and until 2 MWh. The minimum guaranteed price was higher for the first 3750 kWh of electricity purchased (100 EUR/MWh) and then progressively reduced for the electricity purchased between 3750 kWh and 25,000 kWh (90 EUR/MWh).[171] Other than that, Resolution No. 103/2011 maintained the minimum guaranteed price regime as per the earlier situation with a provision for annual review.

178. The Romani Decree, which was enacted on 3 March 2011, i.e., a few months prior to Resolution No. 103/2011 (mentioned in ¶¶ 141-152 above), also contained a provision relating to this regime of minimum guaranteed prices, which provided as follows:

> [B]y 31 December 2012, on the basis of the Ministry of Economic Development's guidelines, the [Italian Electrical Energy Authority] defines the minimum guaranteed prices, that is the integration of the revenues deriving from the participation to the electric market, in relation to the production of renewable energy systems which continue to be operated without incentives and for which . . . the production's safeguard is not ensured by the participation to the market.[172]

179. The Italian Electrical Energy Authority clarified, in the Resolution No. 103/2011, that the above provision in the Romani Decree concerning minimum guaranteed prices refers to

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167 SoC, ¶ 138; SoD, ¶¶ 346-347.

168 **REX-038**, Consultative doc. 9/11, *Ridefinizione dei prezzi minimi garantiti per impianti di produzione di energia elettrica fino a 1 MW alimentati da fonti rinnovabili*; *see* SoD, ¶¶ 356-357.

169 **CEX-216/REX-037**, AEEG Resolution 103/11; *see* SoD, ¶ 356.

170 SoD, ¶ 357, fn 148.

171 **CEX-219E** and **CEX-219F**, AEEG, Press Releases on the minimum guaranteed prices.

172 **CEX-158**, Romani Decree, article 24.8; *see* SoC, ¶ 140.

new incentivizing instruments to be defined as of 2013, and does not limit the scope of application of the minimum guaranteed price regime to facilities already in operation until 2013.[173]

D. RESOLUTION 111/06 REGARDING IMBALANCE COSTS

180. In order to prevent an imbalance between the supply and demand of electricity, Italy maintained some reserve capacity from gas-fired turbines that could increase and decrease production rapidly subject to the demand. In order to regulate the costs of maintaining such reserve capacity of energy,[174] the Italian Electrical Energy Authority passed a Resolution on 9 June 2006 ("**Resolution 111/06**"), which required energy producers to provide in advance a projected figure of the amount of electricity they could inject into the grid. In the event that a producer deviated from its injection projections, it was required to pay what were known as "imbalance costs" or "imbalance compensation" under this Resolution 111/06.[175] In this connection, the following provisions of the Resolution 111/06 are important to note:

> 39.2. In the event in which the actual imbalance for a dispatching point in a relevant period were to be negative, the dispatching user pays . . . an actual imbalance compensation for the electric energy purchased within the ambit of the dispatching service.
>
> . . . .
>
> 40.4. The imbalance compensation for the measurement of the negative actual imbalances of which in paragraph 40.1, letter b), is equal:
>
> > (a) in each relevant period in which the aggregate imbalance by zone is positive, to the assessment price of the sales offers accepted in the market on the day before the relevant period in the zone in which the dispatching point is located;
> >
> > (b) in each relevant period in which the aggregate imbalance by zone is negative, to the maximum value of the following:
> >
> > > (i) the highest price among those of the sales offers accepted in the market for the dispatching service for the purposes of balancing in real

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173 **CEX-216/REX-037**, AEEG Resolution 103/11, p. 7; *see* SoC, ¶¶ 141-142.

174 SoC, ¶ 197; SoD, ¶ 373.

175 **CEX-226**, Resolution 111/06, and Annex A, articles 39 and 40; *see* SoC, ¶ 199.

> time in that relevant period, in the zone in which the dispatch point is located, and
>
> ii) the measurement price of the sales offers accepted in the market on the preceding day in the relevant period, in the same zone.[176]

181. In respect of "non-programmable renewable energy sources", Resolution 111/06 mentioned the following:

> 40.6. For the dispatching points by production unit powered by non-programmable renewable energy sources, as well as for the import or export dispatching points relating to electric frontiers belonging to a connection network for which there is no implemented verification of the programmed exchanges, <u>the imbalance compensation is equal to the assessment price of the sales offers of electric energy accepted in the market on the day before the relevant period and in the zone in which the dispatch point is located</u>.[177] (emphasis added)

182. In essence, renewable energy producers were effectively exempted from paying imbalance costs under this regime because of their non-programmable nature.[178] Further, the Parties agree that until 2012, all imbalance costs were passed on to end-consumers via electricity bills under Italy's socialized electricity regime.[179]

E. <u>CLAIMANTS' INVESTMENTS IN ITALY</u>

183. Claimants began investing in Italy's photovoltaic energy market in 2010, and by 2011, they contend that they had invested over EUR 100 million to acquire and develop a total of nine photovoltaic plants.[180] These investments were made by each of the three Claimants, all of which form part of the same corporate structure that shall be explained in (1) below. Thereafter, Claimants' investments shall be delineated between (2) First Claimant, (3) Second Claimant, and (4) Third Claimant, followed by (5) a tabulated representation of the Claimants' investments.

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176 **CEX-226**, Resolution 111/06, articles 39.2 and 40.4.

177 **CEX-226**, Resolution 111/06, article 40.6; *see* SoC, ¶ 200.

178 SoC, ¶ 200; SoD, ¶ 373.

179 SoC, ¶ 200; SoD, ¶ 386.

180 SoC, ¶¶ 148, 173.

(1) Claimants' Corporate Structure

184. The three Claimants are wholly owned subsidiaries of SunReserve International, LP. SunReserve International, LP was created as a joint venture between First Reserve Energy Infrastructure Fund, LP ("**First Reserve**"), a Cayman Islands private equity firm, and SunEdison LLC, a developer of solar photovoltaic facilities.[181]

185. This joint venture was formed pursuant to a Framework Agreement dated 21 May 2010, entered into by and between SunEdison LLC, a Delaware limited liability company ("**SunEdison**"), FREI Sun Holdings (Cayman) Ltd., a Cayman Islands exempted company ("**FR Holdings**"), FREI Sun Holdings (US) LLC, a Delaware limited liability company, SunEdison Reserve International, L.P., a Cayman Islands exempted limited partnership formed by SunEdison and FR Holdings, and SunEdison Reserve US, L.P., a Delaware limited partnership formed by SunEdison and FR Holdings US ("**Framework Agreement**").[182]

186. Attached with this Framework Agreement as Exhibit F was a Fund Guarantee that First Reserve executed and delivered to SunEdison, simultaneously with the execution of the Framework Agreement.[183] In the Fund Guarantee, First Reserve promised to "absolutely, unconditionally and irrevocably guarantees to SunEdison, on the terms and subject to the conditions set forth herein, the due and punctual payment, as and when due, of all Capital Contributions required to be made by FR Holdings . . ."[184] Under the Framework Agreement, FR Holdings, whose capital contributions First Reserve had guaranteed, was committed to capital contributions of USD 150 million.[185]

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[181] RfA, ¶ 24; First Witness Statement of Mr. Mark Florian, 28 July 2017 ("**Florian First Witness Statement**"), ¶¶ 2 *et seq.;* Witness Statement of Mr. Ryan Shockley, 28 July 2017 ("**Shockley Witness Statement**"), ¶ 2.

[182] **CEX-346**, Framework Agreement By And Among Sun Edison LLC, FREI Sun Holdings (Cayman) Ltd., FREI Sun Holdings (US) LLC, SunEdison Reserve US, L.P., and SunEdison Reserve Internaitonal, L.P. ("**Framework Agreement**"), Preamble; Shockley Witness Statement, ¶ 7.

[183] **CEX-346**, Framework Agreement, Preamble and Exh. F.

[184] **CEX-346**, Framework Agreement, Exh. F, Article 1.

[185] **CEX-346**, Framework Agreement, Article 1 ("“Capital Commitments” shall mean the commitments of each Investor to provide the capital contributions to the JV Entities as required by Article 2 hereof, which (i) in the case of FR Holdings shall equal $150,000,000 . . ."), see also Schedule I.

187. Mr. Ryan Shockley explains this joint venture relationship in his Witness Statement on behalf of Claimants, dated 28 July 2017, in the following terms:

> Discussions between the two companies took place over many months and resulted in the execution of a Framework Agreement in May 2010. For its part, First Reserve agreed to commit US $150 million to renewable energy projects in the targeted countries. SunEdison would propose specific renewable energy projects to be included in the joint venture i.e., that SunEdison would construct and that a joint venture company would then purchase and, by the time the framework agreement was concluded, SunEdison had developed an impressive list of potential projects.[186]

188. The First, Second and Third Claimants were amongst the joint venture companies created to acquire and develop photovoltaic projects pursuant to the above described arrangement.[187] The joint venture companies envisaged investments in various countries, including the United States and Canada,[188] but 50% of the total capital investments was to be used in Italy due to the favourable conditions created by the *Conto Energia* regime and the off-take and minimum guaranteed price regime.[189] It is in reliance of this regime that Claimants contend they began investing in Italy's photovoltaic energy market.

(2) First Claimant's Investments

189. Between 2010 and 2011, the First Claimant, i.e., SunReserve Luxco Holdings S.À.R.L, acquired a total of seven photovoltaic plants in Italy, which constituted a portfolio of 27.7 MW. In this process, according to Claimants, the First Claimant invested more than EUR 61 million.[190]

190. The acquisition of the seven photovoltaic plants by the First Claimant was done in four batches. Each of these acquisitions was a result of the First Claimant acquiring the special purpose vehicles ("**SPVs**") that had developed and/or was operating the photovoltaic plant

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186 Shockley Witness Statement, ¶ 7; *see* Florian First Witness Statement, ¶ 11; *see also* **CEX-44**, GRTN Presentation *"Le attività del nuovo GRTN focalizzate sull'energie rinnovabili,"* SINERGY, Rimini; **CEX-45**, GRTN Presentation *"Le attività del GRTN per le fonti rinnovabili"*.

187 SoC, ¶¶ 146, 148.

188 Florian First Witness Statement, ¶ 12.

189 SoC, ¶ 146; *see* Shockley Witness Statement, ¶¶ 8-10.

190 SoC, ¶ 162.

in consideration. This acquisition of SPVs was in turn done by wholly owned Italian subsidiaries of the First Claimant.[191]

191. The first batch of acquisitions occurred on 30 June 2010, when the First Claimant acquired three SPVs controlled by SunEdison Italia S.r.l., i.e., SunEdison Apulia 007 S.r.l., SunEdison Apulia 008 S.r.l. and Sunny Lenare S.r.l.[192] These SPVs had developed the following three solar power plants: (i) a 985.71 kW plant located in the Municipality of Lequile, owned by SunEdison Apulia 007 S.r.l. ("**San Marco**"); (ii) a 968.31 kW plant located in the Municipality of Soleto, owned by SunEdison Apulia 008 S.r.l. ("**Santoro**"); and (iii) a 997.92 kW plant located in the Municipality of Lequile, owned by Sunny Lenare S.r.l. ("**Lenare**").

192. Claimants executed the acquisition of these plants after a due diligence was carried out by the international law firm Ashurst, which confirmed, *inter alia*, that "the authorisation process for the construction and operation" of these plants was completed.[193] Further, these SPVs had also secured the requisite land rights of the three plants by virtue of sale and purchase agreements.[194]

193. The Santoro plant entered into operation on 12 August 2010 and the other two plants, i.e., San Marco and Lenare, entered into operation on 22 December 2010. Each of them was covered within the incentive scheme provided in the Second *Conto Energia* Decree (see Section B(2) above), and qualified for an incentive tariff of 0.3460 EUR/kWh. This tariff, together with its temporal scope of 20 years as of the date of entry into operation of the plant, was specified in the letter from GSE dated 3 March 2011 concerning the San Marco

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191 SoC, ¶ 148.

192 SoC, ¶¶ 149-150; **CEX-288**, SunEdison Apulia 007, SunEdison Apulia 008 and Sunny Lenare S.r.l. Quota Transfer Deeds.

193 **CEX-214**, Ashurst due diligence report "Legal Due Diligence Report in relation to the following photovoltaic plants: San Marco, Santoro, Lenare", pp. 20-22, 25, 26-28, 29-31, 33.

194 SoC, fn 252; **CEX-284**, San Marco Sale and Purchase, and Easement right Agreement; **CEX-285**, Santoro Sale and Purchase, and Easement right Agreement; **CEX-286**, Monaci Sale and Purchase, and Easement right Agreement; **CEX-287**, Lenare Surface and Easement Right Agreement.

plant,[195] and in the three contracts entered into on 31 January 2011 and 15 March 2011 between GSE and the plants' operators.[196]

194. In addition to the incentives under the Second *Conto Energia*, these three plants were also entitled to the minimum guaranteed price under the off-take regime provided by Italy, since these plants were each under the capacity of 1 MW (see Section C above).[197] According to Claimants, the GSE paid this minimum guaranteed price for each of the three plants for a period of six years.[198]

195. The *second* batch of acquisitions by the First Claimant occurred in January 2011, and consisted of only one solar power plant. In this connection, the First Claimant acquired the SPV, Saniso S.r.l.,[199] through its subsidiary SunReserve Luxco Parent III S.à.r.l.[200] This SPV had developed a 20.41 MW plant called Campania located in the Municipality of Gugliano (Province of Naples), and had also already secured the requisite land rights of the plant ("**Campania**").[201]

196. Claimants executed the acquisition of this plant after a due diligence was carried out by the law firm Gianni, Orrigoni, Grippo & Partners in October 2010, which confirmed, *inter alia*, that "the authorization for the construction and operation of [the Campania plant] seems not affected by any critical issues" and that "[t]he formal process for securing the interconnection to the electricity grid has been completed".[202]

197. The Campania plant entered into operation on 24 November 2010, and was thus covered within the incentive scheme of the Second *Conto Energia* (see Section B(2) above), i.e., an

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195 **CEX-290**, San Marco GSE Incentive Tariff Letter.

196 **CEX-293**, Santoro GSE Agreement n. I08F13381307; **CEX-294**, San Marco GSE Agreement n. I08F15697007; **CEX-295**, Lenare GSE Agreement n. I0F15697307; *see* SoC, ¶¶ 150-152.

197 **CEX-296**, Santoro Off-take Regime Agreement, articles 1 and 4; **CEX-297**, Lenare Off-take Regime Agreement, articles 1 and 4; **CEX-298**, San Marco Off-take Regime Agreement, articles 1 and 4.

198 SoC, ¶ 153.

199 **CEX-303**, Saniso S.r.l. Quota Transfer Agreement article 2; **CEX-304**, Saniso S.r.l. Quota Transfer Deed article 1; *see* SoC, ¶¶ 154-155.

200 **CEX-302**, SunEd Reserve Luxco Parent III S. à r.l. Deed of Incorporation, 29 November 2010; *see* SoC, fn 260.

201 **CEX-299**, Campania Single Authorization (Autorizzazione Unica) issued by Calabria Region on 26 March 2009 (Determina 78/09); *see* SoC, ¶ 154.

202 **CEX-301**, Gianni, Origoni, Grippo & Partners, Legal Due Diligence Report for the Photovoltaic Project in Campania, pp. 6-11, 12, 26, 29.

incentive tariff of 0.3460 EUR/kWh for a period of 20 years. This tariff, together with its temporal scope of 20 years as of the date of entry into operation of the plant, was specified in the letter from GSE concerning the Campania plant, and in the contract entered into on 5 March 2011 between GSE and the plant's operator.[203]

198. The acquisition of the Campania plant was succeeded immediately thereafter by the *third* batch of acquisitions by the First Claimant, which occurred by the acquisition of another SPV, SunEd Parco Solare 5 S.r.l., which had already developed and was operating a 998.13 kW plant called Monaci located in the Municipality of Lequile ("**Monaci**").[204] This acquisition was also preceded by a due diligence by Ashurst.[205] Further, the SPV had also already secured the requisite land rights concerning the Monaci plant by virtue of a sale and purchase agreement and the authorizations filed with the Municipality of Lequile.[206]

199. The Monaci plant entered into operation on 30 December 2010, and was thus covered within the incentive scheme of the Second *Conto Energia* (see Section B(2) above), i.e., an incentive tariff of 0.3460 EUR/kWh for a period of 20 years. This tariff was specified in the letter from GSE dated 10 May 2011 concerning the Monaci plant,[207] and in the contract entered into on 18 May 2011 between GSE and the plant's operator.[208] This was supplemented by another contract between GSE and the plant's operator, entitling the Monaci plant to the minimum guaranteed price in Italy's off-take regime.[209]

200. This was followed on 31 March 2011, by the First Claimant's *fourth* and last batch of acquisitions, which constituted the acquisition of the following two solar plants: (i) a 1.8 MW plant called Rustico located in Sicily, owned by SunEdison Sicily 006 S.r.l. ("**Rustico**"); and (ii) a 1.66 MW plant called Milana also located in Sicily, owned by SunEdison Sicily 008 S.r.l. ("**Milana**").

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203 **CEX-306**, Campania plant GSE Agreement n. I08F13988007, articles 1 and 2; *see* SoC, ¶ 156.

204 **CEX-310**, SunEd Parco Solare 5 S.r.l. Quota Transfer Deed; *see* SoC, ¶¶ 157-158.

205 **CEX-307**, Ashurst due diligence report "Legal Due Diligence Report in relation to the following photovoltaic plants: Monaci and Fiumicino", pp. 18-27, 31-33; *see* SoC, ¶ 157.

206 **CEX-308**, Monaci Simplified Authorization (DIA) filed with the Municipality of Lequile in August 2008; *see* SoC, fn 262.

207 **CEX-309**, Monaci GSE Incentive Tariff Letter; *see* SoC, ¶ 158.

208 **CEX-311**, Monaci GSE Agreement n. I0F17928907, articles 1 and 2; *see* SoC, ¶ 158.

209 **CEX-312**, Monaci Off-take Regime Agreement, articles 1 and 4; *see* SoC, ¶ 159.

201. The SPVs, i.e., SunEdison Sicily 006 S.r.l. and SunEdison Sicily 008 S.r.l., were acquired through the First Claimant's subsidiary, i.e., SunReserve Luxco Parent V S.à.r.l.[210] This acquisition was also preceded by a due diligence by Gianni, Orrigoni, Grippo & Partners,[211] and by the SPVs' acquisition of the requisite land rights.[212]

202. The Rustico and Milana plants entered into operation on 28 and 29 April 2011, respectively, and were thus covered within the incentive scheme provided in the Third *Conto Energia* (see Section B(3) above). Each of them qualified for a tariff of 0.313 EUR/kWh for a period of 20 years. This tariff was specified in GSE's tariff confirmation letters,[213] and in corresponding contracts entered into between GSE and the operators.[214]

(3) Second Claimant's Investments

203. The Second Claimant, i.e., SunReserve Luxco Holdings II S.À.R.L, acquired one photovoltaic plant in Italy, which constituted a portfolio of 70.5 MW. In this process, according to Claimants, the Second Claimant invested more than EUR 83 million.[215]

204. The plant acquired by the Second Claimant was called Rovigo, and was located in the Municipality of San Bellino, Veneto Region ("**Rovigo**"). The acquisition of the Rovigo plant occurred through the acquisition of another SPV, Emmezeta Solar Energy S.r.l. on 30 September 2010, which was developing the said plant and had already secured the requisite land rights.[216] This acquisition was also preceded by a due diligence by Ashurst.[217]

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210 **CEX-323**, SunEd Reserve Luxco Parent V S. à r.l. Deed of Incorporation; **CEX-324**, SunEdison Sicily 006 S.r.l. Quota Transfer Deed; **CEX-325**, SunEdison Sicily 008 S.r.l. Quota Transfer Deed; *see* SoC, ¶ 161(2), fn 271.

211 **CEX-322**, Gianni, Orrigoni, Grippo & Partners law firm report "Legal Due Diligence Report on Photovoltaic Projects in the Sicily Region Project Milana - Project Rustico", pp. 6, 15, 19, 29, 42-44; *see* SoC, ¶ 161.

212 **CEX-318**, Rustico Single Authorization (Autorizzazione Unica) (D.R.S. n. 472/2010); **CEX-319**, Milana Single Authorization (Autorizzazione Unica) (D.R.S. 473/2010); **CEX-320**, Rustico Surface and Easement Right Agreement; **CEX-321**, Milana Surface and Easement Right Agreement; *see* SoC, ¶ 161, fn 269.

213 **CEX-327**, Rustico GSE Incentive Tariff Letter; **CEX-328**, Milana GSE Incentive Tariff Letter; *see* SoC, ¶ 161.

214 **CEX-329**, Rustico GSE Agreement n. O03M27266207, articles 1, 2 and 10; **CEX-330**, Milana GSE Agreement n. O03M28467707, articles 1, 2 and 10; *see* SoC, ¶ 161.

215 SoC, ¶¶ 163, 168.

216 **CEX-331**, Rovigo Single Authorization (Autorizzazione Unica) n. 3622/2009; **CEX-333**, Rovigo Works Commencement Notice, filed with the Region of Veneto Urban Authority; **CEX-335**, Emmezeta Solar Energy S.r.l. Quota Transfer Deed; **CEX-336**, SunReserve Luxco Parent II S. à r.l. Deed of Incorporation; *see* SoC, ¶¶ 163-164.

205. The Rovigo plant entered into operation on 22 November 2010, and was thus covered within the incentive scheme of the Second *Conto Energia* (see Section B(2) above), i.e., an incentive tariff of 0.3460 EUR/kWh for a period of 20 years. This tariff was specified in the letter from GSE dated 11 January 2011 concerning the Rovigo plant,[218] and in the contract entered into on 11 February 2011 between GSE and the plant's operator.[219]

206. The Rovigo plant was the "largest plant that SunReserve acquired".[220] After the Second Claimant acquired the Rovigo plant, in October 2010, the SPV, Emmezeta Solar Energy S.r.l., entered into a loan agreement with a few banks for the development and construction of the project.[221] The Second Claimant also arranged an intercompany loan for the SPV.[222]

(4) Third Claimant's Investments

207. The Third Claimant, i.e., SunReserve Luxco Holdings III S.À.R.L, acquired one photovoltaic plant in Italy, which constituted a portfolio of 2.97 MW. In this process, according to Claimants, the Third Claimant invested approximately EUR 5 million.[223]

208. The photovoltaic plant acquired by the Third Claimant was called Fiumicino, and was located in the Municipality of Fiumicino, Lazio Region ("**Fiumicino**").[224] The acquisition of the Fiumicino plant occurred through the acquisition of the SPV, SunEdison Apulia 009 S.r.l. on 22 June 2011, much after the completion of the authorization and connection procedures and after the plant had already entered into operation, which occurred in 15 March 2011.[225] The acquisition of the SPV, SunEdison Apulia 009 S.r.l. was effected through one of the Third Claimant's wholly owned subsidiaries, i.e., SunReserve Luxco

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217 **CEX-334**, Ashurst, Legal Due Diligence Report in relation to the Rovigo Photovoltaic Plant, pp. 18, 21, 26; *see* SoC, ¶ 164.

218 **CEX-340**, Rovigo GSE Incentive Tariff Letter; *see* SoC, ¶ 167.

219 **CEX-341**, Rovigo GSE Agreement n. T03F13776207, articles 1 and 2; *see* SoC, ¶ 167.

220 Florian First Witness Statement, ¶¶ 17-18.

221 **CEX-337**, Emmezeta Solar Energy S.r.l. Facility Agreement, article 3; *see* SoC, ¶ 165.

222 **CEX-338**, Rovigo Equity Contribution Agreement, article 2.1(b); **CEX-339**, Rovigo Intercompany Loan article 2; *see* SoC, ¶¶ 165-166.

223 SoC, ¶¶ 169, 172.

224 SoC, ¶ 163.

225 **CEX-342**, Carnelutti Memorandum titled "Project Fiumicino: Executive Summary Memorandum, p. 6; *see* SoC, ¶¶ 170-171.

Parent VI S.à.r.l.. This acquisition was preceded by the SPV entering into a loan facility agreement with a bank for an amount of EUR 6.3 million for project construction costs.[226]

209. The Fiumicino plant had already qualified, under the Second *Conto Energia* (see Section B(2) above), for an incentive tariff of 0.443 EUR/kWh for a period of 20 years, prior to the Third Claimant's acquisition of the same. This tariff was specified in the letter from GSE dated 17 June 2011 concerning the Fiumicino plant,[227] and in the contract entered into on 28 June 2011 between GSE and the plant's operator.[228]

(5) **Conclusion**

210. In light of the above, Claimants had acquired the a total of nine photovoltaic plants in Italy, which are enlisted below together with the corresponding *Conto Energia* regime and/or off-take regime that they were covered under.

S. No.	PV Plant	Regime(s)	Tariff (EUR/kWh)
First Claimant			
1	San Marco	Second *Conto Energia* + Off-Take Regime	0.346
2	Santoro	Second *Conto Energia* + Off-Take Regime	0.346
3	Lenare	Second *Conto Energia* + Off-Take Regime	0.346
4	Campania	Second *Conto Energia*	0.346
5	Monaci	Second *Conto Energia* + Off-Take Regime	0.346
6	Rustico	Third *Conto Energia*	0.313
7	Milana	Third *Conto Energia*	0.313
Second Claimant			
8	Rovigo	Second *Conto Energia*	0.346
Third Claimant			
9	Fiumicino	Second *Conto Energia*	0.443

[226] **CEX-300**, SunEdison Apulia 009 S.r.l. Quota Transfer Deed; **CEX-305**, Facility Agreement by and between SunEdison Apulia 009 S.r.l. and Natixis SA, article 3.1; **CEX-332**, SunEdison Apulia 009 S.r.l. Shareholder Loan article 2; *see* SoC, ¶ 171.

[227] **CEX-400**, Fiumicino GSE Incentive Tariff Letter; *see* SoC, ¶ 170.

[228] **CEX-343**, Fiumicino GSE Agreement n. I08F19354507, articles 1 and 2; *see* SoC, ¶ 170.

F. ITALY'S MEASURES AFTER THE FIFTH *CONTO ENERGIA* FROM 2012 TO 2014

211. As mentioned in Section B(6) above, the Fifth *Conto Energia* Decree was enacted on 5 July 2012, and provided for a cost threshold of incentive tariffs upto EUR 700 million per year, so as to reach the total cost of EUR 6.7 billion for the incentive program. In this connection, the Preamble of the Fifth *Conto Energia* contained the following relevant recitals:

> IT BEING HELD that, due to the high level of charges accrued and the state of and prospects for technologies, it is sufficient to commit a further 700 million €/year approximately in incentive costs, for the purpose of accompanying [photovoltaic] energy in its progress towards competitiveness, outside the scope of support schemes. This amount will cover charges for plants on the register, those which access tariffs freely and plants which become operational during transitional periods …[229]

212. According to the report of Claimants' regulatory expert, FTI Consulting, Italy surpassed the level of photovoltaic production projected for 2020, by 2012 itself, i.e., 8 years in advance of the objective.[230]

213. From 2012 onwards, i.e., since and including the enactment of the Fifth *Conto Energia* Decree, until 2014, Italy undertook certain additional administrative and/or fiscal measures, which are under challenge by Claimants, and thus, a subject of dispute between the Parties. In brief, these measures include (1) an Administrative Management Fee imposed on photovoltaic energy producers; (2) changes to the Minimum Guaranteed Prices under the Off-Take Regime; (3) an obligation on the photovoltaic energy producers to pay "imbalance costs"; (4) the resolution of domestic complaints relating to one "Robin Hood Tax"; and (5) the classification of photovoltaic plants as "immovable property".

(1) Administrative Management Fee in the Fifth *Conto Energia*

214. Together with provisions relating to the incentive tariff regime, the Fifth *Conto Energia* also contained a provision requiring photovoltaic energy producers to pay an annual administrative fee of EUR 0.0005/kWh of incentivized energy ("**Administrative**

229 **CEX-188**, Fifth *Conto Energia* Decree, Preamble.

230 Expert report of Dr Boaz Moselle and Dr Dora Grunwald, 27 July 2012 ("**First FTI Regulatory Report**"), ¶ 5.56; *see* SoC, ¶ 177.

Management Fee"). This provision applied, as of 1 January 2013, to all photovoltaic energy producers benefitting from the incentive tariffs under any of the *Conto Energia* Decrees. It stated the following:

> To cover GSE management costs, and the cost of checks and controls by GSE, the plant operators that access incentive tariffs under this decree and decrees issued in implementation of article 7 of legislative decree no. 387, 2003 [Off-Take Regime] and article 25 (10) of legislative decree no. 28, 2011 [Romani Decree], are under an obligation, commencing from 1 January 2013, to pay GSE a contribution of 0.05 euro cents for each kWh of subsidised energy, also by means of offset with incentives owed.[231]

215. Articles 10.5 and 10.6 of the Fifth *Conto Energia* provided that GSE will specify "the application rules for . . . access to the incentive tariffs under this decree" and "[t]he procedures for payment of the contributions". Pursuant to this, GSE clarified on its website in 2013 that the annual Administrative Management Fee shall be offset against GSE's first payment of incentive tariffs to any producer in a given year.[232]

216. This policy decision to impose Administrative Management Fee found a mention in the subsequently enacted *Spalma-incentivi* Decree dated 24 June 2014[233] as well (discussed in Section IV.G below). In particular, Articles 25(1) and 25(2) of the *Spalma-incentivi* Decree provided, in their relevant part, as follows:

> Article 25(1): Charges incurred by the GSE for the conduct of management, audit and control activities, related to the incentive and support mechanisms, are to be borne by the beneficiaries of the same activities . . . .
>
> Article 25(2)(3): Within 60 days from the date of entry into force of this Legislative Decree, and every three years thereafter, the GSE proposes to the Minister of economic development the size of tariffs for the activities referred to in paragraph 1 to be applied as from 1 January 2015 and valid for three years. Rates are set by the GSE on the basis of costs, of planning and of development forecasts of the same activities. The proposal includes the methods of payment of the fees.[234]

217. Further, the GSE submitted a report to the Ministry for Economic Development on 21 August 2014, wherein it estimated, according to Respondent, that the Administrative

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231 **CEX-188**, Fifth *Conto Energia* Decree, article 10.4.

232 **CEX-217**, GSE website, "*Conto* V", p. 5.

233 **CEX-266**, Legislative Decree No. 91/2014, converted into law by Law No. 116/2014 dated 11 August 2014.

234 SoD, fn 168-169.

Management Fee would constitute 0.17% of the incentives received by the beneficiaries under the Fifth *Conto Energia*.[235]

(2) Changes to the Minimum Guaranteed Price under Off-Take Regime

218. As mentioned in Section IV.C above, Italy had established an Off-Take Regime, which constituted, *inter alia,* a minimum guaranteed price for electricity produced by small photovoltaic plants with capacity up to 1 MW. This entitlement to a minimum guaranteed price operated in conjunction with the incentive regime under the *Conto Energia* Decrees, except in respect of the all-inclusive tariff provided for in the Fifth *Conto Energia*, which Respondent submits was incompatible with the minimum guaranteed price regime.[236] The modalities of this Off-Take Regime were formulated by the Italian Electrical Energy Authority, which fixed the minimum guaranteed price on a yearly basis.

219. In this connection, the Italian Electrical Energy Authority established the minimum guaranteed price for the year 2013 as EUR 105.8/MWh up to 3,750 kWh of annual energy purchase; EUR 95.2/MWh for annual energy purchase between 3,750 kWh to 25,000 kWh; and EUR 80.6/MWh for annual energy purchase from 25,000 kWh to 2,000,000 kWh.[237]

220. In the meantime, the Italian Electrical Energy Authority had invited *Politecnico di Milano* to prepare a report based on (i) the analysis of average electricity production costs from different sources of renewable energy, depending on data from power plants with a capacity up to 1 MW, and (ii) the analysis on the scale of progressive brackets that could be used to ensure coverage of operating costs and fuel costs for each source. The data relating to operating costs and fuel costs was provided by electricity producer associations in Italy, including, *inter alia*, *Assoelettrica*,[238] which Claimants contest was incomplete and unclear.[239] The report was prepared by *Politecnico di Milano* in July 2013, and provided,

235 **REX-45**, GSE Technical Report, *"Modalità di copertura di oneri sostenuti dal gestore dei servizi energetici GSE SpA per il triennio 2015-2017, ai sensi del Decreto Legge 24 giugno 2014, n. 91, articolo 25"*; *see* SoD, ¶¶ 411-412.

236 SoD, ¶ 343.

237 **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices.

238 SoD, ¶¶ 359-361.

239 First FTI Regulatory Report, ¶¶ 5.8-5.12.

inter alia, that operating costs are only significant in comparison to the market electricity prices in the case of very small scale power plants such as household installations upto 3 kW, and not for the medium scale or large scale power plants.[240]

221. Thereafter, on 31 October 2013, the Italian Electrical Energy Authority issued a document for public consultation bearing No. 486, inviting the stakeholders' comments by 25 November 2013.[241] The public consultation document proposed a new formula for the calculation of minimum guaranteed prices amounting to the average operating costs of renewable energy facilities plus 8%. Applying this formula, Claimants submit that the minimum guaranteed price for photovoltaic plants would be EUR 37.8 per MWh of electricity produced.[242]

222. This public consultation document was followed by a Resolution No. 618/2013/R/EFR dated 19 December 2013 by the Italian Electrical Energy Authority ("**Resolution 618**"). This Resolution revised the minimum guaranteed price for photovoltaic plants with a capacity beyond 20 kW for the year 2014 to EUR 38.9/MWh, i.e., applying a 10% increase of the average operating costs, which were calculated as 35 EUR/MWh.[243] The press release corresponding to this Resolution 618 stated that "the consumer prices index for families and workers has increased by 1.1% in 2013 compared to 2012."[244]

223. Further, the Resolution 618 stated that limited the minimum guaranteed prices to the first 1.5 million kWh of energy purchased per year (instead of the earlier threshold of 2 million kWh per year). On a related note, the distribution based on the amount of electricity purchased, resulting in a progressive decrease of the minimum guaranteed price (see ¶ 219 above), and consequently a "basic" minimum guaranteed price (see ¶ 177 above), was

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240 **REX-041**, *Costi di produzione di energia elettrica da fonti rinnovabili, Rapporto commissionato da AEEG al Politecnico di Milano - Dipartimento di Energia*, July 2013, Annex 1 to 486/2013/R/EFR; *see* SoD, ¶¶ 366-367.

241 **CEX-413/REX-042**, AEEG Document for public consultation no. 486, Oct. 31, 2013; *see* SoC, ¶ 186, fn 293; *see also* SoD, ¶¶ 362-363.

242 SoC, ¶ 187; *see* **CEX-413/REX-042**, AEEG Document for public consultation no. 486, Oct. 31, 2013, pp. 9-10; *see also* **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices.

243 **CEX-219G2**, AEEG, Press Release on the minimum guaranteed prices.for 2014; **CEX-220**, AEEG Resolution No. 618/2013/R/EFR; *see* SoD, ¶¶ 363, 368.

244 **CEX-219G1**, AEEG, Press Release on the minimum guaranteed prices.for 2013.

abolished. One common minimum guaranteed price was fixed for all electricity purchased upto this new limit of 1.5 million kWh.[245]

224. This was followed by minimum guaranteed prices for 2015 and 2016 to be established at 39 EUR/MWh.[246] According to Claimants, the minimum guaranteed prices established by the Italian Electrical Energy Authority for photovoltaic plants since 2014 onwards were lower than the average market price of electricity.[247]

225. Four days after Resolution 618 was issued by the Italian Electrical Energy Authority, the Italian Government enacted the Legislative Decree No. 145/2013, which was known as the *Destinazione Italia* ("***Destinazione Italia***"). This Legislative Decree, *inter alia,* provided that the minimum guaranteed price for all photovoltaic plants benefiting from the *Conto Energia* Decrees would be equal to the hourly zonal price, with the exception for photovoltaic plants with a capacity below 100 kW.[248]

226. The *Destinazione Italia* was subjected to criticism by the President of the Italian Electrical Energy Authority, Mr. Guido Bortoni, and by Members of Parliament, during a session discussing the enactment of the Decree.[249] For instance, Mr. Bortoni mentioned the following in a speech before the Parliament:

> The Legislative Decree, instead, provides for the minimum guaranteed prices to be always equal to the energy market prices, thus basically neutralizing the goals for which [the minimum guaranteed prices] had been introduced in the first place. These measures would require deep analysis of costs. Additionally, this measure might compromise the economic balance of those plants only partially benefiting from support regimes (as for example in case of repowering or revamping) which would be excluded from the application of minimum guaranteed prices in relation to the entire quantity of energy generated. In

245 **CEX-220**, AEEG Resolution No. 618/2013/R/EFR; see SoD, ¶ 365.

246 **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices; *see* SoC, ¶ 189.

247 SoC, ¶ 189.

248 **CEX-262/CEX-221**, Law Decree No. 145/2013, 23 December 2013, article 1(2); *see* SoC, ¶ 191; *see also* SoD, ¶ 369.

249 **CEX-223**, Chamber of Representatives – Session no. 168, Transcript of the discussion about the so called Destinazione Italia Decree (Allegato 1); **CEX-224**, Summary of the Chamber of Representative VI and X Committees joint meeting; **CEX-225**, Senate of the Republic – Session no. 195 (Allegato 2 and 3), Senator Giorno; *see* SoC, ¶ 193.

> conclusion, in light of the foregoing considerations, we ask to restore the framework existing before the issue of the Legislative Decree.[250]

227. On 21 February 2014, the *Destinazione Italia* was enacted into Law No. 9/2014 by the Parliament establishing the minimum guaranteed price regime established under the *Destinazione Italia*.[251]

228. Thereafter, on 17 April 2014, the Italian Electrical Energy Authority issued Resolution 179/2014, which envisaged that the minimum guaranteed price would be allocated for the first 1.5 million kWh of electricity purchased by photovoltaic plants having a capacity above 100 kW.[252]

(3) The Imbalance Costs

229. As mentioned in Section IV.D above, the "imbalance costs" that renewable energy producers were required to pay in Italy was equal to the market price of energy on the day before the relevant period and in the zone in which the dispatch point was located.[253]

230. With respect to these "imbalance costs", the Italian Electrical Energy Authority passed a Resolution 281/2012/R/EFR on 5 July 2012 ("**Resolution 281**"). In this Resolution 281, it was, *inter alia,* mentioned that the treatment of "non-programmable renewable energy sources" in respect of the obligation to pay "imbalance costs" should be equated with the treatment "provided for other production units not entitled to participation in the Market for Dispatching Services".[254]

231. This implied that the non-programmable renewable energy power plants would have to pay imbalance costs over and above the hourly zonal price (which was the previously fixed imbalance costs as mentioned in ¶ 182 above) if the "modified and corrected binding

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250 **CEX-222**, AEEG, *Memoria 9 gennaio 2014 per l'audizione presso la 6a e la 10a Commissione della Camera dei Deputati* (1/2014/I/COM)

251 **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013; SoC, ¶ 194; *see* SoD, ¶ 386.

252 **REX-043**, AEEG, *Delibera 17 aprile 2014 - Aggiornamento dell'ambito di applicazione dei prezzi minimi garantiti per gli impianti alimentati da fonti rinnovabili, per i quali è consentito l'accesso al ritiro dedicato*; SoD, ¶ 370.

253 **CEX-226**, Resolution 111/06, and Annex A, article 40.6.

254 **CEX-227**, AEEG Resolution 281/2012/R/EFR, p. 6; *see* SoC, ¶ 201.

program" was 20% beyond the amount of electricity actually fed into the grid.[255] The "modified and corrected binding program" refers to the amount of electricity that the dispatching user undertook to feed into the grid (as against the amount of electricity actually fed into the grid).[256]

232. Resolution 281 also provided for a "scouting period of at least 6-12 months" before the same was appropriately implemented.[257] In this regard, on 22 November 2012, Resolution 281 was followed by a Resolution 493/2012/R/EFR issued by the Italian Electrical Energy Authority ("**Resolution 493**"). This Resolution 493, *inter alia,* provided for "the modalities of allocation of the imbalance compensation and payments covering the administrative costs to be attributed to the producers".[258]

233. Both these Resolutions, i.e., Resolutions 281 and 493 were challenged by renewable energy producers before Italian administrative courts. On 9 June 2014, the *Consiglio di Stato*, Italy's highest administrative court ruled, in its Decision No. 2936/2014, that Resolution 281 was unlawful in part. In particular, in the following passage, it found that the Resolution discriminated against non-programmable renewable energy by treating it in the same way as other kinds of energy:

> Non-programmable sources of electricity production are characterized by the fact that, while it is not objectively impossible to predict the [amount of] energy produced and fed into the grid, this prediction cannot reach the same level of precision as for programmable sources, by reason of the type of source and the variables that condition its operation . . . the first judge . . . has affirmed that the imposition of such costs must take account of the specificity of the source.[259]

234. Further, in the following passage, the *Consiglio di Stato* clarified the scope of its findings on discrimination:

> The foregoing does not mean that the imbalance costs caused by these production units should, as it was the case in the previous regime, be

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[255] **CEX-227**, AEEG Resolution 281/2012/R/EFR, p. 12; *see* SoD, ¶ 389.

[256] SoD, ¶ 378. For the possibility of non-programmable renewable energy providers to predict the grid injection, *see* SoD, fn 157.

[257] SoD, ¶ 393.

[258] **CEX-228**, AEEG Resolution 493/2012/R/EFR, *see* SoC, ¶ 201.

[259] **CEX-229**, Decision *Consiglio di Stato*, *Sez.* VI, ruling no. 2936; *see* SoC, ¶¶ 201-202.

> socialized. This mechanism would lend itself to similar criticisms, as would achieve discrimination between operators to the benefit, not so clearly justifiable, of those who produce programmable energy.
>
> The economic and technical regulatory power by the Authority must, therefore, be exercised in a manner that permits to reach a solution that, on the one hand, could protect the market in its entirety by imposing imbalance costs also to the production units in question [nonprogrammable sources], and, on the other, could introduce calibrated mechanisms, based on the specificity of the source, that could take into account the methods of electricity production and the resulting difficulties in making a prediction as to input into the grid, which could achieve the same degree of reliability that the programmable energy production units must guarantee.[260]

235. After this decision by the *Consiglio di Stato*, GSE apparently reimbursed certain sums wrongfully charged to renewable energy producers under Resolutions 281 and 493, but did not reimburse all such wrongfully charged sums.[261]

236. Subsequently, the Italian Electrical Energy Authority passed another Resolution 522/2014/R/EEL on 23 October 2014 ("**Resolution 522**"), which also pertained to a regulation of imbalance costs in respect of non-programmable renewable energy producers. In this connection, Resolution 522 provided the following:

> The production units fed by non-programmable renewable sources must be subject to regulation of imbalances . . . the burdens deriving from the imbalances imputable to nonprogrammable renewable sources must not be socialized in order to avoid unjustifiable discrimination, and in order not to continue to allocate burdens on the community . . . it is appropriate to review the guidelines on imbalances for non-programmable renewable sources on the basis of the second option presented in the document . . .[262]

237. Pursuant to Resolution 522, dispatching users were given the option to choose between two courses of action. First, they could chose to pay imbalance costs based on regulations already in force for other unauthorized production units, and in turn, to modify their market supply strategies accordingly. Alternatively, they could chose to apply the new regulations that were specifically aimed at non-programmable renewable energy sources having created distinct bands for different sources of renewable energy with the option of

[260] **CEX-229**, Decision *Consiglio di Stato, Sez.* VI, ruling no. 2936, point 7; *see* SoD, ¶ 395.

[261] SoC, ¶¶ 202, 204.

[262] **CEX-230**, AEEG Resolution 522/2014/R/EEL; *see* SoC, ¶ 203.

commercial aggregation.[263] For photovoltaic plants, the band constituted a threshold for the modified and corrected binding program as 31%.[264]

238. Further to Resolution 522, renewable energy producers continue to pay new imbalance costs since 1 January 2015 onwards.[265] Respondent relies on data until 31 December 2015 to state that 66% of the dispatching points associated with renewable energy producers have opted for the first option mentioned in ¶ 237 above, in order to pay imbalance costs.[266]

(4) The Robin Hood Tax and Constitutional Court Proceedings

239. By way of Legislative Decree No. 112/2008 dated 25 June 2008, which was converted into Law No. 133/2008 on 6 August 2008, Italy imposed taxes on windfall profits of oil, gas and other traditional energy companies, known as the "Robin Hood Tax" This was done by increasing the corporate income tax rate for companies with an annual gross income of over EUR 25 million to 33% from the original 27.5%.[267] The rate of corporate income tax was further increased in July 2009 to 34% by Law No. 99/2009.[268] According to contemporaneous press reports, the Robin Hood Tax was motivated to tap the hike in prices of traditional energy sources, such as oil and gas.[269]

240. In respect of renewable energy producers, Legislative Decree No. 112/2008 provided that "[t]he same disposition does not apply to subjects producing electricity by primarily using biomass and solar-photovoltaic and wind energy sources".[270] The Italian Revenue Agency had further confirmed in a Circular No. 35/E dated 18 June 2010 that "the application of the supplement is excluded for subjects which simultaneously . . . primarily produce

263 SoD, ¶¶ 398-405.

264 SoD, fn 164.

265 SoC, ¶ 203.

266 SoD, ¶ 399.

267 **CEX-231**, Law Decree No. 112/2008, 25 June 2008, converted into law by Law No. 133/2008; *see* SoC, ¶ 206.

268 **CEX-232**, Law No. 99/2009, 23 July 2009.

269 **CEX-233**, Paul Betts, "Italy's 'Robin Hood' swoops again," Financial Times; **CEX-234**, IlSole24Ore, press article, "Wall Street Journal: Robin Hood Tax, Italia prima ad agire"; *see* SoC, ¶ 207; *see also* SoD, ¶ 427.

270 **CEX-231**, Law Decree No. 112/2008, 25 June 2008, converted into law by Law No. 133/2008, article 81(6) (Note: Note: Respondent's translation of article 81(6) is at variance from Claimants'; *see* SoD, ¶ 422).

electricity from renewable sources, using biomass and solar-photovoltaic or wind sources, with respect to the total amount of energy produced."[271] The exclusion of renewable energy producers from Legislative Decree No. 112/2008 is not disputed in these proceedings, except to the extent that Italy argues that this exclusion was based on certain conditions.[272]

241. On 13 August 2011, Italy passed the Legislative Decree No. 138/2011, which was converted into Law No. 148/2011 on 14 September 2011. This Law made, *inter alia,* two amendments to the scheme of Law No. 133/2008. First, it extended the scope of the Robin Hood Tax to also apply to renewable energy producers by deleting the stipulation excluding the renewable energy producers from the Robin Hood Tax. Second, it increased the corporate income tax rate from 34% to 38%, and reduced the threshold gross annual income required for coverage by the Robin Hood Tax to an annual income of EUR 10 million (and taxable income of over EUR 1 million), as opposed to the original EUR 25 million.[273]

242. This was followed in June 2013, by Italy further extending the scope of the Robin Hood Tax through Legislative Decree No. 69/2013, which was converted into Law No. 98/2013 dated 9 August 2013.[274] In particular, by this amendment to the Legislative Decree No. 112/2008, the threshold gross annual income required for coverage by the Robin Hood Tax was further reduced to EUR 3 million (and taxable income of over EUR 300,000).[275] After this extension of the Robin Hood Tax, Claimants' photovoltaic plants also fell within its purview, which was not the case previously.

243. Thereafter, renewable energy producers challenged the constitutionality of such extensions of the Robin Hood Tax before the Italian Constitutional Court.

244. On 11 February 2015, the Italian Constitutional Court rendered its Decision No. 10/2015 declaring the Robin Hood Tax as unconstitutional ("**Decision No. 10/2015**"). In this

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271 **CEX-239**, Circular No. 35/E, pp. 9-10.

272 **CEX-239**, Circular No. 35/E, point 3.2; *see* SoD, ¶¶ 422-424; *see also* SoRy, ¶¶ 482 *et seq.*

273 **CEX-240**, Law Decree No. 138/2011, 13 August 13 2011, articles 7.1(a) and (c), 7.3, preamble; *see* SoC, ¶ 209.

274 **CEX-248**, Law Decree No. 69/2013, 21 June 2013; *see* SoC, ¶ 212.

275 **CEX-248**, Law Decree No. 69/2013, 21 June 2013, article 5.1.

connection, the Constitutional Court specifically declared the "unconstitutionality of Article 81, paragraphs 16, 17 and 18, of [Legislative Decree] No. 112 of June 25, 2008".[276]

245. The motivation behind the Constitutional Court's Decision No. 10/2015 was, *inter alia*, "the incongruity of the means conceived by the legislature to the aim pursued".[277] This incongruity was, in turn, premised on the ground that the legislature established an increase of the corporate income tax that affected the whole income of an entity being taxed, without the support of "a mechanism making it possible to tax separately only a part of the income eventually connected to those activities pursued by the taxpayer".[278]

246. Further, the Constitutional Court, in the following passage, found that the measure in question, i.e., the Robin Hood Tax, was violative of the requirement of ensuring that the entities in question have the "capacity to contribute" the taxes being assessed:

> Under Article 53 of the Constitution, the capacity to contribute (*"capacità contributiva"*) represents the precondition and the limit to the taxation powers of the State and, at the same time, the duty of the taxpayer to take its share of the public expenditure, having to interpret this principle as a sectoral specification of the broader principle of equality under Article 3 of the Constitution . . . It is true that this Court has repeatedly stressed that "the Constitution does not impose a uniform taxation, with absolutely identical criteria and proportional for all types of tax"; rather it demands "an unfailing link with the ability to contribute, in a system framework informed to criteria of progression, as a further articulation, in the specific field of taxation, of the principle of equality, connected to the duty to remove the economic and social obstacles factually limiting the freedom and equality of citizens-human beings, in a spirit of political, economic and social solidarity (arts. 2 and 3 of the Constitution) . . . [A]ny diversification of the tax system, for economic areas or by type of taxpayers, must be supported by adequate justification, without which the differentiation might become arbitrary discrimination.[279]

276 **CEX-253**, Italian Constitutional Court Decision No. 10/2015, p. 16.

277 SoD, ¶ 429; *see* SoRy, ¶ 484.

278 **CEX-253**, Italian Constitutional Court Decision No. 10/2015, ¶ 6.5.1; *see* SoD, ¶ 431.

279 **CEX-253**, Italian Constitutional Court Decision No. 10/2015, ¶ 6.2; *see* SoD, ¶¶ 21, 430; *see also* SoRy, ¶ 484.

247. aIn respect of the temporal scope of its Decision No. 10/2015, the Constitutional Court ruled that its Decision would not have retroactive effect.[280] The rationale behind this finding of non-retroactivity was provided, *inter alia*, in the following terms:

> The role entrusted to the Court as the guardian of the Constitution in its entirety requires avoiding constitutional declarations of illegality that determine, paradoxically, "effects even more incompatible with the Constitution" . . . of those that have led to declare unconstitutional the provision at stake. To avoid this, it is the duty of the Court to modulate its own decisions, even in terms of time, so as to avoid that the affirmation of a constitutional principle determines the sacrifice of another.[281]

248. Following the Constitutional Court Decision No. 10/2015, Claimants, amongst other similar producers, were allegedly not reimbursed the amounts they had paid as Robin Hood Tax, nor were these amounts set off against future payments. Further, Italy confirmed by its Circular No. 18/E of 28 April 2015 that renewable energy producers would have to pay the Robin Hood Tax for the fiscal year 2014.[282]

(5) Classification of Photovoltaic Plants as "Immovable Property"

249. On 19 December 2013, Italy issued a Circular No. 36/E that classified the majority of photovoltaic plants as "immovable property".[283] Such classification as "immovable property" impacted the overall tax liability of photovoltaic plant owners, since for immovable properties the applicable depreciation rate was 4% instead of the 9% they previously used as movable property. Further, it impacted the municipal charges that photovoltaic plant owners had to pay, since they were now subjected to an additional municipal charge on buildings ("**IMU Charge**"),[284] and charges relating to municipal services such as road maintenance and public lighting ("**TASI Charge**").[285]

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280 **CEX-253**, Italian Constitutional Court Decision No. 10/2015, p. 15

281 **CEX-253**, Italian Constitutional Court Decision No. 10/2015; *see* SoD, ¶¶ 21, 433-435; R-SoRj, ¶¶ 554-562; *relying on* **REX-46**, Decisions n. 423 and 13 of 2004, n. 370 of 2003, n. 416 of 1992, n. 124 of 1991, n. 50 of 1989, n. 501 and n. 266 of 1988.

282 **CEX-254**, Circular No. 18/E; *see* SoC, ¶¶ 215-216.

283 **CEX-258**, Circular No. 36/E, §s 2.1, 3.1.2.

284 **CEX-259**, Legislative Decree No. 23/2011; *see* SoC, ¶ 219.

285 **CEX-260**, Law no. 147/2013 of 27 December 2013; *see* SoC, ¶ 219.

250. The Parties dispute whether Circular No. 36/E was a reversal of the traditional position, whereby photovoltaic plants were considered "movable property", which Claimants contend,[286] or whether Circular No. 36/E was only a non-contradictory clarification of the existing legal regime in Italy, which Respondent argues.[287] In this connection, the previous circulars issued by the Revenue Agency assume relevance.[288] These circulars defined movable property as something that is not fixed into the ground and can be easily moved to another seat. Photovoltaic "systems" were considered to fall within the category of movable property,[289] to the extent they constituted plants and machinery that can be "removed and placed in another place, while maintaining their original features".[290]

251. Also relevant is a Resolution 3/T dated 6 November 2008 by the Agency for Territory, which clarified that photovoltaic panels qualify as immovable property, since "the substantial nature of the power plant'" qualify as such for cadastral categories.[291]

252. Respondent considers that the Circular No. 36/E only confirmed the above understanding of movable and immovable properties in Italian fiscal and cadastral regimes, and was, in turn, in line with Italian *Corti di Cassazione* or the Constitutional Court's case law,[292] the OECD Model Tax Convention on Income and on Capital 2014 and the Italian Legislative Decree No. 44/2005.[293]

253. Thereafter, Italy's 2016 Budget Law altered the classification of photovoltaic plants again, and according to Claimants, brought it almost in line with the position prior to the 2013 Circular No. 36/E. Pursuant to this, as of 1 January 2016, the determination of the value of real estate would carried out "taking into account the ground space and the buildings, as well as the elements structurally connected to them which increase their quality and usefulness" but excluding "machinery, devices, equipment and other systems, which are

286 SoC, ¶ 217.

287 SoD, ¶ 22.

288 **CEX-256/CEX-399**, Circular No. 38/E, 11 April 2008; **CEX-257**, Circular No. 38/E, 23 June 2008; *see* SoC, ¶ 217; *see also* SoD, ¶ 444; fn 184.

289 **CEX-257**, Circular No. 38/E, 23 June 2008.

290 **CEX-256/CEX-399**, Circular No. 38/E, 11 April 2008.

291 **REX-048**, Resolution 3/T of 6 November 2008 of the Agency for Territory; *see* SoD, ¶ 445.

292 **REX-050**, Italian Constitutional Court, decision No. 162 of 20 May 2008; *see* SoD, ¶¶ 449-440.

293 SoD, ¶ 451 and fn 187; **REX-014**, OECD Model Law 2014, article 6.2

operational to the specific production process".[294] The 2016 Budget Law also provided municipalities the right to be indemnified to the extent that they were receiving reduced income because of such favourable treatment in respect of the calculation of the value of real estate.[295]

254. Similar to the situation resulting from the Italian Constitutional Court Decision No. 10/2015 relating to the Robin Hood Tax (see ¶ 247 above), Claimants have not been reimbursed nor compensated for the additional amounts of taxes and/or charges they paid due to the classification of their plants as "immovable property".[296]

G. THE *SPALMA-INCENTIVI* DECREE AND THE EVENTS THEREAFTER

255. Contemporaneous with the above described administrative and/or fiscal measures, Italy had enacted the *Destinazione Italia* Legislative Decree (discussed in ¶¶ 225-227), which was converted into law on 21 February 2014.[297]

256. In addition to modulating the minimum guaranteed price regime, the *Destinazione Italia* also gave renewable energy power plant operators who were benefiting from incentive regimes such as green certificates, all-inclusive feed-in tariffs or premium tariffs, the option between (i) continuing the existing incentive scheme for the 20 year period without any additional benefits after the expiration of this period; and (ii) accepting a reduced percentage of tariff incentives under the *Conto Energia* Decrees, in exchange for an extension in the duration of the incentive period by seven years.[298] This option was introduced in the *Destinazione Italia* "[f]or the purpose of containing the annual burden on prices and on the electric rates of the incentives for renewable energy and for the purpose of maximizing the medium-long term production contribution from the existing power

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[294] **CEX-261**, Law No. 208/2015, 28 December 2015, article 1.21; *see* SoC, ¶¶ 221-222; *see also* SoD, ¶ 452.

[295] SoD, ¶ 453.

[296] SoC, ¶ 222; *see* SoD, fn 194.

[297] **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013.

[298] **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013, article 1(3). Claimants submit that photovoltaic plants were not covered by the *Destinazione Italia*, since it was applicable to incentives other than the *Conto Energia; see* SoRy, ¶¶ 317 *et seq.; see also* **CEX-385**, QualEnergia, *"Spalma-incentivi, in Gazzetta Ufficiale il decreto per le rinnovabili non FV"*

plants". Claimants contend that few, if any, investors accepted this offer for a remodulation of tariffs under the *Destinazione Italia*.[299]

257. Six months after the *Detinazione Italia*, on 24 June 2014, Italy enacted the Legislative Decree No. 91/2014 and converted it into law by Law No. 116/2014 on 11 August 2014 ("***Spalma-incentivi* Decree**"). The *Spalma-incentivi* Decree is discussed in (1) below, followed by (2) a discussion of the Italian Constitutional Court's decision in relation to the *Spalma-incentivi* Decree, and (3) the events following the *Spalma-incentivi* Decree.

(1) The *Spalma-incentivi* Decree

258. The *Spalma-incentivi* Decree sought to, *inter alia*, "remodulate" the incentive tariffs under the *Conto Energia* Decree, and to provide for altered "modalities" for disbursement of the incentive tariffs "[s]tarting from 1 January 2015".[300] This, according to Article 26(1) of the *Spalma-incentivi* Decree, was "[i]n order to optimize the management of the timing for the gathering and the disbursement of the incentive tariffs and for the purpose of implementing a better sustainability of the renewable energy support policy".[301] In addition, Article 23(1) of the *Spalma-incentivi* Decree stated that the Decree was motivated towards achieving "a more equitable distribution of the tariff burden among the various categories of energy consumers" and accordingly reducing "electricity rates for customers of medium voltage and low voltage electricity".[302]

259. The *Spalma-incentivi* Decree is the principal regulatory measure at issue in this case, and numerous factual aspects concerning the same are disputed between the Parties. Claimants claim, *inter alia*, that the *Spalma-incentivi* Decree effectively abrogated the *Conto Energia* Decrees in a retroactive manner,[303] and such retroactive regulatory modifications did not

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299 **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013, article 1(3); *see* SoC, ¶ 224; *see also* SoD, ¶¶ 289-291 (Note: Respondent's translation of article 1(3) is at variance with Claimants'.).

300 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, articles 26(1) and 26(3).

301 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(1); *see* SoD, ¶ 299 (Respondent's translation of article 26(1) is at variance with Claimants'.).

302 SoD, ¶ 300.

303 SoC, § G; SoRy, § A(4)(c); **CEX-381**, Communication from the Commission to the European Parliament and the Council, COM (2011) 31, 31 January 2011; **CEX-382**, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM

serve to decrease costs of electricity for "residential customers and public lighting",[304] nor was a drop in electricity consumption a "relevant" motivation behind the *Spalma-incentivi* Decree.[305] On the contrary, Respondent categorizes the *Spalma-incentivi* Decree as a "fine-tuning" of the tariff regime, which was a non-discriminatory and prospective policy choice within the State's regulatory powers. As per Respondent, this was motivated by legitimate considerations relating to the rise in the A3 Component of the total electricity costs borne by the end consumers attributable to the incentive tariffs.[306]

260. The A3 Component of the total electricity costs was projected, by the GSE, to reduce from EUR 6.7 billion in 2013 (see ¶¶ 164-165) to EUR 6.05 billion by 2018 as a result of the *Spalma-incentivi* Decree.[307] On a related note, a decision was issued by the *Corte dei Conti* in Italy in November 2015, which had highlighted the delays in payment of the amounts pertaining to the A3 Component. In this regard, the decision stated that such delays "take the GSE to undertake a greater risk for the fulfilment of all payments to producers of electricity from renewable energy sources, and the consequent ned to resort to credit lines of GSE . . . leaving the Company without the necessary financial flexibility to deal with possible additional requirements."[308]

261. The *Spalma-incentivi* Decree's remodulation of the incentive tariff regime was applicable for photovoltaic plants with a capacity above 200 kW, which constituted 4% of the total beneficiaries under the *Conto Energia* scheme, but amounted to 60% of the total expenditure relating to the incentives.[309] This remodulation of the incentive tariff regime

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(2012) 271, June 6, 2012; **CEX-383**, EC Commission Memo 13/948 of 5 November 2013; **CEX-384**, Italian Procurer General's Brief submitted to the Court of Cassation, 20 September 2016.

304 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 23(1); *see* SoRy, ¶¶ 294, 301.

305 SoRy, ¶¶ 297-298.

306 SoD, ¶¶ 15-16, 294-296, 472-476; R-SoRj, ¶¶ 313-316, 322-326; SoRy, ¶ 297; **CEX-368**, ENEA, *Rapporto Annuale Efficienza Energetica*, 2015, energy efficiency implementation in residential, industry, transportation and services sector generated for the period 2005-2013; **CEX-370**, ENEA, *Domanda e offerta di energia in Italia e nel mondo;* **REX-027**, Illustrative Report to the project of law converting the Law Decree 91/2014 presented to the Parliament (A.S. n. 1541); **REX-060**, Supreme Court of Spain, No. 2810/2016, p. 5-6, citing Constitutional Court of Spain, No. 270/2015; **REX-061**, Italian Constitutional Court, decision No 236/2009, § 6.3.

307 **CEX-365**, GSE Report on prospective developments for RES (2013–2018), *Speciale Energie Rinnovabili*; *see* SoRy, ¶ 295.

308 **REX-063**, *Determinazione e relazione sul risultato del controllo eseguito sulla gestione finanziaria della G.S.E. S.p.A. "Gestore dei Servizi Energetici"* – 2014, p. 23; *see* R-SoRj, ¶ 335.

309 SoD, ¶ 313.

came in the form of three options provided to the photovoltaic plant operators, which they could choose from:

(i) The first option provided under the *Spalma-incentivi* spread out reduced incentive tariffs over a period of 24 years starting from the entry into operation of a photovoltaic plant, instead of the original 20 year period. The incentive tariffs would be reduced pursuant to a percentage of reduction set out in the following table:[310]

Residual Incentivizing Period (Years)	**Percentage of Reduction of the Incentive**
12	25%
13	24%
14	22%
15	21%
16	20%
17	19%
18	18%
above 19	17%

(ii) The second option maintained the original 20 year period of incentive tariffs, but prescribed a remodulation of the incentive tariffs by dividing the tariffs between "a first period in which a reduced incentive tariff is disbursed", i.e. between 2015-2019; and "a second period in which the incentive tariffs [shall be] equally incremented".[311] Under this option, the remodulation percentages were to be established by the Ministry for Economic Development by 1 October 2014, "with the aim of allowing a yearly saving, with respect to the current disbursements and on the assumption of the

[310] **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(a) and Annex 2; *see* SoC, ¶ 228; *see also* SoD, ¶ 314.

[311] **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(b).

adhesion of all the producers to this option, of at least [EUR] 600 [m]illion for the period 2015-2019".[312]

These remodulation percentages were prescribed in the Decree of the Ministry for Economic Development dated 17 October 2014.[313] On 27 October 2014, the GSE's website published the "Tables containing the values of the coefficients of remodulation (1-Xi) to be multiplied with the previous incentives . . . in the event of selection of option b) identified in Article 26, paragraph 3, Law No. 116 of August 11, 2014".[314] Based on these Tables, for the years 2015-2019, the remodulation percentages range from 68.61% of the original tariff under the *Conto Energia* tariff regime, for photovoltaic plants having 11 years out of the 20 year incentive period remaining, to 90.30% for photovoltaic plants having 19 years or more remaining. Correspondingly, during the last five years of the 20 year incentive period, the remodulation percentages range from 131.39% of the original tariff under the *Conto Energia* tariff regime, for photovoltaic plants having 11 years of these 20 years remaining, to 109.70% of the original tariff for photovoltaic plants having 19 years or more remaining.[315]

(iii) The third option also maintained the original 20 year incentive period, but prescribed for a progressive reduction of incentive tariffs for the residual incentive period based on the capacity of a photovoltaic plant. This progressive reduction was stipulated in the following terms:

(a) 6% for photovoltaic plants having a capacity between 200 and 500 kW;

(b) 7% for photovoltaic plants having a capacity between 500 and 900 kW; and

(c) 8% for photovoltaic plants having a capacity higher than 900 kW.[316]

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312 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(b).

313 **REX-030**, Ministerial Decree 17 October 2014, Laying down the mode for the restructuring of tariffs for electricity produced by photovoltaic plants, in compliance with article 26, paragraph 3, letter. b) of Decree-Law 24 June 2014, n. 91; *see* SoD, ¶ 314.

314 **CEX-267**, GSE, Tables reshaping values of coefficient; *see* SoC, ¶ 229.

315 **CEX-267**, GSE, Tables reshaping values of coefficient; see SoC, fn 344.

316 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(c); *see* SoC, ¶ 230; *see also* SoD, ¶ 314.

262. The *Spalma-incentivi* Decree granted the photovoltaic plant operators until 30 November 2014 to communicate to the GSE which of the above three options they select. The *Spalma-incentivi* Decree also mentioned that "[i]n the absence of a communication from the producer", the default option that shall be applied by the GSE is the third one.[317] It was estimated that this remodulation of the incentive tariff regime would bring about savings to the total cost of the incentive regime in the amount of EUR 420 million per year.[318]

263. Based on data provided by the GSE, Respondent submits that by 30 November 2014, 37.29% photovoltaic plant operators chose the second option of tariff remodulation, whereas 1.39% chose the first option. To all the remaining plants, the third option was assigned by default.[319] All of Claimants' photovoltaic plants were assigned the third option by default.

264. In addition to the above tariff remodulation scheme, the *Spalma-incentivi* Decree also provided for the following options to the photovoltaic plant operators:

> The recipients of the incentive tariffs mentioned in paragraphs 3 and 4 may access to bank loans amounting up to the difference between the expected incentive tariff as of 31 December 2014 and the remodulated incentive tariff pursuant to paragraphs 3 and 4. Such loans can benefit, cumulatively or alternatively, on the basis of agreements with the banking system, of funding or guarantees by *Cassa depositi e prestiti S.p.A . . .*[320]
>
> Should it be necessary in relation to the remodulated duration of the disbursement of the incentive tariffs, the Regions and the local entities adapt, each in relation to their competences, the duration of the permits, however named, issued for the construction and operation of the [photovoltaic] plants falling within the scope of application of this Article 26.[321]

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317 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(c); *see* SoC, ¶ 231; *see also* SoD, ¶ 315.

318 SoD, ¶ 301.

319 SoD, ¶ 316.

320 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(5); *see* **REX-031**, Ministerial Decree 29 December 2014, State guarantee on the exposure of *Cassa Depositi e Prestiti S.p.A* for bank loans to the beneficiaries of the incentives under Article 26, paragraph 5, of Law Decree 24 June 2014, No. 91; *see also* SoD, ¶ 318 (The loan guarantee scheme mentioned in article 26(7) of the *Spalma-incentivi* has not yet entered into force. A photovoltaic industry association in Italy, *Assorinnovabili*, maintains a rolling clock on its website counting the days that have elapsed since Italy first promised the loan guarantees involving *Cassa depositi e prestiti S.p.A; see, in this regard,* **CEX-387**, *Ritardometro* or rolling clock of the PV industry association Assorinnovabili: http://www.assorinnovabili.it/Scopri-le-rinnovabili/Ritardometro_126.html; SoRy, ¶ 334).

321 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(6); *see* SoD, ¶ 319.

> The recipients of long-term incentive tariffs, however named, for the production of renewable energy, can sell up to 80% of such incentives to a buyer selected amongst the "primary European financial players".[322]

265. The *Spalma-incentivi* Decree also brought about alterations in payment modalities. Whereas previously the GSE would pay incentive tariffs to photovoltaic plant operators on a monthly basis, at least for plants with capacity over 20 kW, based on the plant's actual production,[323] the *Spalma-incentivi* Decree provided that from the second semester of 2014, the GSE would pay tariffs in monthly instalments of 90% of the plant's estimated yearly average production. Thereafter, the GSE would make the requisite adjustments by 30 June of the following year.[324]

266. Moreover, the *Spalma-incentivi* Decree, together with a Decree of the Minister of Economic Development dated 24 December 2014, altered the Administrative Management Fee of EUR 0.0005/kWh of incentivized energy prescribed in the Fifth *Conto Energia* (see Section F(1) above). It was estimated that this alteration in the Administrative Management Fee would bring about savings to the total cost of the incentive regime in the amount of EUR 30 million per year. The Administrative Management Fee was made contingent on the photovoltaic plant's capacity in the following terms:

(a) 2.20 EUR/kW for photovoltaic plants having a capacity between 3 and 6 kW;

(b) 2 EUR/kW for photovoltaic plants having a capacity between 6 and 20 kW;

(c) 1.80 EUR/kW for photovoltaic plants having a capacity between 20 and 200 kW;

(d) 1.40 EUR/kW for photovoltaic plants having a capacity between 200 and 1000 kW; and

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322 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, articles 26(7)-26(12); *see* SoD, ¶ 320.

323 **CEX-30**, AEEG Resolution no. 188/05, 14 September 2005, article 4; **CEX-32**, Sample GSE agreement under First *Conto Energia* Decree, article 3; **CEX-268**, AEEG Resolution No. 90/2007, 13 April 2007, article 8.5; **CEX-164**, Sample GSE agreement under the Fourth *Conto Energia* Decree, article 4; **CEX-194**, Sample GSE agreement under the Fifth *Conto Energia* Decree, article 6.

324 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(2); **REX-029**, Ministerial Decree 16 October 2014, Approval of operating procedures for the disbursement by the GSE of tariffs for electricity produced by PV plants, in implementation of Article 26, paragraph 2 of the Law Decree No 91 of 24 June 2014; *see* SoD, ¶ 306; *see* SoC, ¶ 232; *see also* SoD, ¶ 305;.

(e) 1.20 EUR/kW for photovoltaic plants having a capacity above 1 MW.[325]

267. In addition the above major changes, the *Spalma-incentivi* Decree also introduced other regulatory alterations, such as (i) introduction of a contribution of 5% to the system costs for power plants having capacity between 20 to 500 kW operating under the "regime of exchange in proximity";[326] (ii) revision of the remuneration of electrical systems in the smaller Italian islands that are not interconnected;[327] and (iii) reduction in the preferential electricity tariff enjoyed by the Italian Railway Network S.p.A to the effect of savings in the total cost estimated at EUR 80 million.[328]

268. After these measures were introduced in the *Spalma-incentivi*, a cumulative savings of almost EUR 2.7 billion on electricity bills was recorded by the Ministry for Economic Development, of which approximately EUR 1.7 billion were for the benefit of small and medium enterprises (with an average percentage decrease of 8.5% for small voltage enterprises and of 10% for the medium voltage enterprises) and the remaining EUR 1 billion benefitted the consumers.[329]

269. Claimants highlight that the *Spalma-incentivi* Decree was enacted amidst criticism from various factions, including committees or ambassadors writing on behalf of international investors,[330] associations of renewable energy producers at the national level in Italy,[331] and most notably by Italian Senators and members the Italian House of Representatives

325 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 25; **CEX-271**, Decree of the Minister of Economic Development, 14 December 2014, § 1; **CEX-272**, GSE Note, *"Modalità operative per il riconoscimento delle tariffe a copertura dei costi sostenuti dal GSE per il sostegno alle fonti rinnovabili e all'efficienza energetica"*; *see* SoC, ¶ 233; *see also* SoD, ¶ 301.

326 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 25*bis; see* SoD, ¶ 301.

327 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 28; *see* SoD, ¶ 301.

328 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 29; *see* SoD, ¶ 301.

329 **REX-028A**, MISE Press Release of 6 February 2015, *Bollette elettriche, vanno a segno misure governo: risparmi per 2,7 miliardi*; *see* SoD, ¶¶ 302-303.

330 **CEX-279**, Christopher Prentice, Ambassador of the United Kingdom in Rome, Letter to the President of the Senate Committee, Massimo. Mucchetti; **CEX-280**, Foreign Investors Solar Committee, letter to President Matteo Renzi, published in Quale Energia, press article, *"Spalma-incentivi, 30 investitori internazionali scrivono a Renzi"; see* SoC, ¶¶ 238-239; *see also* SoRy, ¶ 245.

331 **CEX-281**, Energy Magazine, press article, "*Oettinger no ai tagli retroattivi agli incentive*"; **CEX-282**, AssoRinnovabili, Letter to Günther Oettinger, European Energy Commissioner, 26 June 2014, *see* SoC, ¶ 240.

during discussions surrounding the enactment of the *Spalma-incentivi* Decree.[332] In this regard, one of the senators, Senator Piccoli, mentioned the following in respect of the alteration of the regime under the *Conto Energia* Decree:

> Intervention on the photovoltaic, by changing the terms of the agreements between the State and individuals, implies less credibility and worst international reputation . . . in the eyes of investors, then we cannot forget that many disputes are predictable both internal and in international fora. Indeed, such a mechanism . . . seems to conflict with the protection of investment forecasts contained in the European Energy Charter Treaty.[333]

270. Similarly, Senator Arrigoni criticized the *Spalma-incentivi* Decree stating that it had "three negative features: it is retroactive, discriminatory, and likely to be challenged as it violates essentially the certainty of international and national law and thus the credibility of our country before Italians and foreign investors . . ."[334]

(2) **The Italian Constitutional Court Decision**

271. On 24 January 2017, the Italian Constitutional Court released its Decision No. 16/2017 originally dated 7 December 2016 on the legitimacy of Articles 26(2) and 26(3) of the *Spalma-incentivi* Decree ("**Constitutional Court Decision**").[335]

272. Renewable energy producers challenged the constitutionality of these provisions of the *Spalma-incentivi* Decree, on the ground that they were contrary to Articles 3 and 41 of the Italian Constitution, "for violation on the principle of reliance on firm grounds of advantage, recognized by agreements qualified as of 'private law'" and for "their unreasonableness and because of the disparity of treatment between different operators of

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[332] **CEX-273**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 291, pp. 74-78; **CEX-274**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 292; **CEX-275**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 278; **CEX-276**, Congress of Deputies of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 279; **CEX-277**, Congress of Deputies of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 280; **CEX-278**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 304; *see* SoC, ¶¶ 234-237; *see also* SoRy, ¶ 245.

[333] **CEX-273**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 291, pp. 74-75; **CEX-278**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 304.

[334] **CEX-275**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 278; *see* SoC, ¶ 235; *see also* SoRy, ¶¶ 245; 247-248.

[335] **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016.

the sector".[336] As per Respondent, these involved issues relating to legitimate expectations, reasonableness and equality and lack of proportionality.[337]

273. The Constitutional Court denied the challenges to the constitutionality of Articles 26(2) and 26(3) of the *Spalma-incentivi* Decree. Notable findings of the Constitutional Court Decision, in this regard, were, *inter alia,* as follows:

> As a matter of principle, the reliance of citizens in legal certainty is "a fundamental and indispensable element of the rule of law . . . However – as the firm case-law of this Court, in coherence also with that of the ECtHR, has clarified – protection of reliance does not entail, in our legal system, that the legislature may not enact provisions which change unfavorably the regulation of long-term relationships, and this even if their object are perfect legal rights . . . The only exception is, in matters of criminal law, that of the prohibition of retroactive norms, set by article 25, second para., of the Constitution". It remains firm that such provisions, "as any other legal norm, must not result in an irrational regulation, arbitrarily effecting substantial rights created by the previous law, frustrating in such way also the reliance of citizens in legal certainty" . . .
>
> The analysis of the ratio of the contested norm excludes that it has unreasonably and unforeseeably affected the long-term relations, arising from the agreements reached by the percipients of the incentives with GSE, therefore violating the principle of legal certainty.
>
> In fact, the legislature in 2014 has intervened in a general context in which, on the one hand, the remuneration of incentivizing fees for energy produced through photovoltaic apparatus was gradually increasing, taking into account both the costs of production as a result of the considerable technological development of the sector, and the overall European framework. But on the other hand, and correlatively, one registered the growing economic burden of such incentives on the final users of electric energy, especially on SMEs which are the fabric of national industry.[338]

274. Further, in respect of the GSE contracts and the reliance placed by renewable energy producers on them, the Constitutional Court, *inter alia,* found:

> [T]he guarantee of stability of the incentive for all the due period does not imply, however, as a necessary consequence, that the measure should remain

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336 **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, p. 1.

337 SoD, ¶¶ 8, 322.

338 **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, ¶¶ 8.1 and 8.2; *see* SoD, ¶¶ 327-331.

> unchanged for 20 years, unchanged and unaffected by the variations which are common to long-term contracts.
>
> This is even truer if one considers that the agreements reached with GSE cannot be qualified as contracts meant to determine the exclusive profit of the operator, with terms and conditions blocked at the initial conditions, for twenty years, even if technological conditions may change profoundly. They are instead regulatory instruments, aimed at reaching the objective of incentivizing certain sources of energy in equilibrium with other sources of renewable energy, and with the minimum sacrifice for the users who ultimately bear the economic burden.[339]

(3) Events following the *Spalma-incentivi* Decree

275. Claimants' position is that the reduction of incentive tariffs had a "dramatic impact", and resulted in a reduction in value of Claimants' investments by 19%, and when coupled with the other regulatory measures taken by Italy, the reduction in value amounted to 27%.[340] This allegedly resulted, *inter alia*, in Claimants having to restructure the debts they had undertaken for financing their investments, and also impacted the payment of dividends to investors. In this connection, Claimants' witness, Mr. Mark Florian states as follows:

> Indeed, prior to Italy's retroactive amendment of the tariff regime, we had been distributing dividends to our investors, as expected when we made the original investment. The tariff reduction eliminated our ability to pay any substantive dividends and made it difficult, without a restructuring, to pay the debt service payments on the PV plants. This change eliminated any substantive return to our investors on the investment, and put the ability to even return the capital invested in the PV plants at substantial risk.[341]

276. Ultimately, in 2016, Claimants' parent company (SunReserve International, LP, created by SunEdison and FirstReserve as discussed in Section E(1) above) decided to sell the entire investment portfolio in photovoltaic plants in Italy. Claimants concluded this sale in

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339 **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, ¶ 8.3; *see* SoD, ¶¶ 332-334; *see also* R-SoRj, ¶¶ 318-320.

340 Second Witness Statement of Mr. Mark Florian, 29 March 2018 ("**Second Florian Witness Statement**"), ¶ 16; First Expert Report of Richard Edwards, 28 July 2017 ("**First FTI Quantum Report**"), ¶ 2.21.

341 Second Florian Witness Statement, ¶ 17.

August 2016, while specifically reserving and retaining their ownership over the present ECT claim against Italy.[342]

277. Prior to this, on 4 May 2016, Claimants sent a letter to Respondent notifying it of the dispute, and inviting it to settle the dispute amicably.[343] Absent any amicable settlement, Claimants proceeded to commence these arbitration proceedings.

V. SUMMARY OF THE PARTIES' CLAIMS AND RELIEFS SOUGHT

278. In these arbitration proceedings, Claimants claim that Respondent breached the ECT by first promising fixed incentive tariffs under the *Conto Energia* regime and consistent minimum guaranteed prices under the off-take regime, and subsequently, backing out of its promises by undertaking various regulatory measures culminating in the *Spalma-incentivi* Decree that came into effect on 1 January 2015.

279. Claimants claim that Italy's actions resulted in a breach of the ECT on three counts: (i) failure to grant Claimants' investments fair and equitable treatment, (ii) impairing Claimants' investments by unreasonable or discriminatory measures, and (iii) violating the ECT's Umbrella Clause.

280. Using the Date of Assessment of 1 January 2015, Claimants updated assessment of damages, including interest, is EUR 40.89 million.[344]

281. In their SoC and SoRy, Claimants request the Tribunal to issue an Award containing the following relief:

(a) a declaration that the Tribunal has jurisdiction over this dispute;

(b) a declaration that Italy has violated the Energy Charter Treaty and international law with respect to Claimants' investments;

(c) compensation to Claimants for all damages they have suffered, as set forth in Claimants' submissions and as may be further developed and quantified in the course of this proceeding;

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342 First Florian Witness Statement, ¶¶ 27-28; **RE-128**, Share Purchase Agreement with Tages Capital SGR S.p.A., 5 August 2016.

343 **CEX-7**, Notice of Legal Dispute Arising Under the Energy Charter Treaty and Offer of Amicable Settlement.

344 SoRy, ¶ 562; Second Expert Report of Richard Edwards, 29 March 2018 ("**Second FTI Quantum Report**"), Table 1-2.

(d) all costs of this proceeding, including (but not limited to) Claimants' attorneys' fees and expenses, the fees and expenses of Claimants' experts, and the fees and expenses of the Tribunal and SCC;

(e) pre-award and post-award compound interest at the highest lawful rate from the Date of Assessment until Italy's full and final satisfaction of the Award; and

(f) any other relief the Tribunal deems just and proper.[345]

282. In their Post-Hearing Brief and Reply Post-Hearing Brief, Claimants amended their request for relief in the following manner:

- a declaration that the Tribunal has jurisdiction under the ECT for all of Claimants' claims, thereby rejecting Respondent's jurisdictional objections in full;
- a declaration that Italy has violated Part III of the ECT and international law with respect to Claimants' investments;
- compensation to Claimants for all damages they have suffered as set forth in their Statement of Claim and in their Reply Memorial on the Merits and as may be further developed and quantified during the course of this proceeding;
- all costs of this proceeding, including (but not limited to) Claimants' attorneys' fees and expenses, the fees and expenses of Claimants' experts, and the fees and expenses of the Tribunal and SCC;
- pre- and post-award compound interest at the highest lawful rate from the Date of Assessment until Italy's full and final satisfaction of the Award; and
- any other relief the Tribunal deems just and proper.[346]

283. Respondent challenge the Tribunal's jurisdiction over the entirety of Claimants' claims on the ground that this is a dispute between European investors against an EU Member State, and such intra-EU disputes cannot be resolved under the ECT. Alternatively, Respondent challenge the Tribunal's jurisdiction over parts of Claimants' claims that (i) are allegedly exempted under Article 21 ECT; (ii) were not part of Claimants' offer to resolve disputes amicably; and (iii) that are covered by the dispute resolution clauses in the agreements entered into between GSE and Claimants' subsidiaries.

284. In the alternative, Respondent contests all of Claimants' claims on the merits and also disputes Claimants' calculation of damages.

345 SoC, ¶ 347; SoRy, ¶ 563.

346 PHB, ¶ 141; C-RPHB, ¶ 61.

285. In its updated requests for relief, contained in the R-SoRj, Respondent requests the Tribunal to:

(a) Decline jurisdiction to decide, as the ECT does not cover intra-EU disputes.

(b) Alternatively, decline jurisdiction over the totality of claims, since:

- Some of the attacked measures are exempted under Article 21 ECT;
- No amicable solution has been attempted for some further measures; and
- The exclusivity forum choice contained in the GSE Agreements bans this Tribunal from judging under the Umbrella Clause.

(c) In a further alternative, decline admissibility of protection of the Claimants' alleged interests since these are barred from seeking relief, as they did not seek amicable solution for a number of claims.

(d) Should the Tribunal consider to have jurisdiction over the case and that claims are either totally or partially admissible, declare on the merits that:

- The Respondent did not violate Article 10(1) ECT, first and second sentence, since it did not fail to grant fair and equitable treatment to the Claimants' investment.
- The Respondent did not violate Article 10(1) ECT, fourth sentence, either, since it always adopted reasonable and non-discriminatory measures to affect Claimants' investment.
- Article 10(1) ECT, last sentence (the so-called "Umbrella Clause") does not apply in the case at stake, or, alternatively, that the Respondent did not violate it neither through statutory or regulatory measures, nor the GSE Conventions.
- Consequently, declare that no compensation is due.

(e) In the unfortunate event that the Tribunal were to recognize legitimacy to one of the Claimants' griefs:

- Declare that damages were not adequately proved.
- In addition, declare that both the methods for calculation and calculation itself of damages proposed by the Claimants are inappropriate and erroneous.
- Order the Claimant[s] to pay all relevant expenses and disbursements by the Respondent because of these proceedings in accordance with [SCC] Arbitration Rules.[347]

347 R-SoRj, ¶¶ 633-635.

286. In its Post-Hearing Brief and Reply Post-Hearing Brief, Respondent "reiterates all its objections and defences concerning jurisdiction, the admissibility of the claim and its merits."[348]

VI. JURISDICTION ISSUE RELATING TO EU LAW AND *ACHMEA*

A. RELEVANT TREATY PROVISIONS

287. The following provisions of the ECT are relevant for the Tribunal's analysis of the jurisdiction issue relating to EU law and the ECJ Judgment. The dispute resolution provision, contained in Article 26 ECT, is reproduced only to the extent relevant:

> **Article 1(2) ECT**
>
> "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.
>
> **Article 1(3) ECT**
>
> "Regional Economic Integration Organisation" means 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.
>
> **Article 1(10) ECT**
>
> "Area" means with respect to a state that is a Contracting Party:
>
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
>
> (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.
>
> With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.
>
> **Article 16: Relation to Other Agreements**

[348] R-PHB, ¶ 228; R-RPHB, ¶ 68.

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.

Article 25: Economic Integration Agreements

(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalising, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.

(3) This Article shall not affect the application of the WTO Agreement according to Article 29.

Article 26: Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b)

(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)

(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

. . . .

288. The relevant provisions of the Treaty of the Functioning of the European Union ("**TFEU**") are as follows:

Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
>
> **Article 351**
>
> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
>
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

289. Finally, Articles 30, 31, 32 and 41 of the Vienna Convention on the Law of Treaties 1969 ("**VCLT**") are also relevant for the Tribunal's analysis:

> **Article 30. Application of Successive Treaties Relating to the Same Subject-Matter**
>
> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
>   (a) As between States parties to both treaties the same rule applies as in paragraph 3;
>
>   (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

Article 41. Agreements to Modify Multilateral Treaties between Certain of the Parties Only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

   (a) The possibility of such a modification is provided for by the treaty; or

   (b) The modification in question is not prohibited by the treaty and:

      (i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

      (ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph l(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

B. THE PARTIES' POSITIONS

290. Respondent raised the jurisdictional objection relating to the ECT's non-application to intra-EU disputes in its Statement of Defence for the first time. However, prior to any other submissions by the Parties on this jurisdictional objection, the ECJ released the ECJ Judgment in Case C-284/16, *Slowakische Republik v Achmea BV* on 6 March 2018 (see ¶ 32 above). Thereafter, the Parties' submissions dealt with this jurisdictional objection taking into account considerations arising out of the ECJ Judgment. Since the Parties' submissions relating to the ECJ Judgment reflect their most recent position on the issues relating to EU law, the Tribunal considers them to have updated their prior submissions taking into account the ECJ Judgment, and shall primarily focus on those more recent submissions in the following Sections.

(1) Respondent's Position

291. Respondent's position is that the ECJ Judgment is of direct relevance in these proceedings, and that the Judgment confirms the lack of jurisdiction of tribunals under Article 26 ECT in intra-EU investment disputes.

a. Applicable Law

292. According to Respondent, EU law is part of or a "subsystem" of international law, and its rules and principles assume relevance in international law due to the principle of primacy or *primauté* of EU law. Thus, it has to be applied by a tribunal established pursuant to Article 26 ECT, "both with regard to the validity of the arbitration agreement and its merits". Further, as per Respondent, EU law also applies as part of the national law of EU Member States.[349]

293. With respect to the applicable law to jurisdictional issues, while Respondent primarily considers that cases in the ICSID regime are similar to cases such as the present one, being administered by the SCC with the seat in Stockholm, Respondent, in the alternative, endorses this distinction. This is on the ground that awards rendered in the latter kind of regime, i.e., with their seat in Stockholm, will have to be considered under EU public order, when being reviewed by annulment courts in Sweden or enforcing courts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). As per Respondent, the ECJ Judgment forms part of the EU public order, and thus any award not in compliance with the same could be annulled for being contrary to the basic principles of the Swedish legal system (see ¶ 315 below).[350]

b. The Reasoning of the ECJ Judgment applies to ECT

294. It is Respondent's position that the offer of a Member State to an investor to arbitrate disputes as per Article 26 ECT is "exactly identical" to the situation of Article 8 of Agreement on encouragement and reciprocal protection of investments between the

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[349] Respondent's Comments on ECJ Judgment, ¶¶ 4-5; Hr. Tr. Day 1, pp. 158(4)-158(19); R-RPHB, ¶¶ 37-39; *relying, inter alia, on* **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶¶ 4.120-4.124; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016.

[350] Hr. Tr. Day 4, pp. 225(6)-226(21); R-PHB, ¶¶ 51-58.

Kingdom of the Netherlands and the Czech and Slovak Federative Republic ("**Slovak-Dutch BIT**").[351]

295. What is relevant in the present case is that the obligations that Italy assumed towards Luxembourg are in the nature of intra-EU obligations. The bilateral nature of these obligations, and consequently the offer to arbitrate, is not altered either by the fact that the ECT is a multilateral treaty, or by the fact that the EU is a party to the ECT.[352]

296. Respondent contends that the ECJ Judgment has confirmed the proposition that any agreement entered into between Member States has to respect the autonomy of the EU legal order. This autonomy requires that dispute resolution in respect of intra-EU rights and obligations be carried out by bodies that can make a reference to the ECJ for a preliminary ruling on questions of interpretation and application of EU law, as per Article 267 TFEU, in order to preserve the monopoly of the ECJ on matters of EU law, and in turn, the full effectiveness of EU law. Such bodies would constitute only courts and tribunals of EU Member States, which are state-established permanent institutions capable of deciding disputes with *res judicata* effect, even those relating to the ECT. These do not include arbitral tribunals of the nature sitting under the ECT. Not only can such tribunals not make a reference to the ECJ, but their awards, upon being rendered, are also subjected only to very limited grounds of review by courts. Thus, even under the ECT, as under the Slovak-Dutch BIT, the Member States established a mechanism of settling investment disputes that is not capable of ensuring the proper application or full effectiveness of EU law.[353]

297. Respondent supports its submissions by relying on recent blog articles that have endorsed the extension of the reasoning of the ECJ Judgment to ECT cases.[354] Respondent also places reliance on the recent Declarations of the Representatives of the Governments of the

[351] Respondent's Comments on ECJ Judgment, ¶ 11.

[352] Respondent's Comments on ECJ Judgment, ¶¶ 13-15.

[353] Respondent's Comments on ECJ Judgment, ¶¶ 18-20; 26-32; R-PHB, ¶¶ 56-58; *see also* for submissions relating to Article 344 TFEU, SoD, ¶¶ 134-142; Hr. Tr. Day 1, pp. 164(2)-166(3); *relying on* **REX-009**, Case C-459/03, judgment of 30 May 2006.

[354] Respondent's Comments on ECJ Judgment, ¶¶ 12, 25; *relying on* **RLA-014**, Steffen Hindelang, "The Limited Immediate Effects of CJEU's Achmea Judgement", https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/; **RLA-015**, Nikos Lavranos, "Black Tuesday: the end of intra-EU BITs" http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/.

EU Member States dated 15-16 January 2019 as confirmation that the principles established in the ECJ Judgment were not specifically linked to the Slovak-Dutch BIT and also extend to the ECT. Respondent considers these Declarations, specifically the one Italy signed on 15 January 2019, to hold binding value.[355] Further, in Respondent's view, all previous arbitral case law that has rejected the argument that intra-EU BITs and application of the ECT in the intra-EU context is incompatible with the TFEU, is rendered irelevant in light of a final judgment on this proposition rendered by the ECJ.[356]

298. According to Respondent, the application of the ECJ Judgment to intra-EU ECT cases is not inhibited by either (i) the absence of a disconnection clause, which was unnecessary as per Respondent, or (ii) the presence of the EU as a party to the ECT, which only reinforces the applicability of the ECJ Judgment to ECT, in Respondent's view.[357]

299. With respect to the opinion of Advocate General Wathelet dated 19 September 2017 preceding the ECJ Judgment ("**AG Opinion**"), Italy's argument is that the AG Opinion does not hold any more than pure academic or scholarly value after the ECJ Judgment has already decided the relevant issues. As per Italy, in any event, the AG Opinion was based on the wrong assumption of arbitral tribunals, on certain occasions, being able to refer questions for the preliminary ruling of the ECJ under Article 267 TFEU, which possibility has been definitively ruled out by the ECJ Judgment.[358]

300. Respondent also criticizes the recent award rendered in *Masdar v. Spain,* whereby the tribunal assumed jurisdiction over an intra-EU investment dispute under the ECT after the ECJ Judgment was rendered. Respondent's criticism focuses on the fact that the *Masdar* tribunal did not account for how the ECJ Judgment's reasoning extends also to multilateral

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355 R-PHB, ¶¶ 5-6; R-RPHB, ¶¶ 8-13, 23-35; *relying on* **CL-191**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea on Investment Protection in the European Union, 15 January 2019; **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019; **RLA-019**, 2011 International Law Commission (ILC) *Guide to Practice on Reservations to Treaties,* ¶ 1.2; **RLA-020**, 2006 ILC *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Principles 1 and 4.

356 Respondent's Comments on ECJ Judgment, ¶ 24.

357 Hr. Tr. Day 1, pp. 166(15)-167(16); Hr. Tr. Day 1, pp. 170(10)-170(18).

358 Respondent's Comments on ECJ Judgment, ¶¶ 39-43.

treaties such as the ECT, and placed excessive reliance on the AG Opinion.[359] In this connection, Respondent points out that the questions referred to the ECJ, the principles relied on by the ECJ to arrive at its conclusions and the issues addressed by the ECJ, specifically about the characteristics of EU law, all apply equally to multilateral conventions. Further, a tribunal "such as" the one established under Article 8 Slovak-Dutch BIT includes the present Tribunal sitting under the ECT, since it operates within a comparable procedural framework, in particular relating to the law applicable to its procedure and the judicial review and finality of its award.[360]

c. Intra-EU Arbitration is in violation of Articles 267 and 344 TFEU and the general autonomy of EU law

301. Respondent's position is that arbitration under the ECT of intra-EU investment disputes violates Article 267 and 344 TFEU and the general principle of autonomy of EU law, the consequence of which is that the Member State's offer to arbitrate under Article 26 ECT becomes inapplicable vis-à-vis investors of another Member State.[361] According to Respondent, as a result of the *sui generis* nature of EU law and its primacy in the EU legal order, Member States are prevented from allowing a dispute that potentially involves EU law aspects to be resolved by an international arbitral tribunal. The appropriate forum, instead, would be competent national court or tribunal in the Italian Republic, which could decide disputes relating to the EU law contained either in the primary or secondary EU legislations.[362]

302. In this connection, Respondent posits two arguments concerning the relationship between EU law and the ECT. First, Respondent contends that it is possible to interpret the ECT, as per international law, as not applying between EU Member States. Second, in the

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359 R-SoRj, ¶¶ 138-142, 169-183; R-PHM, ¶ 177; *relying on* **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award.

360 R-SoRj, ¶¶ 143-168.

361 Respondent's Comments on ECJ Judgment, ¶¶ 6-10.

362 SoD, ¶¶ 39-40; Hr. Tr. Day 1, pp. 159(25)-163(10); *relying on* **REX-001A**, Charter of Fundamental Rights of the European Union; **REX-001B**, Treaty on European Union; **REX-001C**, Treaty on the Functioning of the European Union.

alternative, any conflict between the ECT and EU law should, in Respondent's view, be resolved in favour of EU law.[363]

303. With respect to the interpretation of the ECT, Respondent relies on Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ("**VCLT**"), and on the principle of harmonious interpretation. Respondent highlights five provisions of the ECT, i.e., Article 1(2) (definition of "Contracting Party"), Article 1(3) (definition of "Regional Economic Integration Organisation"), Article 1(10) (definition of "Area"), Article 25 (Economic Integration Agreements) and Article 16 (Relation to Other Agreements).

304. Concerning Articles 1(2), 1(3) and 1(10) ECT, Respondent contends that given that the ECT itself recognizes Regional Economic Integration Organisations ("**REIO**") as Contracting Parties and also envisages an overlap of territories between the REIO and its Member States, the allocation of competences within an REIO, such as the EU, is not a question of geographical boundaries, but instead one of substantive competences.[364]

305. Concerning Article 25 ECT, Respondent argues that the definition of an Economic Integration Agreement ("**EIA**") perfectly fits the EU, and that more preferential treatment between the Parties to such EIAs is compatible with the ECT.[365]

306. In addition, relying on Article 16 ECT, Italy argues that nothing in Part III or V of the ECT can be construed to derogate from any provision of EU law, specifically the Treaty of the European Union ("**TEU**") and the TFEU (referred to together as the "**EU Treaties**"), or any right to dispute resolution therein. This is on the ground that the system of investment protection established under EU law is "doubtless more favourable and offers more articulated forms of protection to the investors and their investments" than the ECT. Even when it comes to access to justice, while the option of international arbitration is not available to EU citizens against EU Member States, EU citizens are entitled to non-

363 Respondent's Comments on ECJ Judgment, ¶¶ 22-23.

364 SoD, ¶¶ 46-48; Hr. Tr. Day 1, pp. 158(25)-159(7).

365 SoD, ¶¶ 49-51.

discriminatory and consistent court jurisdiction across the EU, and are also entitled to the final recourse of the ECJ.[366]

307. In support of the above interpretative arguments, Italy relies on context offered by (i) the Decision, included in Annex 2 to the Final Act of the European Energy Charter Conference, with respect to Articles 24(4)(a) and 25 ECT, which offers investors from non-Member States of an EIA access to treatment accorded under the EIA when the said investors have a registered office, central administration or principle place of business in the Area of a party to that EIA; and (ii) the EU and its Member States' declaration with respect to Article 25 ECT.[367]

308. Further, Italy produces preparatory works and documents relating to the circumstances of adoption of the ECT, including contemporaneous EU Directives in the energy sector, to contend that the ECT was never formulated to regulate the EU internal market.[368] In the same vein, it relies on investment arbitration case law to reflect the consistency in judicial behaviour and practice of EU Member States on this issue.[369] Concerning the findings of these investment arbitration case law, which Claimants rely on extensively (see ¶ 319 below), Respondent submits that none of the published awards or decisions have addressed systematically all the relevant issued under international law.[370]

309. Respondent's alternative argument proceeds under the assumption of a conflict between the ECT and EU law, specifically the EU Treaties. In this connection, Respondent contends that EU Treaties, as they stand after amendment by the Lisbon Treaty in December 2007, prevail over the ECT, as per (i) the conflict rule of primacy of EU law; (ii) Article 30 VCLT, and/or (iii) Article 16 ECT.

310. With respect to the Lisbon Treaty, Respondent explains the allocation of competences between the EU and its Member States, pointing out that Article 207 TFEU, which defines

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[366] SoD, ¶ 53; Respondent's Comments on ECJ Judgment, ¶¶ 34-38; *see also* R-SoRj, ¶¶ 124-130.

[367] SoD, ¶¶ 55-61.

[368] SoD, ¶¶ 62-65; *relying on* **REX-003**, Commission Proposal for a Council Directive concerning common rules for the internal market in electricity, COM (91)548 final, OJ No C65 of 14 March 1992; *see also* R-SoRj, ¶¶ 131-132.

[369] SoD, ¶¶ 66-70; *relying on* **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award.

[370] R-SoRj, ¶¶ 133-135.

the "common commercial policy" now includes foreign direct investment after the Lisbon Treaty's entry into force. Whereas a number of matters covered in the ECT still have mixed competences of the EU and/or its Member States, the EU has exclusive competence over the common commercial policy, and specifically, foreign direct investment.[371]

311. Respondent argues that the principle of primacy of EU law is a "specific conflict rule" under the public international law that follows from Article 351(1) TFEU. This principle applies to give priority to the EU Treaties regardless of the bilateral or multilateral character of the ECT or the fact that the EU is a party to the ECT.[372]

312. In Respondent's view, as a result of the subsequent entry into force of the Lisbon Treaty, it is *lex posterior* and prevails over the ECT with respect to EU Member States as per Articles 30(3) and 30(4) VCLT. In this connection, Respondent advocates for a liberal interpretation of "same subject matter" in Article 30 VCLT, and goes on to explain the protections available to investors under the EU legal regime.[373]

313. The same result is arrived at, as per Respondent, if one applies Article 16 ECT as a conflict rule. This is on the ground, as mentioned above, that EU law provides for a more favourable and more articulated level of protection to the investors than the ECT, in light of, *inter alia*, the internal market rules, the principle of non-discrimination of nationals, the Charter of Fundamental Rights, and the case law of the ECJ.[374] Lastly, Respondent, in any event, submits that the Lisbon Treaty amounts to a modification of the ECT as per Article 41 VCLT.[375]

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371 SoD, ¶¶ 74-80; *relying on* **REX-002**, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

372 R-PHB, ¶¶ 45-50; R-RPHB, ¶¶ 45-49; *relying on* **CL-191**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea on Investment Protection in the European Union, 15 January 2019; **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019.

373 SoD, ¶¶ 81-85; § II.1.C; Hr. Tr. Day 1, pp. 159(12)-159(24). *relying on* **REX-004**, Report of the Study Group of the International Law Commission, Fragmentation of International Law. Difficulties arising from the diversification and expansion of international law, 13 April 2006, A/CN.4/L.682.

374 SoD, ¶¶ 86-91; *relying on* **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 4.178.

375 SoD, ¶¶ 92-98.

314. In general, in addition to the above, Respondent expresses its agreement with the observations made by the EC in the EC NDP Submission.[376]

d. Non-enforceability of Award rendered contrary to the ECJ Judgment

315. It is Respondent's submission that any award assuming jurisdiction over intra-EU disputes under the ECT would not be enforceable within the EU, be it awards rendered within or outside the EU, or rendered under an institutional (ICSID or SCC) or *ad hoc* setting. As per Respondent, there is no diversification based on where such an award is ultimately rendered or under which set of procedural rules. In this connection, Respondent cites the decisions of the EC against Spain and Czech Republic, wherein it was clearly stated that awards rendered by tribunals under the ECT in intra-EU cases constitute State aids to be authorized by the EC before being executed. Further, Respondent also relies on the stay of enforcement granted by the Swedish Court of Appeal based on the ECJ Judgment in *Novenergia II v. Spain*. Lastly, 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 (SFS 1999:116) ("**Swedish Arbitration Act**") (see ¶ 293 above).[377]

(2) Claimants' Position

a. Applicable Law

316. According to Claimants, the applicable law for the Tribunal does not include EU law. In this connection, Claimants contend that Article 26(6) ECT can only be interpreted as referring to the substantive rules governing the Tribunal's analysis of Italy's liability, and does not address the applicable law to this Tribunal's jurisdiction. The Tribunal's jurisdiction is governed only by the provisions of the ECT, specifically Article 26 thereof, and nothing beyond. Claimants alternatively submit that even if Article 26(6) ECT were

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[376] R-SoRj, fn 45.

[377] Respondent's Comments on ECJ Judgment, ¶¶ 44-45; R-SoRj, ¶ 186; R-PHB, ¶¶ 51-58; R-RPHB, ¶¶ 39-44; *relying on* **RLA-016**, EC Decision State aid SA.40348 (2015/NN) – Spain; **RLA-017**, EC Decision State Aid SA.40171 (2015/NN) – Czech Republic; German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15, ECLI:DE:BGH:2018:311018BIZ2.15.0, ¶¶ 25-28.

relevant for the Tribunal's jurisdiction, the phrase "applicable rules and principles of international law" only covers public international law and does not encompass a regional legal order such as EU law. Further, as per Claimants, EU law does not apply in the present case since Claimants have specifically chosen to bring claims under the ECT and not under EU law. In addition, Claimants state that EU law cannot be used as general principles of international law under Article 31(3)(c) VCLT.[378]

317. In this connection, Claimants also maintain that the outcome does not differ between cases in the ICSID regime and cases being administered by the SCC or *ad hoc* arbitrations under the UNCITRAL Rules. Under Swedish law, which applies as the *lex arbitri* in the present case, there is no external principle that would limit this Tribunal's jurisdiction, and any question of jurisdiction would have to be answered with reference to the arbitration agreement alone.[379]

b. This Tribunal has jurisdiction over intra-EU investment cases under the ECT

318. Claimants dispute Respondent's submissions relating to the interpretation of the ECT, and its alternative argument relating to the resolution of any conflict between the ECT and EU law in favour of the latter. Claimants also disagree with the observations made by the EC in this connection.

319. In respect of the interpretation of the ECT, Claimants emphasise the plain letter of the ECT confirms that it applies to intra-EU disputes. The distinction between intra-EU and extra-EU disputes that Respondent attempts to read into the ECT does not exist in its text, which, as per Claimants provides no limitations concerning investors from certain Contracting

378 SoRy, ¶¶ 116-123; C-SoRj, ¶¶ 38-44; Hr. Tr. Day 1, pp. 112(5)-113(15); *relying on* **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶¶ 459, 461; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 198-199; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue.

379 Hr. Tr. Day 1, pp. 107(24)-108(11); C-PHB, ¶ 15-37; C-RPHB, ¶¶ 4-7, 15; *relying, inter alia, on* **CL-180**, *Foresight Luxembourg Solar 1 S.A.R.L, Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. The Kingdom of Spain,* SCC Arbitration V (2015/150), Final Award**;** **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award; **CL-183**, Decision in the Svea Court of Appeal, Case No. T-6247-15; **CL-184**, Decision in the Svea Court of Appeal, Case No. T 2675-14.

Parties not being able to resolve disputes against certain other Contracting Parties. Further, in the instant case, neither the home State, i.e., Luxembourg, nor the host State, i.e., Italy, could have made any reservations to the ECT as a result of Article 46 ECT. Claimants also mention the absence of a specific disconnection clause in the ECT, which was originally envisaged, but never included, during the treaty drafting process of the ECT. Similarly, Claimants contest Respondent's reliance on Article 16 ECT, emphasising that due to the option of international arbitration provided to investors in the ECT, the same is more favourable than the legal regime under EU law. Claimants support their arguments by relying on "unanimous" ECT case law, i.e., 24 decisions and/or awards rendered by ECT tribunals that have rejected jurisdictional objections relating to EU law.[380]

320. With respect to the EU's position as an REIO in the ECT, Claimants contend that the ECT only recognizes that some Member States are also members of regional organizations, while ensuring that the Member States are distinguished from the REIO's independent candidacy as a party to the ECT.[381]

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[380] SoRy, ¶¶ 47-58, 67-81; C-SoRj, ¶¶ 28-36; C-PHB, ¶¶ 4-14; *relying on* **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015; **CL-120**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, Apr. 30, 2010, ¶ 109; **CL-121**, *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, Oct. 22, 2012, ¶¶ 236–38; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016; **CL-115**, *WNC Factoring Ltd. v. Czech Republic*, UNCITRAL, PCA Case No. 2014-34, Award, Feb. 22, 2017; **CL-113**, *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Case V 2015/014, Final Award, Mar. 10, 2017; **CL-116**, *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case V 2014/181, Final Award, Mar. 10, 2017; CL-117, **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017; **CL-4**, *Charanne B.V. & Construction Investments S.a.r.l. v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, Jan. 21, 2016; **CL-8**, *EDF International S.A. v. Republic of Hungary*, UNCITRAL (award not public), *Republic of Hungary v. EDF International S.A.*, Swiss Federal Supreme Court Case 4A_34/2015, Judgment, Oct. 6, 2015; **CL-43**, *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016; **CL-122**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, July 17, 2016; **CL-118**, *JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, Oct. 11, 2017; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018; **CL-169**, *Antin Infra. Servs. Lux. S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶¶ 192-196, 229; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award; **CEX-462**, Note for the Attention of Ambassador Rutten from Secretary General Clive Jones, Feb. 19 1993.

[381] C-SoRj, ¶¶ 90-94; *relying on* **CL-177**, Johann Basedow, "The European Union's International Investment Policy. Explaining Intensifying Member State Cooperation in International Investment Regulation", PhD Thesis, The London School of Economics and Political Science (2014).

321. Similarly, Claimants consider Respondent's arguments relating to Article 25 ECT and the Decision, included in Annex 2 to the Final Act of the European Energy Charter Conference, with respect to Articles 24(4)(a) and 25 ECT (see ¶ 307 above), to be "misplaced". This is on the ground that Article 25 ECT does not address how EU Member States should treat investors from other EU Member States, nor does the said Decision require anything other than a parity of treatment by EU Member States for investors from within the EU and investors from outside the EU, who maintain business activities within the EU.[382]

322. Claimants also rebut Respondent's alternative argument relating to the resolution of any conflict between the ECT and EU law (see ¶¶ 309-313 above). In this connection, Claimants contend, at the outset, that the ECT and EU law, specifically the EU Treaties after the Lisbon Treaty, do not share the same subject matter.[383]

323. Claimants alternatively also submit that even assuming that the EU Treaties and the ECT had the same subject matter, the former would not prevail over the latter as per Articles 30(3) and 30(4) VCLT, since there was no incompatibility between the substantive protections of the ECT and EU law. Similarly, the Lisbon Treaty could not be considered a modification of the ECT under Article 41 VCLT, since a "deactivation" of investor protection between Italy and Luxembourg would eliminate the rights of these Member States (being exercised by investors) under the ECT. Further, Claimants emphasise on the absence of any concrete intention to modify the ECT, which could also have been done through the process for amendment prescribed in Article 42 ECT. Claimants question Respondent's argument relating to consistent State practice by EU Member States, by

[382] SoRy, ¶¶ 59-63.

[383] SoRy, ¶¶ 83-85; C-SoRj, ¶ 16; *relying on* **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015, ¶¶ 4.146-4.176; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 460; **CL-124**, Tomas Fecák, Chapter 5: Intra-EU International Investment Agreements, in International Investment Agreements and EU Law, KLUWER L. INT'L 467–68 (2016); **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013; **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010; **CL-13**, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, Mar. 27, 2007 ¶ 159; **CL-10**, *Achmea B.V. (formerly Eureko) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, Oct. 26, 2010; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶¶ 346-351.

pointing out that at least five EU Member States intervened and supported the position that EU law did not bar intra-EU arbitration during the proceedings surrounding the ECJ Judgment.[384]

324. Lastly, Claimants dispute Respondent's understanding of Article 16 ECT's conflict rule, on the ground that the ECT offers a stronger level of investor protection, as exemplified primarily by the right to resolve disputes by international arbitration under Article 26 ECT, which is a fundamental protection not available in EU law. This is also true for substantive protections, for which Claimants rely on the proposals in the AG Opinion and on instances where domestic courts have denied violations of investors' rights, which have subsequently been upheld by investment tribunals.[385] Similarly, Claimants contest the EC's reliance on Article 351 TFEU as a conflict rule (see ¶ 347 above), on the ground that it applies only to agreements concluded prior to 1 January 1958 or before a Member State's date of accession into the EU, which does not include the ECT in the instant case.[386]

c. The ECJ Judgment does not apply to the present case

325. It is Claimants' contention that the ECJ Judgment does not have any implications on the present Tribunal's jurisdiction. Claimants posit this argument for the following reasons.

326. First, Claimants submit that since this Tribunal's jurisdiction is governed only by the provisions of the ECT, and the conditions for jurisdiction emanating therefrom, the ECJ

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384 SoRy, ¶¶ 86-95; C-SoRj, ¶¶ 16-20, 32-33; *relying on* **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015, ¶¶ 4.146-4.147; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 199, 205-206; **CL-43**, *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶¶ 72-75; **CL-10**, *Achmea B.V. (formerly Eureko) v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, Oct. 26, 2010, ¶¶ 245, 281-282; **CL-12**, *Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction, June 6, 2007, ¶ 63; **CL-13**, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, Mar. 27, 2007 ¶¶ 168-171.

385 SoRy, ¶¶ 96-102; C-SoRj, ¶¶ 22-26; Hr. Tr. Day 1 pp. 114(15)-115(2); *relying on* **CL-35**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005 ¶ 141 (quoting Thomas Wälde); **CL-33**, Christian Tietje, The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States, Beiträge zum Transnationalen Wirtschaftsrecht, Sept. 1, 2008, at 12-13; **CL-4**, *Charanne B.V. and Constr. Invs. S.à.r.l. v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, Jan. 21, 2016 ¶ 435; *see also* **CL-161**, Opinion of Advocate General Wathelet, *Slowakische Republik v. Achmea B.V.*, Case C-284/16, Sept. 19, 2017, ¶¶ 77, 181, 215; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue.

386 C-SoRj, ¶¶ 95-96.

Judgment cannot enter the Tribunal's applicable law framework through any "backdoor", much less through Article 26(6) ECT, since this provision is neither relevant for the Tribunal's jurisdiction, nor includes the ECJ Judgment, or EU law in general (see ¶ 316 above).[387]

327. Second, Claimants submit that the reasoning of each of the 23 investment tribunals, which denied the EU law related jurisdictional objection under the ECT prior to the ECJ Judgment (see ¶ 319 above), continues to hold value even after the ECJ Judgment.[388] Further, Claimants rely on all decisions or awards rendered after the ECJ Judgment, which have rejected the jurisdictional objections relating to EU law, and in particular place reliance on *Greentech v. Italy*.[389]

328. Third, in Claimants' view, even in the alternative that the ECJ Judgment forms part of the applicable law to the Tribunal's jurisdiction, the same is clearly distinguishable from the instant case for two reasons.

329. Firstly, the ECJ Judgment restricts its own application to BITs concluded "between" EU Member States, and accordingly does not apply to multilateral investment treaties, especially those to which the EU itself is a party. The ECT is such a multilateral agreement, having 54 signatories, in addition to the EU itself. As per Claimants, the ECJ Judgment did not condemn resolution of disputes arising from investment treaties through international arbitration *per se*, but only precluded such international arbitration when the EU was not party to the underlying agreement or treaty. Claimants contend that the EC cannot ague on these lines now when the EU had already signed the ECT in 1997. In this

[387] SoRy, ¶¶ 116-123.

[388] SoRy, ¶ 124; Hr. Tr. Day 1, pp. 104(18)-104(24).

[389] Hr. Tr. Day 1, pp. 104(18)-105(12); C-PHB, ¶¶ 4-11, 31-33; *relying on* **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award; **CL-169**, *Antin Infra. Servs. Lux. S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award.

connection, Claimants also dispute the binding value of the EC Communication 2018 (see ¶ 47 above).[390]

330. Secondly, the ECJ Judgment was rendered in the context of the governing law provision of the Slovak-Dutch BIT, contained in Article 8(6) thereof, which was different from Article 26(6) ECT. Article 8(6) Slovak-Dutch BIT left open the scope for the tribunal in *Achmea v. Slovakia* to interpret and apply EU law, by including the "law in force of the Contracting Party concerned" and "other relevant Agreements between the Contracting Parties" in the applicable law framework. As per Claimants, these broad stipulations in Article 8(6) Slovak-Dutch BIT do not exist in Article 26(6) ECT, since the same only covers rules and principles of international law as the applicable law in ECT arbitrations.[391]

331. Claimants support the above arguments by relying on the recent award of the tribunal in *Masdar v. Spain*, which denied the relevance of the ECJ Judgment on its jurisdiction under the ECT, stating that the same had "no bearing" and "cannot be applied to, multilateral treaties, such as the ECT, to which the EU itself is a party".[392] In addition, Claimant submits that any extension of the ECJ Judgment to the ECT is inhibited by the presence of Article 16 ECT, which ensures that the ECT prevails over the EU Treaties.[393]

d. The Tribunal need not be concerned with the future enforceability of the Award

332. Lastly, Claimants contend that due to the recency of the ECJ Judgment, its specific impact upon the actual enforcement of awards is uncertain and clouded by numerous unresolved questions. In any event, any such impact on enforcement of awards is likely to be "minimal to non-existent" as per Claimants.

333. In this connection, Claimants seek to distinguish the procedural framework of these arbitration proceedings from the procedural framework of an ICSID arbitration. This is on

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390 SoRy, ¶¶ 127-131; C-SoRj, ¶¶ 47-50; C-PHB, ¶¶ 8-0; *relying on* **CL-125**, ECJ Judgment, ¶¶ 57-58, 62; **CL-126**, European Court of Justice, Opinion, *Case 2/15*, May 16, 2017, ¶ 293.

391 SoRy, ¶¶ 127-131; C-SoRj, ¶¶ 51-52; *relying on* **CL-125**, ECJ Judgment, ¶¶ 4, 40-42.

392 C-SoRj, ¶¶ 72-76; *relying on* **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶¶ 678-682.

393 C-PHB, ¶ 32; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶¶ 192-194.

the ground that the present arbitration proceedings are governed by the Swedish law on arbitration (Stockholm being the seat) and the New York Convention. The latter instrument mandates signatory states to confirm and execute foreign arbitral awards with only a few limited exceptions, which, in Claimants' view, Italy has not established. Thus, whether and to what extent Italy's obligation under the New York Convention may subsequently conflict with any of its obligations under the EU Treaties are not questions that should concern the Tribunal at this stage. Accordingly, this Tribunal need not predict or speculate about the enforceability of its ultimate Award.[394]

334. On a related note, Claimants challenge Respondent's reliance on the EC's communications to Spain and Czech Republic regarding the ECT awards constituting State aids to be authorized by the EC before being executed (see ¶ 315 above). In Claimants' view, these communications are irrelevant to this Tribunal's jurisdiction, and also do not impact the merits of these proceedings, which have been brought under the ECT and not under EU law. Claimants point to a number of arbitral awards that have awarded relief to investors aggrieved by Spanish measures after the EC's communication to Spain relating to state aid. Claimants also submit, in this regard, that neither has Italy reported its incentive regime regarding photovoltaic energy to the EC as constituting state aid, nor has the EC initiated a state aid review of the incentive regimes in Italy, despite having been aware of the same since 2008.[395]

335. In any event, Claimants argue that any award rendered by this Tribunal upholding jurisdiction will not carry the risk of being annulled pursuant to Sections 33(1) and 33(2) of the Swedish Arbitration Act, since (i) investor-State disputes are considered arbitrable in Swedish law; and (ii) intra-EU investor-State arbitration is not contrary to the basic principles of Swedish law, as is implicitly confirmed by the Declaration of the

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[394] SoRy, ¶¶ 139-142; C-SoRj, ¶¶ 54-57; C-PHB, ¶ 24; C-RPHB, ¶ 10; *relying on* **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ¶¶ 330, 340-341.; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 230.

[395] C-SoRj, ¶¶ 60-71; *relying on* **CL-117**, *Eiser Infra. Ltd. and Energia Solar Lux. S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017; **CL-119**, *Novenergia II – Energy & Env't (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018; **CL-169**, *Antin Infra. Servs. Lux. S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, June 15, 2018.

Representatives of the Governments of EU Member States signed by Sweden on 16 January 2019.[396]

C. THE EC'S OBSERVATIONS

336. In this Section, the Tribunal summarises the EC's observations regarding (i) the applicability of EU law for the Tribunal's assessment of its jurisdiction; (ii) the implications of the ECJ Judgment for these proceedings; and (iii) the interaction between the ECT and EU law, specifically the EU Treaties.

(1) Applicability of EU law for the Tribunal's Jurisdiction

337. In the EC's view, EU law forms part of the "applicable rules and principles of international law" under Article 26(6) ECT, and the "relevant rules of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) VCLT. The EC states that nothing in the ECT indicates that it operates as *lex specialis* vis-à-vis EU law. Rather, reference to EU law should form a part of the task of interpretation of the ECT pursuant to Article 31(3)(c) VCLT. For this proposition, the EC relies on Article 38 of the Statute of the International Court of Justice, the jurisprudence of the International Court of Justice and academic writing. Incidentally, the EC also states that EU law is applicable also as the national law of EU Member States.[397]

338. Further, according to the EC, the fact that EU law is part of international law, and is therefore applicable as such under Article 26(6) ECT for matters of validity of the arbitration and the merits, has not been disputed by investment arbitral tribunals after the

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396 C-RPHB, ¶¶ 11-16; *relying on* **CL-184**, Decision in the Svea Court of Appeal, Case No. T 2675-14; **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019; **C-467**, *Analysis: A full run-down of the Svea Court of Appeal's reasoning in the recent PL Holdings v. Poland set-aside decision*, IA Reporter; **C-468**, *Arbitral awards in investment protection dispute remain mainly unchanged, Svea* Hovrätt Press Release.

397 EC NDP Submission, ¶¶ 17, 32, 42-48; *citing, inter alia,* Antonio Parra, "Applicable Law in Investor-State Arbitration", in Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2008), pp. 7-8; Thomas Eilmansberger, "Bilateral Investment Treaties and EU Law", 46 Common Market Law Review (2009), p. 421; Hervé Ascencio, "Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law", 31 ICSID Review 2 (2016), p. 371; *Tunisia v. Libyan Arab Jamahiriya (Case Concerning Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf)*, Merits, Judgment, 10 December 1985, ICJ Reports 15(1985), ¶ 43.

award in *Electrabel v. Hungary*. The disputed issue between tribunals instead concerns whether the ECT prevails over EU law or vice-versa.[398]

339. In this regard, the EC's position is that the process of "systemic coherence" requires the ECT to be interpreted in such a way as to avoid any conflict with EU law, and not the other way around. For that purpose, according to the EC, an interpretation of Article 26 ECT taking into account the general principle of autonomy of EU law (Articles 4(3) and 19 TEU and Articles 267 and 344 TFEU) leads to the conclusion that there is no offer to arbitrate by Germany to Swedish investors.[399]

(2) **Implications of the ECJ Judgment**

340. In the EC's view, the ECJ Judgment, which confirms the position that the EC took in the EC Intervention Application, renders the offer to arbitrate in Article 26 ECT "precluded".[400] According to the EC, this is on the ground of the general principle of EU law of autonomy of the EU legal order, which is enshrined in the liberally interpreted Article 344 TFEU, and on the keystone of the EU judicial system, i.e., the preliminary ruling procedure, provided in Article 267 TFEU. In addition, the EC relies on Articles 4(3) and 19 TEU for the principle of autonomy of EU law.[401]

341. It is the EC's position that the ECJ Judgment applies equally to intra-EU investor-State arbitrations under the ECT since (i) intra-EU investment arbitral tribunals are not "national courts or tribunals" in the sense of Article 267 TFEU, which proposition applies to tribunals under the ECT as well, regardless of whether the tribunal is an ICSID tribunal or an UNCITRAL tribunal; and (ii) there is no complete review of arbitral awards by such tribunals through national courts within the EU. This is the case even for ongoing

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398 EC NDP Submission, ¶¶ 42-48; *citing Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶¶ 4.111-4.199; *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (same as **CL-4**), ¶ 439; *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016 (same as **CL-43**), ¶¶ 74, 75, 87.

399 EC NDP Submission, ¶¶ 48-52; *citing Oil Platforms (Iran v. USA)*, Merits, Judgment, 6 November 2003, ICJ Reports 161 (2003), ¶¶ 41 and 78; *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, ECJ Case No. C-104/16 P, Judgment, 21 December 2016, ¶ 86.

400 EC NDP Submission, ¶ 7.

401 EC NDP Submission, ¶¶ 15-16, 31; *citing* ECJ Judgment, ¶¶ 32, 36-37.

investment cases, since the ECJ's judgments, unless specifically limited in time, apply *ex tunc*.[402]

342. Further, concerning the fact that the EU is a Contracting Party to the ECT, the EC submits that (i) the ECJ, in its findings in the ECJ Judgment, intended to carve out only those international courts that are set up by agreements signed by the EU that respect the autonomy of the EU and its legal order; and (ii) the Tribunal has been set up as a result of bilateral commitments between Italy and Luxembourg, and not as a result of the EU's participation in the ECT.[403]

(3) **Interaction between the ECT and EU law**

343. Regarding the interaction between the ECT and the EU Treaties, i.e., the TEU and the TFEU, the EC offers two solutions: first, a harmonious interpretation of the ECT in conformity with EU law, or second, in the event of a conflict, the primacy of EU law as *lex posterior.*

344. With respect to the harmonious interpretation of the ECT, the EC, in addition to its submission that EU law forms part of relevant rules of international law under Article 31(3)(c) VCLT (see ¶ 337 above), also puts forth an interpretation on the basis of other means of interpretation under Articles 31 and 32 VCLT. In this regard, the EC relies, *inter alia*, on (i) the definition of "Contracting Party" under Article 1(2) ECT, which includes an REIO such as the EU; (ii) the definition of an REIO in Article 1(3) ECT; and (iii) other provisions relating specifically to an REIO, such as Article 36(7) ECT and Article 1(10) ECT, the latter of which defines the term "Area" with respect to an REIO. On this basis, the EC states that the ECT recognises that the relationships between Member States to an REIO and the REIO are governed by the provisions of the agreement establishing the REIO itself. Further, according to the EC, in light of these provisions of the ECT, investments within the REIO are investments within the same Contracting Party, to which the offer to arbitrate under Article 26 ECT does not apply. In this regard, the EC

402 EC NDP Submission, ¶¶ 32-39.

403 EC NDP Submission, ¶¶ 32-40; *citing Association Vent De Colère! Fédération nationale and Others v. Ministre de l'Écologie, du Développement durable, des Transports et du Logement and Ministre de l'Économie, des Finances et de l'Industrie*, ECJ Case No. C-262/12, Judgment, 19 December 2013, ¶¶ 39-43.

also criticises the interpretation of Article 26 ECT offered by certain arbitral tribunals for depriving certain provisions of the ECT of their full effect or importance.[404]

345. Moreover, the EC derives context to support its interpretation from the Statement made by the European Communities under Article 26(3)(b)(ii) ECT, specifically stating that "[t]he Communities and the Member States will . . . determine among them who is the respondent party to arbitration proceedings initiated by an Investor of **another** Contracting Party" (emphasis added by the EC). The use of the term "another", according to the EC, restricts the offer to arbitrate in Article 26 ECT to investors from non-EU Member States. Additionally, the context for interpretation of Article 26 ECT is also derived by the EC from the fact that the EU and its Member States negotiated the ECT as one single block, pursuant to the EU law principle of unity in the international representation of the EU.[405]

346. The EC does not consider the absence of a "disconnection clause" in the ECT to affect its interpretation of Article 26 ECT, since a "disconnection clause" is "superfluous" in respect of intra-EU relations between Member States, even more so since the EU is already a Contracting Party to the ECT. In this regard, the EC advocates of the "liability follows competence" principle to allocate liability between the EU and its Member States, deriving support from the Draft Articles on the Responsibility of International Organizations and the jurisprudence of the International Tribunal for the Law of the Sea. It highlights that since renewable energy falls within the EU's exclusive competence, the EU is the one responsible towards investors and not its Member States. In light of this demarcation of

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[404] EC NDP Submission, ¶¶ 54-66; criticizing the interpretations of the tribunals in, *inter alia*, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (same as **CL-4**), ¶ 439; *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016 (same as **CL-43**), ¶¶ 74, 75, 87.

[405] EC NDP Submission, ¶¶ 67-86; *citing European Commission v. Kingdom of Sweden*, ECJ Case No. C-246/07, Judgment, 20 April 2010, ¶ 73; Eleftheria Neframi, "The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations" 47 Common Market Law Review 2 (2010), p. 335, fn. 45; Pieter Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the European Community", 6 European Journal of International Law 1 (1995), pp. 228-229; Johann Basedow, "The European Union's International Investment Policy. Explaining Intensifying Member State Cooperation in International Investment Regulation", PhD Thesis, The London School of Economics and Political Science (2014), pp. 136, 156, 164, 166; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶¶ 4.130-4.142; Communication from the Commission on European Energy Charter COM(91) 36 final of 14 February 1991; Council and Commission Decision of 23 September 1997 on the Conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, Official Journal of the EU L69, 9 March 1998, p. 1.

responsibilities between the EU and its Member States, a disconnection clause or its absence is not material for the interpretation of the ECT.[406]

347. The EC's alternative proposal, with respect to the rules relating to conflict between treaties, is that the conflict rule in Article 351(1) TFEU does not apply to multilateral treaties where only the rights and obligations of EU Member States is at stake. Instead a "special conflict rule", i.e., the general principle of primacy of EU law, arrived at based on an *a contrario* reading of Article 351 TFEU, applies with the result that the EU Treaties take absolute precedence over Article 26 ECT.[407]

348. The EC also contends that the same result is achieved pursuant to Articles 30 (successive treaties) and 41 (modification of multilateral treaties) VCLT, since either (i) Germany and Sweden's reaffirmation of Articles 4(3) and 19 TEU and Articles 267 and 344 TFEU after their ratification of the ECT can be construed as an amendment for the purposes of Article 41 VCLT; or (ii) the TEU and TFEU constitute "later treaties" on the same subject matter as the ECT, and the ECT applies only to the extent it is compatible with these later treaties. Similarly, Article 16 ECT does not inhibit this conclusion, since it is only a rule of "interpretation" and not one of conflict and, in any event is overruled by a later conflict rule in Article 351 TFEU, together with the principle of primacy of EU law.[408]

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406 EC NDP Submission, ¶¶ 87-101; *citing* Maja Smrkolj, "The Use of the 'Disconnection Clause' in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?", Paper presented at the GARNET Conference, "The EU in International Affairs", Brussels, 24-26 April 2008; Raphael Oen, *Internationale Streitbeilegung im Kontext gemischter Verträge der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (2005), p. 72; Christoph Herrmann, "Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationalen Organisationen – Eine Untersuchung am Beispiel der Mitgliedschaft der EG und ihrer Mitgliedstaaten in der WTO" in Bauschke et al. (eds.), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen* (2003), p. 159; Frank Hoffmeister, "Litigating against the European Union and Its Member States, 21 European Journal of International Law (2010), issue 3, pp. 724-747, at p. 728; ITLOS Advisory opinion of 2 April 2015, case no 21, ¶¶ 151-174; Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014, OJ L 257, 28.8.2014, p. 121.

407 EC NDP Submission, ¶¶ 107-110; *citing*, *inter alia*, *European Commission v. Slovak Republic*, ECJ Case No. C-264/09, Judgment, 15 September 2011, ¶ 41; *Commission of the European Communities v. Republic of Austria*, ECJ Case No. C-147/03, Judgment, 7 July 2005, ¶ 58; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶ 4.183.

408 EC NDP Submission, ¶¶ 111-112; *citing* United Nations International Law Commission, Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), ¶¶ 21 *et seq.*

(4) **Non-enforceability of Award rendered by the Tribunal**

349. The EC qualifies the measures contested by Claimants as "state aid" in the sense of Article 107(1) TFEU, which has not been authorized by the EC. Given that the EC has the exclusive authority to authorize such state aid, this Tribunal is not competent to conduct this assessment, especially since a determination of the fair and equitable treatment breach will require EU law principles of state aid to be looked into. Accordingly, as per the EC, if this Tribunal was to grant compensation to Claimants, it would be authorizing state aid, hence violating the distribution of competence set out in EU law, which may hinder the enforcement of any award as a violation of EU law. However, in the event the Tribunal does assume jurisdiction, the EC offers its availability to explore ways for safeguarding the EU law on state aid in this case.[409]

D. THE TRIBUNAL'S ANALYSIS

350. In this Section, the Tribunal shall examine the Parties' submissions with respect to Respondent's jurisdictional objection pertaining to EU law, and shall, to the extent possible, follow the Parties' order of submissions while laying out its determinations. In the process, the Tribunal shall also address the EC's observations on this matter, to the extent relevant and appropriate.

351. At the outset, the Tribunal shall determine the disputed issues relating to the applicable law to this Tribunal's jurisdiction (1). Thereafter, based on its findings on the applicable law, the Tribunal shall determine whether EU law limits or precludes this Tribunal's jurisdiction in these proceedings under Article 26 ECT (2). Lastly, the Tribunal shall address the Parties' submissions on the matters of interpretation of the ECT and the

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409 EC NDP Submission, ¶¶ 123-129; *citing* ECJ, Judgment in *Athinaiki*, Case C-362/09 P, EU:C:2010:783; ECJ, Judgment in *Deutsche Lufthansa*, EU:C:2013:755, C-284/12, ¶ 28; ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, ¶ 42; ECJ, Judgment in *SFEI and Others*, C-39/94, EU:C:1996:285, ¶ 36; Bernard Hanotiau, "*L'arbitrage et le droit européen de la concurrence*", in: Robert Briner (ed.), L'arbitrage et le droit européen, Reports of the International Colloquium of CEPANI April 25, 1997, Bruylant, 1997, pp. 31 to 64, at p. 47; Bernard Hanotiau, "Competition Law issues in international commercial arbitration: An arbitrator's viewpoint", in: 6 The American Review of International Arbitration [1995], pp. 287 to 299, at p. 294; PCA Case No. AA 227, *Yukos v Russia*, ¶ 1352; ICSID Case No. ARB/03/24, *Plama v Bulgaria*, ¶¶ 138, 140, and 143; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶¶ 4.137-4.142.

resolution of any conflicts between the different treaties in question, i.e., the ECT on the one side and the EU Treaties on the other side (3).

(1) **Applicable Law**

352. The Parties have made extensive submissions concerning the applicable law to this Tribunal's jurisdiction, specifically directed towards whether EU law falls within this sphere of applicable law in these proceedings. In order to determine this foundational question, the Tribunal shall (a) first, determine whether the applicable law regime in the ECT, prescribed in Article 26(6) ECT applies to questions of this Tribunal's jurisdiction; (b) second, address the interaction between Article 26 ECT and the Swedish legal order, in light of Stockholm, Sweden being the seat of this arbitration; and (c) lastly, based on the determinations of the first two issues, determine the nature and applicability of EU law for questions of jurisdiction.

a. **Whether Article 26(6) ECT applies to Questions of Jurisdiction**

353. The Parties are in dispute about whether the applicable law to questions of jurisdiction can be derived from Article 26(6) ECT. To recall, Article 26(6) ECT provides that "[a] tribunal established under paragraph (4) shall decide the <u>issues in dispute</u> in accordance with this Treaty and <u>applicable rules and principles of international law</u>." (emphasis added)

354. Respondent's position is that Article 26(6) ECT applies equally to the "issues in dispute" pertaining to the merits of the case and the jurisdiction of the Tribunal. The EC is of the same view. Claimants, however, submit that Article 26(6) ECT only refers to the substantive rules governing the Tribunal's analysis of Italy's liability, and does not address the applicable law to this Tribunal's jurisdiction, which is governed solely by the provisions of the ECT.

355. The Tribunal is persuaded by Claimants' submissions.

356. In order to appropriately understand the scope of Article 26(6) ECT, the phrase "issues in dispute" is instrumental. Interpreting this phrase as per Article 31(1) VCLT, i.e., "in accordance with the ordinary meaning to be given to the terms of the treaty in their context", it is relevant to consider Article 26(1) ECT as part of the context of Article 26(6)

ECT. Article 26(1) ECT delineates the types of "disputes" covered within Article 26 ECT generally. It provides as follows:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably. (emphasis added)

357. It is evident from this provision that the only "disputes" that Article 26 ECT applies to are those that concern an alleged breach of an obligation of the host State as prescribed in Part III of the ECT. Part III of the ECT is titled "Investment Promotion and Protection". Article 26 ECT itself is contained in Part V of the ECT titled "Dispute Settlement". Thus, the specific qualification of the term "disputes" in Article 26(1) ECT to cover only disputes relating to investment promotion and protection (Part III of the ECT), and not disputes relating to dispute settlement itself (Part V of the ECT), entails that Article 26(1) ECT addresses only "disputes" relating to the substantive obligations of the host State concerning investment promotion and protection. By implication, the phrase "issues in dispute" in Article 26(6) ECT should also be understood as covering only those issues that relate to alleged breaches of such substantive obligations of the host State.

358. Therefore, the applicable law framework provided in Article 26(6) ECT, i.e., "the Treaty and applicable rules and principles of international law" is only relevant for the substantive issues in dispute concerning Respondent's liability under the ECT. This provision does not prescribe the applicable law framework for questions relating to this Tribunal's jurisdiction.

b. Article 26 ECT and Swedish Law

359. In light of the Tribunal's finding that Article 26(6) ECT does not apply to questions of this Tribunal's jurisdiction, the Tribunal shall now examine which law(s) applies to such questions.

360. The starting point for this examination is the dispute resolution provision in the ECT, i.e., Article 26 ECT itself. Given that Article 26 ECT is a provision contained in an international treaty, its interpretation and application should be in accordance with the

broad framework of the VCLT. This uncontroversial proposition finds endorsement in case law, including a decision of the Svea Court of Appeal in *Kazakhstan v. Stati*.[410]

361. Article 26 ECT, *inter alia,* contains Respondent's expression of its "unconditional consent" to arbitrate investor-State disputes, and the terms and conditions for the exercise of such consent (see Article 26(3) ECT). This consent to arbitrate materializes into an arbitration agreement when the concerned investor(s) accepts this offer. In this regard, the investor(s) has a choice of four regimes to submit its dispute: (i) arbitration under the ICSID Convention; (ii) arbitration under the ICISD Additional Facility Rules; (iii) *ad hoc* arbitration under the UNCITRAL Rules; and (iv) arbitration administered by the SCC (see Article 26(4) ECT).

362. In the instant case, Claimants' acceptance of Respondent's offer to arbitrate came in the form of Claimants' RfA dated 26 August 2016, whereby Claimants opted for the fourth regime, i.e., arbitration administered by the SCC (see ¶ 7 above). The SCC Board determined Stockholm, Sweden to be the seat of this arbitration (see ¶ 17 above). As a result, Swedish law relating to arbitration may also be a relevant consideration when examining this Tribunal's jurisdiction as the law of the seat or *lex arbitri*. Whether and to what extent the law of the seat is relevant for a determination of this Tribunal's jurisdiction is a disputed issue between the Parties.

363. The Parties were questioned about this specific matter during the Hearing, specifically in the context of the Decision on the *Achmea* Issue rendered by the tribunal in *Vattenfall v. Germany* ("***Vattenfall* Decision**").[411] The Parties also made extensive submissions about this matter in their post-hearing submissions.[412]

364. In general terms, the Parties disagree about the relevance of the *Vattenfall* Decision, rendered in the context of the ICSID Convention regime, in the present case being administered by the SCC with the seat of arbitration in Stockholm. On the one hand, Respondent considers that "the whole reasoning behind the *Vatte[n]fall* award, that ICSID

[410] **CL-184**, Svea Court of Appeal, Judgment in Case T 2675-14, Dec. 9, 2016, pp. 47-48.

[411] **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue; see Hr. Tr. Day 1, pp. 106:7-107:23, 166:4-166:13; Hr. Tr. Day 3, pp. 246:22-247:3.

[412] C-PHM, ¶¶ 15-37; C-RPHM, ¶¶ 4-21; R-PHM, ¶¶ 38-58; R-RPHM, ¶¶ 36-49.

would represent an autonomous legal order insulated from application of EU law, cannot apply in a situation where exactly the reverse has to be stated".[413] On the other hand, Claimants submit that "the Tribunal should not hesitate to extend the reasoning of *Vattenfall* to this SCC arbitration seated in Stockholm".[414]

365. In particular, amongst other aspects, the Parties' submissions have focussed on the finding of the *Vattenfall* tribunal that "in cases where the investor opts for another forum, such as an *ad hoc* UNCITRAL arbitration or arbitration under the SCC Rules, that tribunal's jurisdiction may be circumscribed by the local arbitration law of the place of arbitration."[415] This finding was rendered in the *Vattenfall* Decision, after the tribunal found, while examining the relation between Article 26 ECT and the ICSID Convention, that "the terms of the ICSID Convention do not add to the Tribunal's jurisdiction, but rather provide its 'outer limits'".[416]

366. Neither Claimants nor Respondent question the propriety of the *Vattenfall* Decision's above quoted finding that in investor-State arbitrations under the UNCITRAL regime or the SCC regime, a tribunal's jurisdiction may be circumscribed by the local arbitration law of the seat of the arbitration (see ¶ 365 above). Respondent quotes the above referenced findings of the *Vattenfall* Decision (see ¶ 365 above) and characterizes the Tribunal's questions during the Hearing about the relevance of the *Vattenfall* Decision as being "extremely well posed".[417] Claimants also do not dispute the role played by Swedish law on arbitration on this Tribunal's jurisdiction, i.e., of circumscribing or providing outer limits to the Tribunal's jurisdiction. They only contend that there exists no such circumscription that emanates from any principle in Swedish law.[418]

367. Whether or not there is any circumscription or limitation on this Tribunal's jurisdiction that emanates from Swedish law is a question the Tribunal will address subsequently (see

413 R-RPHM, ¶ 37.

414 C-PHM, ¶ 37.

415 **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 127.

416 **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 126.

417 R-RPHM, ¶ 37.

418 C-PHM, ¶¶ 15 *et seq*.

Section D(2) below). However, at this stage, the only relevant question for the Tribunal to determine is whether Swedish law as the *lex arbitri* is part of the applicable law framework for questions relating to this Tribunal's jurisdiction, and if so to what extent. The Tribunal answers that question in the affirmative, with the qualification that the *lex arbitri* circumscribes this Tribunal's jurisdiction and does not add to the Tribunal's jurisdiction. In other words, the *lex arbitri* would provide the "outer limits" to a tribunal's jurisdiction, just as the ICSID Convention does for arbitrations under the ICSID regime.

368. To this limited extent that the outer limits to this Tribunal's jurisdiction stem from Swedish law, as opposed to the ICSID Convention that plays this circumscribing role in the ICSID regime, there does exist a distinction between the present case and an arbitration in the ICSID regime.[419] Thus, to this extent, the Tribunal is not persuaded by Claimants' and Respondent's primary submissions that there is no distinction whatsoever between arbitrations under the ICSID Convention regime and the SCC regime.

369. As mentioned above (see ¶ 293 above), Respondent's alternative contention is that there is a distinction between arbitrations under the ICSID Convention regime and the present arbitration. In support of this distinction, Respondent argues, *inter alia,* that (i) pursuant to Section 33 of the Swedish Arbitration Act and Article V of the New York Convention, the validity and enforceability of the Award of this Tribunal will be threatened if EU public order, a constituent part of Swedish law, is not respected;[420] and (ii) consequently, the reasoning of the *Vattenfall* Decision should not be extended to the present case, due to the distinct legal settings of both the cases.[421] Claimants also respond to each of these arguments, submitting, *inter alia,* that (i) the future validity and enforceability of the Award of this Tribunal should not concern the Tribunal at this jurisdictional stage, and in

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419 The Tribunal notes that the outer limits that stem from the ICSID Convention relate to the autonomous understanding of what qualifies as an "investment", whereas the outer limits that stem from the Swedish legal order are of a different nature. This is explained in further detail in ¶ 372 below. However, in both the ICSID and the SCC regimes, the role played by these outer limits remains the same, i.e., the circumscription of the Tribunal's jurisdiction.

420 R-PHM, ¶¶ 51-58; R-RPHM, ¶¶ 36-49; *citing* Section 33 of the Swedish Arbitration Act 1999; Article V of the New York Convention; German Federal Supreme Court, Decision of 31 October 2018, reference I ZB 2/15, ECLI:DE:BGH:2018:311018BIZ2.15.0, ¶¶ 25-28; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision of the Nacka District Court in Stockholm, 23 January 2019.

421 R-RPHM, ¶ 37.

any event, there will no threat to the validity or enforceability of the Award since investor-State disputes are arbitrable under Swedish law;[422] and (ii) the reasoning of the *Vattenfall* Decision should be extended to the present case, and there is no substantive distinction between arbitrations under the ICSID Convention regime and the present arbitration.[423]

370. At this stage, the Tribunal does not consider it appropriate or necessary to examine the Parties' dispute about whether the overall reasoning of the *Vattenfall* Decision should apply to the present case. It suffices to state that the Tribunal is not bound by any prior case law that has addressed jurisdictional objections arising out of EU law, be it under the ICSID Convention regime or otherwise.

371. Similarly, the Tribunal also does not consider it appropriate or necessary to examine the Parties' disagreements about how Swedish courts or other enforcing courts may review the Tribunal's Award in future, and whether the Tribunal's Award will be considered valid or enforceable under Section 33 of the Swedish Arbitration Act or Article V of the New York Convention. The Tribunal is mindful of its duty to render an enforceable Award. In the present situation, the Tribunal does not foresee any hindrances to the validity or enforceability of this Award. In any event, at this stage, the Tribunal is not in a place to predict the future validity or enforceability of its Award before Swedish courts or other enforcing courts. Currently, the Tribunal is only concerned with determining the applicable law framework for questions over this Tribunal's jurisdiction over this intra-EU investor-State dispute. In other words, it is the validity and enforceability of the arbitration agreement between the disputing parties that is in question at this stage and not the future validity and enforceability of the Award.

372. Consequently, the Tribunal determines that the applicable law framework for questions of jurisdiction includes (i) Article 26 ECT; (ii) to be interpreted and applied in accordance with the VCLT; and (iii) in light of the circumscription or outer limits provided by Swedish

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422 C-PHB, ¶ 24; C-RPHB, ¶¶ 10-16; *relying on* **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ¶¶ 330, 340-341.; **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 230; **CL-184**, Decision in the Svea Court of Appeal, Case No. T 2675-14; **C-467**, *Analysis: A full run-down of the Svea Court of Appeal's reasoning in the recent PL Holdings v. Poland set-aside decision*, IA Reporter; **C-468**, *Arbitral awards in investment protection dispute remain mainly unchanged, Svea* Hovrätt Press Release.

423 C-PHM, ¶ 37; C-RPHM, ¶¶ 4-7.

law, which applies as *lex arbitri.* These outer limits to the Tribunal's jurisdiction can take the form of (i) any restrictions to the arbitrability of the dispute emanating from Swedish law, i.e., whether or not the dispute may be determined by arbitrators (see Section 49(2) of the Swedish Arbitration Act and Article II(1) of the New York Convention[424]); and (ii) any other restrictions that could render the arbitration agreement unenforceable, for being invalid, inoperative or incapable of being performed (see Section 49(1) of the Swedish Arbitration Act and Article II(3) of the New York Convention[425]).

c. The Nature and Applicability of EU Law

373. In light of the Tribunal's delineation of the scope of the applicable law to jurisdictional issues in the previous sections, the Tribunal shall next examine whether and where EU law falls within this applicable law framework.

(i) Nature of EU Law

374. In this regard, at the outset, the Tribunal considers it appropriate to analyse the nature of EU law, i.e., whether it qualifies as international law and/or constitutes a part of the

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424 Section 49 of the Swedish Arbitration Act: "Where foreign law is applicable to the arbitration agreement, section 4 shall apply to issues which are covered by the agreement, except when: 1. in accordance with the applicable law, the agreement is invalid, inoperative, or incapable of being performed; or 2. in accordance with Swedish law, the dispute may not be determined by arbitrators."

Section 4 of the Swedish Arbitration Act: "A court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators.

A party must invoke an arbitration agreement on the first occasion that a party pleads his case on the merits in the court. The invocation of an arbitration agreement raised on a later occasion shall have no effect unless the party had a legal excuse and invoked such as soon as the excuse ceased to exist. The invocation of an arbitration agreement shall be considered notwithstanding that the party who invoked the agreement has allowed an issue which is covered by the arbitration agreement to be determined by the Debt Enforcement Authority in a case concerning expedited collection procedures …."

Article II(1) of the New York Convention: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

425 Article II(3) of the New York Convention: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

domestic law of the EU Member States. Claimants have consistently argued that EU law is distinct from "public international law", since it constitutes a regional legal order (see ¶ 316 above). Respondent's position is that EU law is applicable as international law and as the national law of the EU Member States (see ¶ 292 above). The EC is of the same view (see ¶ 337 above).

375. The Tribunal is not persuaded by Claimants' characterization of EU law as a regional legal order distinct from public international law. Claimants themselves recognize, at another point in their submissions, that "EU law is a collection of treaties – nothing more."[426] To the extent that EU law is comprised of international treaties between sovereign States such as the EU Treaties, i.e., the TEU and the TFEU, it is indisputably a source of international law. In this regard, the Tribunal agrees with the EC's invocation of Article 38 of the Statute of the International Court of Justice (see ¶ 337 above), which enlists the sources of international law, the primary amongst them being international conventions or treaties.

376. In addition, EU law also constitutes part of the domestic legal order of the EU Member States. Due to its *sui generis* nature, EU law has been described by the Advocate General in the *Kadi* case as a "municipal legal order of translation dimension."[427] This *sui generis* nature of EU law was explained in the ECJ Judgment in the *Slowakische Republik v Achmea BV* case in the following terms:

> Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law.
>
> . . . .
>
> Given the nature and characteristics of EU law . . ., that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.[428]

426 C-SoRj, ¶ 45.

427 Opinion of the Advocate General Maduro in Case C-402/05, paragraph 21, [2008] ECR I-6351; see Respondent's Comments on ECJ Judgment, f.n. 4; **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 4.118.

428 ECJ Judgment, ¶¶ 33, 43.

377. Investment arbitration case law has also endorsed the dual or multiple nature of EU law, i.e., constituting international law, to the extent that it is sourced from treaties, and constituting a part of the domestic legal order of the EU Member States. The following findings of the tribunal in *Electrabel v. Hungary* clearly explain this "multiple nature of EU law":

> *(i) The Multiple Nature of EU Law:* EU law is a *sui generis* legal order, presenting different facets depending on the perspective from where it is analysed. It can be analysed from the perspectives of the international community, individual Member States and EU institutions.
>
> Given those perspectives, EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders.[429]

378. In light of the above, the Tribunal is persuaded by Respondent's submissions and the EC's observations that EU law has a dichotomous nature. To the extent that it is sourced from international treaties, it constitutes part of international law. Simultaneously, it also constitutes a part of the domestic legal order of EU Member States.

(ii) Applicability of EU Law

379. Having established the nature of EU law, the Tribunal shall now examine its applicability to the questions of this Tribunal's jurisdiction under Article 26 ECT. As determined above (see ¶ 372 above), the Tribunal considers the applicable law framework for such questions to be constituted by (i) Article 26 ECT; (ii) the principles of the VCLT pertaining to the interpretation of Article 26 ECT, which emanate from Articles 31 and 32 VCLT; and (iii) Swedish law, which applies as *lex arbitri* to provide the circumscription or outer limits to this Tribunal's jurisdiction.

380. Given the dichotomous nature of EU law (see ¶ 378 above), there are two possible gateways for it to enter the Tribunal's analysis of its jurisdiction. First, EU law may potentially enter this jurisdictional analysis through Article 31(3)(c) VCLT, if it qualifies as "relevant rules of international law applicable in the relations between the parties" (item

429 **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶¶ 4.117-4.118 and *et seq.*; see also **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶ 278.

(ii) of the applicable law framework). Second, EU law may potentially become applicable as a constituent part of the Swedish legal order, which operates to create outer limits to this Tribunal's jurisdiction under the ECT (item (iii) of the applicable law framework). The Tribunal shall examine both these gateways in turn.

EU law as relevant rules of international law under Article 31(3)(c) VCLT

381. Article 31(3)(c) VCLT, quoted in ¶ 289 above, requires that while interpreting a treaty provision in accordance with its ordinary meaning in its context and in light of the treaty's object and purpose, together with the context shall be taken into account "[a]ny relevant rules of international law applicable in the relations between the parties".

382. The EC proposes that EU law should be considered as part of such relevant rules of international law while interpreting the ECT "in a situation between two EU Member States"[430] (see ¶¶ 337-339 above). In support of this, the EC relies on the process of systemic coherence in interpretation of treaties, apparently evidenced in case law of the ICJ,[431] and on other investment arbitration case law that recognizes EU law as a manifestation of international law.[432] Further, the EC also states that the specific requirements of Article 31(3)(c) VCLT are fulfilled, i.e., (i) EU law qualifies as "international law"; (ii) EU law is "directly applicable to the subject-matter of the case", which involves EU Member States; and (iii) EU law is binding on the disputing parties before this Tribunal.[433]

383. Respondent supports the EC's observations, albeit not specifically on this issue relating to Article 31(3)(c) VCLT.[434] As per Claimants, since EU law does not qualify as public international law, it falls beyond the realm of "relevant rules of international law applicable

430 EC NDP Submission, ¶ 48.

431 In particular, *Oil Platforms (Iran v. USA)*, Merits, Judgment, 6 November 2003, ICJ Reports 161 (2003), ¶¶ 41 and 78.

432 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶¶ 4.111-4.199; *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (same as **CL-4**), ¶ 439; *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016 (same as **CL-43**), ¶¶ 74, 75, 87.

433 EC NDP Submission, f.n. 42.

434 R-SoRj, f.n. 45.

in the relations between the parties" under Article 31(3)(c) VCLT (see ¶ 316 above). Further, Claimants also supplement their argument by stating that applying EU law under Article 31(3)(c) VCLT in the manner that the EC proposes would result in the undesirable consequence that "the same words in the same treaty hav[e] different meanings depending on the independent legal obligations entered into by one state or another, depending on the parties to a particular dispute".[435]

384. In order to examine if EU law enters the interpretative analysis through Article 31(3)(c) VCLT, the Tribunal is required to examine whether (i) EU law qualifies as international law; (ii) EU law is relevant and applicable in the relations between the parties; and (iii) systemic coherence requires EU law to be considered while interpreting Article 26 ECT.

385. The Tribunal has already answered the first question in ¶ 384 above in the affirmative. EU law, to the extent that it is sourced from the EU Treaties, does constitute international law (see ¶ 375 above).

386. With respect to the second and third questions in ¶ 384 above, the Tribunal is not persuaded by the EC's observations. The Tribunal does not consider the EU Treaties to be relevant rules that are applicable in the relations between the parties, such that systemic coherence requires taking them into account for a harmonious interpretation of Article 26 ECT. This is for three reasons.

387. *First*, as a general matter, it is important to remember that Article 31(3)(c) VCLT requires that the relevant rules of international law be "taken into account, <u>together with the context</u>" (emphasis added). The general rule for interpretation is laid down in Article 31(1) VCLT, which requires an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

388. The EC proposes that the interpretation of Article 26 ECT commence by taking into account EU law under Article 31(3)(c) VCLT, which it recognizes as an "element extrinsic

[435] Hr. Tr. Day 1, pp. 113(19)-113(23); *relying on* **CL-179**, *Vattenfall et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue.

to the [ECT]”.[436] Only subsequently does the EC support its interpretation of the ECT based on Article 31(3)(c) VCLT with the “other means of interpretation”.[437] The EC’s proposal reverses the logical order of the interpretation process. The rules of international law to be accounted for together with the context under Article 31(3)(c) VCLT, while essential, are not the logical starting point of the interpretation process. Instead, the starting point of the interpretation process is the general rule in Article 31(1) VCLT, which prioritizes the text of the treaty provision under interpretation over any other elements of treaty interpretation. In other words, Article 31(3)(c) VCLT and the relevant rules of international law applicable thereunder cannot rewrite the treaty being interpreted, or substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted.

389. *Second*, the EC suggests that introducing EU law into the interpretative analysis of Article 26 ECT under Article 31(3)(c) VCLT, when the ECT is being applied between two EU Member States, results in a harmonious interpretation through a process of systemic coherence. As mentioned in ¶ 382 above, the EC limits its proposed interpretation of Article 26 ECT to “a situation between two EU Member States”. However, what the EC proposes is in contradiction to the objective of harmonious interpretation or system coherence between different bodies of international law. The ECT is a multilateral convention, to which sovereign States other than the EU Member States are also parties. Claimants rightly submit that allowing EU law into the interpretation process of the ECT when the ECT is being applied between EU Member States would result in the same provision in the ECT (in this case, Article 26 ECT) having different interpretations for different Contracting Parties depending on the origins of the disputing parties in a particular case.

390. Contrary to the EC’s proposal, the condition for applicability under Article 31(3)(c) VCLT is not whether EU law is “directly applicable to the subject-matter of the case” or whether a conflicting interpretation would lead to an EU Member State conflicting its own “obligations at different levels of international law”.

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436 EC NDP Submission, ¶ 47.

437 EC NDP Submission, §§ 2.1 and 2.2, ¶ 52 in particular.

391. To make the interpretation of a multilateral convention dependent on a case-by-case consideration of the factual subject matter or on the origins of the disputing parties does not achieve the objective of affording a consistent and universal interpretation to a treaty provision. If the interpretation of a treaty were to be made contingent on the factual subject-matter of every case, Article 31(3)(c) VCLT would have specifically permitted a consideration of "subject matter of the case" when determining which rules of international law are relevant and applicable. The VCLT aspires for the "universal recognition" of "the principles of free consent and of good faith and the *pacta sunt servanda* rule". This aspiration of the universal recognition of these principles underlines the need for coherence, and, in turn, for a single unified interpretation of each treaty provision.

392. In light of the above, while the objectives of harmonious interpretation and systemic coherence proposed by the EC are well-intentioned, they are not achieved by rendering EU law relevant and applicable to the interpretation of Article 26 ECT through Article 31(3)(c) VCLT.

393. *Third*, on a related note, none of the cases mentioned in the EC's observations support the EC's proposed understanding of Article 31(3)(c) VCLT. The investment arbitration cases relied upon by the EC do not support the proposition that EU law should be considered, under Article 31(3)(c) VCLT, together with the context of the ECT while interpreting Article 26 thereof.[438] Similarly, in its judgment in the *Oil Platforms* case, the ICJ invoked Article 31(3)(c) VCLT to interpret a particular treaty provision in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran in light of the "relevant rules of international law on the use of force . . . that is to say the provisions of the Charter of the United Nations and customary international law."[439] To take into account the such universal rules of international law on use of force under Article 31(3)(c) VCLT is different from taking into account the very specific provisions of the EU

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438 *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015 (same as **CL-9**), ¶¶ 4.111-4.199; *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016 (same as **CL-4**), ¶ 439; *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016 (same as **CL-43**), ¶¶ 74, 75, 87.

439 In particular, *Oil Platforms (Iran v. USA)*, Merits, Judgment, 6 November 2003, ICJ Reports 161 (2003), ¶¶ 41-42.

Treaties that the EC proposes. The two situations are not comparable, and thus the ICJ's judgment in the *Oil Platforms* case also does not support the EC's reliance on the objectives of systemic coherence and harmonious interpretation.

394. In light of the above, the Tribunal does not consider EU law to be relevant or applicable to the interpretation of Article 26 ECT, pursuant to Article 31(3)(c) VCLT. In any event, in order for any rule of international law to be applicable under Article 31(3)(c) VCLT, it is also imperative that such rule be a clearly determinable rule. The need for such clarity is implicitly reflected in the primacy of the text of the treaty under interpretation, as per the general rule in Article 31(1) VCLT. The Tribunal shall address this further, to the extent relevant, in the context of the applicability of EU law as part of the Swedish legal order.

EU Law as a part of the Swedish legal order

395. As mentioned above (see ¶¶ 378-380 above), the second gateway for EU law to enter the Tribunal's analysis of questions of jurisdiction is through the Swedish legal order, which operates to create outer limits to this Tribunal's jurisdiction as the *lex arbitri*.

396. The Tribunal has already found that EU law has a dichotomous nature, i.e., it is a manifestation of international law to the extent it is sourced from the EU Treaties, and is simultaneously also a constituent part of the EU Member States' domestic legal order (see ¶ 378 above). Since Sweden is an EU Member State, EU law does form a part of the Swedish legal order, and thus could potentially create outer limits to this Tribunal's jurisdiction as a part of the *lex arbitri*.

397. The role of the *lex arbitri* as creating outer limits to the Tribunal's jurisdiction is discussed in Section D(1)(b) above. As mentioned in ¶ 372 above, these outer limits can take the form of (i) any restrictions to the arbitrability of the dispute emanating from Swedish law; and (ii) any other restrictions that could render the arbitration agreement invalid, inoperative or incapable of being performed.

398. The Tribunal considers that such restrictions to the Tribunal's jurisdiction cannot be lightly assumed. Any restriction to jurisdiction should emanate from a clearly determinable rule. This is for the following two reasons.

399. *First,* under Swedish law, as Claimants rightly point out, the language of the dispute resolution provision is crucial, and a departure from its express terms is usually not permitted. This is true for commercial as well as investor-State cases.[440] For instance, the following findings of the Svea Court of Appeal in Case No. T-2675-14, while interpreting Article 26 ECT as per Article 31 VCLT are reflective of the sanctity of the clear text of the arbitration agreement, in particular one contained in the dispute resolution clause of a treaty:

> In order for an arbitral tribunal to be competent to try a dispute, a valid arbitration agreement must be in place between the parties to the dispute. In the present case, the question of whether there was an arbitration agreement between the Investors and Kazakhstan is to be assessed on the basis of Art. 26 ECT, which the Investors invoked as basis for the arbitral tribunal's jurisdiction in their request for arbitration . . .
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> . . . .
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> The wording of the treaty always constitutes the starting point for the interpretation. If the wording is clear, it in principle also constitutes the end point for the interpretation.[441]

400. *Second,* given that Article 26 ECT contains, in explicit terms, the "unconditional consent" of a State to arbitrate investor-State disputes (see ¶ 361 above), any conditions or restrictions to be imposed on such consent are required to be clear and explicit as well. It cannot be doubted that when the creation of the arbitration agreement is unequivocal as a matter of form, any substantive restrictions on its existence, be it legal restrictions on arbitrability or any other restrictions on the enforceability of the arbitration agreement should be clearly established in order to inhibit the effect of the arbitration agreement.

401. In light of the above, the Tribunal finds that any outer limits that the Swedish legal order may impose on this Tribunal's jurisdiction require to be clearly determinable. Given that EU law, due to its dichotomous nature, is a constituent part of Swedish law, at least to the extent of the EU Treaties, it may also theoretically create such outer limits. In the next Section, the Tribunal shall determine whether any such clear outer limits emerge from EU law, as it stands currently, i.e., after the ECJ Judgment.

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440 C-PHB, ¶¶ 18-23; *relying on* **CL-183**, Decision in the Svea Court of Appeal, Case No. T-6247-15; **CL-184**, Decision in the Svea Court of Appeal, Case No. T 2675-14.

441 **CL-184**, Decision in the Svea Court of Appeal, Case No. T 2675-14, pp. 47-48.

402. Before concluding this Section, the Tribunal considers it important to clarify the precise scope of the Tribunal's determinations that shall follow in light of the delineation of the precise applicable law framework. Given that the Tribunal has found that the first gateway for the entry of EU law into the applicable law framework is closed, EU law does not enter the Tribunal's applicable law framework through Article 31(3)(c) VCLT (see ¶ 394 above). Thus, the question to be resolved is no longer about the interpretation of Article 26 ECT taking into account EU law as part of the relevant context for such interpretation. Instead, the analysis that will follow in the forthcoming Section shall only relate to the application of EU law to questions of this Tribunal's jurisdiction as a constituent part of the Swedish legal order, which comprises the *lex arbitri*. Thus, the question, to which the Tribunal next turns, is whether EU law provides any limitations to this Tribunal's jurisdiction.

(2) Whether EU Law provides a Limitation to this Tribunal's Jurisdiction

403. The question of whether Swedish law, through EU law, creates any limitation to this Tribunal's jurisdiction under Article 26 ECT shall be examined from two related perspectives: (a) first, the Tribunal shall analyse whether any clearly discernible limitations arise from the EU Treaties and/or the principle of autonomy of EU law relied upon by Respondent; and (b) second, the Tribunal shall determine whether the ECJ Judgment and the EU Member States' January 2019 Declarations provide or confirm any such limitations.

a. The EU Treaties and the Principle of Autonomy

404. Respondent invokes Articles 267 and 344 TFEU (quoted in ¶ 288 above) and the general principle of autonomy of EU law to argue that EU law does not permit intra-EU investor-State arbitration. Articles 267 and 344 TFEU are requoted below for ease of reference:

> **Article 267**
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

405. In particular, as per Respondent, Article 267 TFEU, which provides for the preliminary ruling mechanism before the ECJ, is essential for preserving the basic character of the EU Treaties' legal order, since it aims to ensure consistency in the understanding of EU law. Since this Tribunal is not a "court or tribunal of a Member State" under Article 267 TFEU, it cannot invoke this preliminary ruling mechanism.[442] In respect of Article 344 TFEU, Respondent's view is that disputes relating to the interpretation or application of EU law cannot be submitted to any dispute resolution mechanism not provided for in the EU Treaties itself. In this context, Respondent invokes the principle of mutual trust between the EU Member States' legal and judicial institutions and the principle of autonomy of EU law (see ¶¶ 296 and 301 above).

406. The EC also invokes the need for preserving the autonomy of the EU legal order, along the above lines (see ¶¶ 339-340 above).

407. Claimants dispute the existence of any prohibition of intra-EU investor-State arbitration emanating from the above treaty provisions or legal principles. In this connection,

[442] SoD, ¶¶ 102 *et seq.;* Respondent's Comments on ECJ Judgment, ¶¶ 26-32.

Claimants primarily rely on unanimous case law from investor-State arbitral tribunals that have rejected jurisdictional objections relating to EU law (see ¶ 319 above).

408. The Tribunal shall examine the implications of the ECJ Judgment and the recent legal developments thereafter separately in the next Section. In this Section, the Tribunal is only concerned with whether the above quoted provisions of the TFEU together with the principles of a mutual trust and autonomy of EU law serve to create clearly discernible limits to this Tribunal's jurisdiction under Article 26 ECT. The Tribunal answers this question in the negative. The Tribunal notes the following in this connection.

409. *First,* neither Article 267 TFEU nor Article 344 TFEU contains an explicit prohibition of investor-State arbitration. None of the Parties nor the EC disputes that. Instead, these provisions are concerned with the preliminary ruling mechanism for the ECJ and the jurisdiction over disputes relating to the interpretation or application of the EU Treaties themselves.

410. This mechanism and the jurisdictional limitation for disputes relating to the EU Treaties cannot create any express or implied limitations to this Tribunal's jurisdiction over an investor-State dispute under Article 26 ECT. Articles 267 and 344 TFEU certainly do not pertain to investor-State arbitration specifically. In fact, Respondent itself recognizes that "Article 344 TFEU expresses a more general principle".[443] However, Respondent uses this general principle, together with Article 267 TFEU, to implicitly invoke the principle of autonomy of EU law, and thereby derives a prohibition of investor-State arbitrations under EU law.

411. The Tribunal finds Respondent's reading of these provisions to be overly expansive. For instance, Respondent submits that the general principle in Article 344 TFEU pertains to disputes concerning the interpretation or application of EU law overall, and not only the EU Treaties.[444] However, that is inconsistent with the language of Article 344 TFEU, which clearly applies only to disputes between EU Member States relating to the interpretation or application of the EU Treaties, and thus has no direct application in the

443 SoD, ¶ 135.
444 SoD, ¶ 135.

present case. In this regard, the *Greentech v. Italy* tribunal correctly found that an investor-State arbitration under Article 26 ECT does not "concern the interpretation or application of the EU treaties, but instead concerns rights and obligations under the ECT."[445] In fact, the ECJ in its earlier Opinion No. 1/2009, upon which Respondent relies,[446] had found that Article 344 TFEU "merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties" and does not prohibit disputes involving private persons.[447]

412. Similarly, with respect to Article 267 TFEU, the Tribunal is mindful that the preliminary ruling mechanism may be important to ensure a uniform understanding of the EU Treaties and EU law in general, including the ECT, which forms part of EU law since the EU is a party to it. However, the Tribunal notes that this mechanism is neither the only manner in which a uniform understanding of EU law can be achieved, nor a mandatory procedure that all courts and tribunals even within the EU legal order are required to adhere to. This is evidenced by the fact that courts in the EU legal order have often rejected requests to refer questions relating to the ECT for a preliminary ruling. As *obiter dictum*, the Tribunal notes that this happened most recently in the Svea Court of Appeal's rejection, in the *Novenergia II v. Spain* case, to refer to the ECJ the question of "whether Article 26 of the ECT is applicable between the [M]ember [S]tates of the European Union, and if that is the case, whether Article 26 of the ECT is compatible with the European Union's primary law". In this regard, the tribunal in *Electrabel v. Hungary* rightly noted under this provision that "there is no automatic reference to or seizure by the ECJ, as soon as any question of EU law arises in a dispute before an EU national court."[448]

413. Furthermore, the principle of autonomy of EU law has nothing to do with this Tribunal's jurisdiction over intra-EU investor-State arbitrations under the ECT. The principle of

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445 **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 350.

446 Hr. Tr., Day 1, pp. 160(12)-161(9).

447 See, in this regard, **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶¶ 4.154-4.155; *see also* **CL-43**, *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 80.

448 **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 4.148.

autonomy is best explained by the ECJ Judgment itself, where the ECJ qualified this autonomy as being "with respect both to the law of the Member States and to international law", and stated that this autonomy "is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law."[449] The fact that EU law has a *sui generis* nature of being autonomous with respect to domestic law and international law does not, in any manner, inhibit the jurisdiction of investor-State arbitral tribunals.

414. *Second,* as mentioned in ¶ 408 above and as rightly submitted by Claimants, it has been unanimously accepted in investment arbitration case law that there is no conflict between intra-EU investor-State arbitration under Article 26 ECT and the above discussed provisions of the TFEU and the principles of autonomy and mutual trust in EU law. In other words, EU law, until before the ECJ Judgment, was unanimously understood to not create any limitations on arbitral tribunals' jurisdiction.

415. In the words of the tribunal in *Electrabel v. Hungary,* there was "no legal rule or principle of EU law that would prevent [it] from exercising its functions in this arbitration under Article 26 ECT."[450] Along the same lines, the tribunals in *RREEF v. Spain* and more recently in *Novenergia II v. Spain* noted that there is no "disharmony or conflict"[451] or no "incompatibility"[452] between the ECT and EU law. These, and many other tribunals,[453] have made similar findings in the context of Article 26 ECT or other BIT dispute

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449 **CL-125**, ECJ Judgment, ¶ 33.

450 **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 4.166; see also ¶¶ 4.146 and 4.153 ("There is indeed no rule in EU law that provides, expressly or impliedly, that such an international arbitration is inconsistent with EU law.").

451 **CL-43**, *RREEF Infrastructure (G.P.) Limited and RREEF PanEuropean Infrastructure Two Lux S.a.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, June 6, 2016, ¶ 82.

452 **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶¶ 438-442.

453 *See, for instance,* **CL-120**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, Apr. 30, 2010, ¶ 109; **CL-121**, *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, Oct. 22, 2012, ¶¶ 236–38; **CL-116**, *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case V 2014/181, Final Award, Mar. 10, 2017, ¶¶ 126-128; **CL-115**, *WNC Factoring Ltd. v. Czech Republic*, UNCITRAL, PCA Case No. 2014-34, Award, Feb. 22, 2017; **CL-113**, *I.P. Busta & J.P. Busta v. Czech Republic*, SCC Case V 2015/014, Final Award, Mar. 10, 2017; **CL-8**, *EDF International S.A. v. Republic of Hungary*, UNCITRAL (award not public), *Republic of Hungary v. EDF International S.A.*, Swiss Federal Supreme Court Case 4A_34/2015, Judgment, Oct. 6, 2015; **CL-122**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, July 17, 2016; **CL-118**, *JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, Oct. 11, 2017.

resolution clauses, after examining the provisions of the TFEU and other principles of EU law discussed above. All found that there were no limitations provided by EU law on intra-EU investor-State arbitral tribunals' jurisdiction.

416. The above conclusions were not inhibited by the fact that the EU is a party to the ECT. As stated by the tribunal in *Charanne v. Spain:*

> [T]he competence of the Arbitral Tribunal to decide on a claim filed by an investor of an EU Member State against another EU Member State on the basis of the alleged illegal nature of the actions carried out in the exercise of its national sovereignty, is perfectly compatible with the participation of the EU as a REIO in the ECT. And, as we shall see in subsequent sections of the present award, there is no rule of EU law which prevents EU Member States to resolve through arbitration their disputes with investors from other Member States through arbitration. Nor is there any EU law rule that prevents an arbitral tribunal to apply EU law to resolve such a dispute.[454]

417. The tribunal in *Blusun v. Italy* summarized the consistent line of jurisprudence in investor-State arbitration in the following terms:

> Overall the effect of these decisions is a unanimous rejection of the intra-EU objection to jurisdiction. The tribunal in each case has found that the relevant BIT or the ECT was intended to bring about binding obligations between EU Member States. The tribunals found no contradiction between the substantive provisions of EU law and the substantive or dispute resolution provisions of the BITs. No such system for investor-State arbitration exists in EU law, and it would be incorrect to characterise such disputes as inter-State disputes such that Article 267 of the TFEU could be said to preclude jurisdiction.[455]

418. This Tribunal finds no reason to depart from this consistent line of jurisprudence. The bare provisions of the EU Treaties in consideration, specifically Articles 267 and 344 TFEU, and the ensuing principles of autonomy and mutual trust, do not create any limitations to this Tribunal's jurisdiction under Article 26 ECT.

419. Next, the Tribunal shall examine whether this conclusion is affected or altered by the ECJ Judgment of 6 March 2018 and the legal developments that followed thereafter.

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[454] **CL-4**, *Charanne B.V. & Construction Investments S.a.r.l. v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, Jan. 21, 2016, ¶ 438; *see also* **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 199, 204.

[455] **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶ 303.

b. The ECJ Judgment, the Declarations and other Issues

420. On 6 March 2018, the ECJ Judgment was rendered in Case C-284/16, *Slowakische Republik v Achmea BV*. The Parties' submissions thereafter have focussed on the implications of the ECJ Judgment on this jurisdictional objection relating to EU law. Before considering those submissions, the Tribunal recalls below the key findings of the ECJ Judgment that are disputed between the Parties. The conclusion reached by the ECJ Judgment was as follows:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[456] (emphasis added)

421. Prior to reaching this conclusion, the ECJ also, *inter alia,* stated the following:

> It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected . . .
>
> In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU,

[456] **CL-125**, *Slowakische Republik v. Achmea B.V.*, ECJ Case C-284/16, Preliminary Ruling, Mar. 6, 2018, ¶ 62, *see also* ¶ 60.

> and is not therefore compatible with the principle of sincere cooperation . . . .[457] (emphasis added)

422. The Parties have not debated the propriety of the reasoning behind the ECJ Judgment. Accordingly, the Tribunal, in its determinations below, also shall not examine whether the ECJ Judgment's interpretation of Articles 267 and 344 TFEU was appropriate and properly motivated. Instead, the central dispute between the Parties concerns the scope and implications of the ultimate conclusion of the ECJ Judgment, i.e., whether the above conclusion (quoted in ¶ 420 above) reached in the context of Article 8 of the Slovak-Dutch BIT, also extends to the ECT. In other words, as per the emphasised part in the above-quoted conclusion of the ECJ Judgment, is Article 26 ECT also "preclude[ed]" as a result of the ECJ Judgment's interpretation of Articles 267 and 344 TFEU for being a provision "such as" Article 8 of the Slovak-Dutch BIT?

423. In this regard, Respondent is of the view that the ECJ Judgment has confirmed the importance of the autonomy of the EU legal order, which derives from Articles 267 and 344 TFEU. Respondent argues that due to the generic and expansive language used in the ECJ Judgment, its conclusion extends to the ECT when it is being applied for bilateral intra-EU obligations, regardless of the fact that the ECT is a multilateral treaty or that the EU is a party to the ECT. In this connection, Respondent also relies on the January 2019 Declarations by the EU Member States in support of its submission that the principles established in the ECJ Judgment were not specifically linked to the Slovak-Dutch BIT. Respondent considers all prior investment arbitration case law rejecting the EU law related jurisdictional objection to now be irrelevant, and criticizes all subsequent decisions and awards for not recognizing the breadth of the ECJ Judgment (see ¶¶ 294-300 above).

424. The EC's views align with that of Respondent (see ¶¶ 340-342 above).

425. Claimants submit that the reasoning of each of the investor-State tribunals that rejected the EU law relating jurisdictional objection continues to hold value even after the ECJ Judgment. Further, they rely on the more recent decisions by tribunals that have also upheld jurisdiction even in the face of the ECJ Judgment. In any event, Claimants

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457 **CL-125**, *Slowakische Republik v. Achmea B.V.*, ECJ Case C-284/16, Preliminary Ruling, Mar. 6, 2018, ¶¶ 57-58.

distinguish the ECJ Judgment from the present case on the ground that the ECJ Judgment itself restricted its conclusion only to BITs concluded "between" EU Member States, and did not address, much less condemn, multilateral conventions such as the ECT. Further, Claimants highlight that the ECJ Judgment was rendered in the context of a different governing law provision, i.e., Article 8(6) of the Slovak-Dutch BIT, than what Article 26(6) ECT provides (see ¶¶ 325-331 above).

426. Before examining the Parties' submissions, the Tribunal considers it important to recall its findings above to establish the appropriate context for the determinations that follows. The Tribunal has found that the only manner in which EU law is applicable to questions of this Tribunal's jurisdiction is as a constituent part of the Swedish legal order, which constitutes the *lex arbitri*. Accordingly, EU law can only apply to the extent and in a manner that it provides for any outer limits to this Tribunal's jurisdiction. Such outer limits, if any, are required to be contained in clearly determinable rules (see ¶¶ 395-402 above).

427. In light of this context, and having reviewed the ECJ Judgment and the Parties' submissions in this regard, the Tribunal finds that the ECJ Judgment does not provide any clearly determinable outer limits to this Tribunal's jurisdiction under Article 26 ECT. This is for the following three reasons.

428. *First*, the Tribunal finds that the manner in which the ECJ Judgment's conclusion is worded makes it unclear whether the ECJ intended for the same to apply to multilateral conventions such as the ECT. In its conclusion, quoted in ¶ 420 above, the ECJ Judgment found that its interpretation of Articles 267 and 344 TFEU precludes "a provision in <u>an international agreement concluded between Member States</u>, such as Article 8 [of the Slovak-Dutch BIT]". (emphasis added) The emphasised part in the conclusion already appears to indicate that the conclusion was intended only for international agreements that were concluded between the EU Member States, i.e., agreements to which only EU Member States are parties.[458] This would usually include bilateral agreements between EU

[458] In this regard, see the findings in **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 398 ("[T]he ECJ in Achmea was careful to confine its ruling to agreements "concluded between Member States"489, thereby leaving open the possibility of dispute resolution pursuant to international agreements that are not "intra-EU" in the sense of being concluded by Member States as among themselves.")

Member States "such as" the Slovak-Dutch BIT. It is unclear whether multilateral conventions, to which non-EU Member States are also parties, are also covered within the ambit of this conclusion. The ECT is such a multilateral convention.

429. This lack of clarity is deepened in light of the immediately preceding findings of the ECJ, emphasised in the extract quoted in ¶ 421 above. Herein, the ECJ concluded that international agreements "providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law", provided that such international agreements are "concluded . . . by the EU". The EU is a party to the ECT and is recognized as a REIO under Articles 1(2) and 1(3) ECT. In this connection, the Tribunal is not persuaded by Respondent's and the EC's emphasis on the division of competences between the EU and its Member States under EU law, and the assertion that EU's position as a REIO under the ECT only serves to confirm such division of competences. This division of competences in EU law or the fact that the ECT may be a so-called "mixed agreement" based on the EU's and its Member States' respective external competences,[459] does not add any clarity to the question of whether the ECJ Judgment was intended to apply to intra-EU arbitrations under the ECT.

430. *Second*, the Tribunal considers it important that the AG Opinion rendered, pursuant to Article 252 TFEU, by Advocate General Wathelet on 19 September 2017 prior to the ECJ Judgment had specifically mentioned the ECT.[460] Despite being presented with an AG Opinion that discussed the ECT and sought to distinguish its dispute resolution mechanism from those in BITs, the ECJ was silent about the ECT in the Judgment.

431. It is notable that the ECJ Judgment discussed the binding value of the AG Opinion, finding that "[t]he Court is not bound either by the Advocate General's conclusion or by the reasoning which led to that conclusion."[461] In the present case, Respondent also challenges the binding value and the propriety of the AG Opinion (see ¶¶ 299-300 above). However,

459 SoD, ¶¶ 74-80.

460 **CL-161**, Opinion of Advocate General Wathelet, *Slowakische Republik v. Achmea B.V.*, Case C-284/16, Sept. 19, 2017, ¶ 43.

461 **CL-125**, *Slowakische Republik v. Achmea B.V.*, ECJ Case C-284/16, Preliminary Ruling, Mar. 6, 2018, ¶ 27.

the Tribunal does not consider it appropriate or necessary to examine the propriety the AG Opinion. Further, the Tribunal is mindful of the lack of binding value of the AG Opinion. Notwithstanding these considerations, the only point that the Tribunal considers important for the purposes of its present determinations is that the ECJ had the opportunity to render more expansive findings that would explicitly cover multilateral conventions such as the ECT, but did not do so.

432. In light of this, the Tribunal considers that the ECJ Judgment's conspicuous silence on the ECT clouds the question of whether its conclusions extend to the ECT with greater lack of clarity. To this extent, the Tribunal is in agreement with the following findings of the tribunal in *Masdar v. Spain*:

> Had the CJEU seen it necessary to address the distinction drawn by the Advocate General between the ISDS provisions of the ECT and the investment protection mechanisms to be found in bilateral investment treaties made between Member States within the ambit of its ruling, it had the opportunity to do so. In fact, the Tribunal notes that the CJEU did not address this part of the Advocate General's Opinion, much less depart from, or reject, it. The *Achmea* Judgment is simply silent on the subject of the ECT.[462]

433. *Third,* the Tribunal finds that this lack of clarity about the scope of the ECJ Judgment is further compounded by the January 2019 Declarations. As per Respondent, the first of the January 2019 Declarations, signed on 15 January 2019 by 22 EU Member States including Italy, is binding and "conclusively determine[s] the issue of jurisdiction" under the ECT.[463] The second of these Declarations, signed on 16 January 2019 by 5 EU Member States including Sweden, does not differ from the 15 January 2019 Declaration, but only refrains from making a "binding declaration as for the ECT as yet".[464] The third of these Declarations, signed only by Hungary, is considered by Respondent to be identical to the second Declaration.[465] Respondent's position is that these January 2019 Declarations are not intended only to inform arbitral tribunals about the EU Member States' position but

462 **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, ¶ 682.

463 R-RPHB, ¶¶ 28-35.

464 R-RPHB, ¶¶ 18-22.

465 R-RPHB, f.n. 7.

intended to be binding interpretations of the ECT in light of the ECJ Judgment , which "once [and] for all settles the issue".[466]

434. The Tribunal is not persuaded by Respondent's characterization of the January 2019 Declarations for two reasons.

435. Firstly, although the Tribunal is not at a juncture where it is interpreting the ECT in light of the ECJ Judgment but is only focussed on determining whether the ECJ Judgment applies to the present case (see ¶ 402 above), the Tribunal nonetheless notes that the January 2019 Declarations cannot operate as binding interpretations of the ECT. While there is no doubt that such Declarations may be issued and are consistent with the ECT, they do not replace the process of interpreting a treaty provision that has to be conducted in accordance with the principles in Articles 31 and 32 VCLT. If and to the extent the January 2019 Declarations fall within any of the tenets of interpretation under Articles 31 or 32 VCLT, they may be taken into account in the interpretative process. Indeed, the January 2019 Declarations themselves do not state that they provide interpretations that are binding on arbitral tribunals, but instead clarify their scope as being intended to "inform investment arbitration tribunals about the legal consequences of the *Achmea* judgment".[467]

436. Secondly, and in any event, the Tribunal finds that the contents of these January 2019 Declarations do not add clarity in respect of the question of whether the ECJ Judgment extends to the ECT. The primary reason for this continuing lack of clarity is the incongruity between the 15 and 16 January 2019 Declarations. While the 15 January 2019 Declaration states that in light of the ECJ Judgment, Article 26 ECT "would be incompatible with the [EU] Treaties and thus would have to be disapplied",[468] the 16 January 2019 Declaration signed by 5 Member States including Sweden, specifically refrains from taking any position on whether the ECJ Judgment extends to the ECT. In the

466 R-RPHB, ¶ 33.

467 **CL-191**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea on Investment Protection in the European Union, 15 January 2019, ¶ 1, p. 3; **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019, ¶ 1, p. 3.

468 **CL-191**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea on Investment Protection in the European Union, 15 January 2019, p. 2.

following passage, it appears to acknowledge that the ECJ Judgment only related to BITs and was silent on the ECT:

> The Achmea case concerns the interpretation of EU law in relation to an investor-state arbitration clause in a bilateral investment treaty between Member States. The Member States note that the *Achmea* judgment is silent on the investor-state arbitration clause in the Energy Charter Treaty. A number of international arbitration tribunals post the *Achmea* judgment have concluded that the Energy Charter Treaty contains an investor-State arbitration clause applicable between EU Member States. This interpretation is currently contested before a national court in a Member State. Against this background, the Member States underline the importance of allowing for due process and consider that it would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra EU application of the Energy Charter Treaty.[469] (emphasis added)

437. Further, both the January 2019 Declarations specifically refer to the pending annulment proceedings in the *Novenergia II v. Spain* case before the Svea Court of Appeal concerning the interpretation of Article 26 ECT.[470] While these annulment proceedings are yet to be concluded, the Tribunal notes, as *obiter dictum,* that in the interim period, in April 2019, the Svea Court of Appeal refused Spain's request to refer the following question for a preliminary ruling of the ECJ: "whether Article 26 of the ECT is applicable between the [M]ember [S]tates of the European Union, and if that is the case, whether Article 26 of the ECT is compatible with the European Union's primary law" (see ¶ 412 above). In light of this recent development, Respondent's submission that "it is expected that the question [will] be referred to the CJEU soon, and these 5 Member States will be allowed to sign the 22 Member States Declaration once the CJEU pronounce[s] on the issue"[471] is clouded with uncertainty at this stage.

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469 **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019, p. 3. The Tribunal notes that the third Declaration, signed only by Hungary on 16 January 2019, in fact uses stronger language to state that "the *Achmea* judgment concerns only the intra-EU bilateral investment treaties . . . and it does not concern any pending or prospective arbitration proceedings initiated under the ECT."

470 **CL-191**, Declaration of the Representatives of the Governments of the Members States on the Legal Consequences of the Judgment of the Court of Justice in Achmea on Investment Protection in the European Union, 15 January 2019, f.n. 3; **CL-192**, Declaration of the Representatives of the Governments of the Members States on the Enforcement of the Judgment of the Court of justice in Achmea and on Investment Protection in the European Union, 16 January 2019, f.n. 8.

471 R-RPHB, ¶ 19.

438. *Fourth,* in addition to the diverging January 2019 Declarations, the fact that EU Member States are themselves requesting for the question of the relationship between Article 26 ECT and EU law, particularly after the ECJ Judgment, to be referred to the ECJ is indicative of the prevailing lack of clarity on this question. In fact, during the Hearing, upon being questioned, Respondent informed the Tribunal that it had also requested the Italian *Consiglio di Stato* for a referral to the ECJ of question(s) relating to the interpretation of the ECT:

> PROF. GIARDINA: Why don't you think it would be preferable to obtain a specific rule from the European Court on the ECT, for instance, or another kind of arbitration? Because it is reasonable also to think of this way of solving the problem. Now we have to decide, of course, so we cannot wait for another decision by the European Court interpreting the Energy Charter Treaty.
>
> But it's my question: why do you ask us to make this difficult exercise to interpret the *Achmea* decision?
>
> MR. GIORDANO: We actually raised a preliminary ruling under Articles 267 and 344 in a specific issue concerning energy as well, so under the ECT as well. So we are actually waiting for a decision in that sense from the Consiglio di Stato, which is of course the main judge in the administrative system. Being a final and ultimate jurisdiction of the administrative Italian system, it is of course obliged to raise the preliminary ruling before the European Court of Justice. So we did it in one case.[472]

439. The above response by Respondent upon being questioned about why this Tribunal, and not the ECJ itself, should clarify whether the ECJ Judgment extends to the ECT implicitly indicates that even Respondent believes that there is currently a lack of clarity on the question of the scope of the ECJ Judgment vis-à-vis the ECT, and that such lack of clarity should be explicitly resolved by the ECJ.

440. While Respondent has since not informed the Tribunal of the status of its request for referral before the Italian *Consiglio di Stato*, for the purposes of the current proceedings, Respondent's implicit admission of a lack of clarity regarding the relationship between Article 26 ECT and EU law further persuades the Tribunal to find that there are currently no clearly discernible limitations to this Tribunal's jurisdiction emanating from EU law.

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[472] Hr. Tr. Day 1, pp. 171(12)-172(5).

441. The Tribunal is therefore convinced by Claimants' characterization of the question of the applicability of the ECJ Judgment to the ECT as currently being "theoretical and speculative".[473] This theoretical and speculative question is not for this Tribunal to conclusively resolve. The ECJ Judgment could have or any subsequent ruling by the ECJ may in future resolve this question conclusively. For the purposes of this Tribunal's current jurisdictional analysis, it suffices to state, at this stage, that absent any clearly discernible limitations to its jurisdiction under Article 26 ECT, EU law does not inhibit this Tribunal from exercising jurisdiction over Claimants' claims.

442. This lack of clearly discernible limitations is rendered even more conspicuous by a recent court decision in the Swedish legal order, whereby intra-EU investor-State disputes were recognized as being arbitrable. In a decision of the Svea Court of Appeal in *PL Holdings v. Poland* from February 2019, referred to by Claimants,[474] the Court refused to annul an award rendered under the BIT between the Belgium-Luxembourg Economic Union and Poland on jurisdictional grounds relating to EU law. Specifically, the Svea Court of Appeal found that intra-EU investor-State disputes were not *per se* non-arbitrable, and that an award rendered under the intra-EU investor-State arbitration would not violate Swedish *ordre public*.[475] Thus, the Court refused to annul the award on these grounds under Section 33 of the Swedish Arbitration Act, although it did partially annul the award on other unrelated grounds.

443. On a related note, the Tribunal also agrees with the distinction Claimants draw between an earlier judgment of the Nacka District Court in Stockholm in the *Micula v. Romania* case of January 2019 and the present case. Respondent relies on this judgment as an example of a case where a Swedish court refused to enforce an ICSID award in an intra-EU BIT case.[476] However, as Claimants rightly point out, the *Micula v. Romania* case pertained to the enforceability of an award, the payment of which the EC had declared to be

473 C-PHB, ¶ 25.

474 C-RPHB, ¶¶ 12-16; *citing* **C-467**, *Analysis: A full run-down of the Svea Court of Appeal's reasoning in the recent PL Holdings v. Poland set-aside decision*, IA Reporter; **C-468**, *Arbitral awards in investment protection dispute remain mainly unchanged, Svea* Hovrätt Press Release.

475 **C-467**, *Analysis: A full run-down of the Svea Court of Appeal's reasoning in the recent PL Holdings v. Poland set-aside decision*, IA Reporter.

476 R-PHB, ¶ 53; R-RPHB, ¶ 44.

incompatible State aid.[477] In the instant case, none of the payments or amounts claimed by Claimants have been declared as impermissible State aid, nor does Respondent's jurisdictional objection under EU law raise State aid issues.

444. The only relevant issue for this Tribunal's jurisdiction is whether the Swedish legal order, and through it EU law, creates any clearly discernible limitations to this Tribunal's jurisdiction under Article 26 ECT. The Tribunal has not found any such clearly discernible limitations arising from Swedish and/or EU law. Thus, absent any clear indication about whether the ECJ Judgment's interpretation of Articles 267 and 344 TFEU extends to the ECT, the present case falls within the outer limits of this Tribunal's jurisdiction.

(3) Interpretation of Article 26 ECT and Conflict of Treaties

445. With respect to Respondent's jurisdictional objection relating to EU law, the only issues left for the Tribunal to determine stem from the Parties' expansive submissions concerning (a) the interpretation of Article 26 ECT independent of EU law entering this process of interpretation, and (b) the alleged conflict between the ECT and the EU Treaties as two regimes of international law, and how this conflict should be resolved using international law rules such as Articles 30 and 41 VCLT, Article 351 TFEU and/or Article 16 ECT. The Tribunal shall briefly examine the Parties' submissions on these topics below.

a. Interpretation of Article 26 ECT

446. To recall, the Tribunal has already found that on an application of EU law as it exists currently, there appear to be no clearly discernible limitations on this Tribunal's jurisdiction under Article 26 ECT (see ¶ 444 above). However, this still leaves open the question of interpreting Article 26 ECT in its context and in light of the ECT's object and purpose, and whether such interpretation of the ECT excludes intra-EU investor-State arbitration from the purview of Article 26 ECT. This interpretation will, of course, not take into account EU law under Article 31(3)(c) VCLT, in light of the Tribunal's earlier finding that EU law does not qualify as relevant or applicable under Article 31(3)(c) VCLT (see ¶ 394 above).

[477] C-RPHB, ¶¶ 18-19.

447. Under Article 31 VCLT (quoted in ¶ 289 above), the primary indication of the intention of the Parties to a treaty is the text of the treaty provision being interpreted. That treaty provision is Article 26 ECT (quoted in ¶ 287 above). In particular, the question in this interpretation exercise is whether the term "Contracting Party" in the phrase "[d]isputes between a Contracting Party and an Investor of another Contracting Party" in Article 26(1) ECT can be read as excluding EU Member States in so far as intra-EU investor-State arbitrations are concerned.

448. **Text of Article 26 ECT**: The Tribunal finds the text of Article 26 ECT to be clear and unambiguous. It contains no explicit indication of any exclusion of EU Member States from the scope of the term "Contracting Party" in Article 26 ECT. Further, the provision does not expressly recognize any distinction between intra-EU and extra-EU disputes whatsoever. Neither Respondents nor the EC contests these uncontroversial propositions.

449. **Context**: As part of the context of Article 26 ECT, Respondent (see ¶¶ 304-308 above) and the EC (see ¶¶ 344-345 above) rely on many provisions of the ECT to propose that EU Member States are excluded from the term "Contracting Party" in Article 26 ECT. Each of these provisions are quoted in ¶ 287 above. These include:

(i) The EU's position as a REIO under Article 1(3) ECT, and the fact that as such, the EU is a "Contracting Party" of the ECT under Article 1(2) ECT and has its own demarcated definition of "Area" under Article 1(10) ECT.

(ii) Article 25 ECT, which permits more preferential treatment between the Parties to EIAs (Economic Integration Agreements), and the Decision, included in Annex 2 to the Final Act of the European Energy Charter Conference, with respect to Articles 24(4)(a) and 25 ECT, and the EU's and EU Member States' Declaration under Article 25 ECT.[478]

(iii) Article 16 ECT, which as per Respondent prohibits derogation from any more favourable provision in EU law, including its access to justice mechanism, for the benefit of an investor from an EU Member State.

[478] The Decision and the Declaration are available at: https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

(iv) The Statement made by the European Communities under Article 26(3)(b)(ii) ECT, which as per the EC restricts the offer to arbitrate under Article 26 ECT only to investors from non-EU Member States, since the Statement uses the term "another" the following phrase: "[t]he Communities and the Member States will . . . determine among them who is the respondent party to arbitration proceedings initiated by an Investor of **another** Contracting Party." (emphasis added by the EC)

450. The Tribunal considers that none of the above contextual matters warrants that the term "Contracting Party" in the clear text of Article 26 ECT should be interpreted as excluding a reference to EU Member States, and thereby excluding intra-EU arbitrations. In this regard, the Tribunal notes the following:

(i) The EU's position as a REIO under Article 1(3) ECT does not indicate that Article 26 ECT is not applicable between EU Member States. The fact that Article 1(3) ECT recognizes the transfer of "competence over certain matters" by the EU Member States to the EU also does not reflect that the provisions of the ECT become inapplicable between the Member States. Similarly, the two definitions of the term "Area" in Article 1(10) ECT are not mutually exclusive, and the reference to "the agreement establishing the [REIO]" appears to only be relevant for the geographical demarcation of the "Area" in question. The Tribunal agrees with Claimants' contention that these provisions, taken together with Article 1(2) ECT, only indicate that the ECT recognizes that some Member States are also members of REIOs, while ensuring that both the REIO and the Member States maintain their independent positions as Contracting Parties to the ECT (see ¶ 320 above). This is also in line with consistent jurisprudence of investor-State tribunals.[479]

(ii) The same can be said for Respondent's reliance on Article 25 ECT, and the corresponding Decision with respect to Articles 24(4)(a) and 25 ECT and the EU's and EU Member States' Declaration under Article 25 ECT. Article 25 ECT, the Decision and the Declaration also only recognize that a Contracting Party to the ECT

[479] **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 194-195; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 143.

can simultaneously be party to an EIA. However, this does not indicate that ECT and its dispute resolution mechanism is inapplicable between EU Member States.

(iii) Article 16 ECT, although relied upon extensively by Respondent, in reality runs counter to Respondent's proposal. In essence, Article 16 ECT provides that between the ECT and any other international agreement between two or more ECT Contracting Parties on the same subject matter as Parts III or V of the ECT, the "more favourable" provisions shall prevail. Assuming that the ECT and the EU Treaties pertain to the same subject matter, the Tribunal considers that, to the extent of the dispute resolution mechanism, the ECT provides for a more favourable regime since it envisages multiple options for dispute resolution, including investor-State arbitration, which the EU Treaties do not specifically provide for. Thus, in this regard too, the Tribunal finds Claimants' position convincing (see ¶ 319 above). Respondent's submission that Article 26 ECT is not applicable between EU Member States as a result of Article 16 ECT fails.

(iv) Only the EC makes observations with respect to the Statement made by the European Communities under Article 26(3)(b)(ii) ECT. The only passage that the EC relies upon is the following:

> The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of <u>another Contracting Party</u>. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days. (emphasis added)

According to the EC, the use of the term "another" before Contracting Party excludes disputes brought by EU investors against an EU Member State from the purview of the ECT. This proposition does not follow from the language of the above Statement. If the intention was to exclude intra-EU disputes from the purview of Article 26 ECT, that could and should have been mentioned in the ECT itself. While the above Statement may hold interpretative significance under Article 31(2)(b) VCLT, it cannot be used to override the clear text of Article 26 ECT. Further, upon reading the Statement in context, it also appears to only recognize a demarcation of competences between the EU and the Member States, but not to completely exclude the application of ECT provisions between EU Member States.

451. **Disconnection Clause**: Another contextual matter discussed by the Parties and the EC is the absence of a disconnection clause in the ECT. Whereas Respondent and the EC consider that the inclusion of such a disconnection clause would have been superfluous (see ¶¶ 298 and 346 above), Claimants emphasize this absence, which they deem conspicuous in light of the EC's prior treaty practice and the ECT's *travaux préparatoires* (see ¶ 319 above).

452. The Tribunal finds Claimants' argument on the absence of a disconnection clause convincing. The consequence that Respondent and the EC attempt to derive from a strained contextual interpretation of the ECT would have been convenient to achieve had a disconnection clause existed therein. A disconnection clause would have achieved the purpose of limiting the application of the ECT, which is a mixed agreement, such that it was only applicable vis-à-vis third parties and not between EU Member States. Thus, in essence, Respondent and the EC attempt to implicitly read into the ECT a disconnection clause when none exists. It is unanimously accepted in investment arbitration case law that this cannot be done.[480]

453. What makes the absence of a disconnection clause more telling is the fact that during the negotiations of the ECT, the European Communities had in 1993 proposed the inclusion of a disconnection clause.[481] While this proposal did not ultimately materialize, it does reflect that at that time a disconnection clause was not considered to be superfluous as the EU and Respondent submit currently. This is not surprising considering that until the ECT's entry

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[480] **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶ 186; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶¶ 433-439; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Final Award, 27 December 2016, ¶¶ 280, 301.

[481] **CEX-462**, Note for the Attention of Ambassador Rutten from Secretary General Clive Jones, Feb. 19, 1993.

into force, disconnection clauses were common practice in international agreements entered into by the EU, as Claimants rightly point out.[482]

454. In light of the above, the Tribunal does not find any contextual support for excluding EU Member States from the term "Contracting Party" in Article 26 ECT or for excluding intra-EU investor-State disputes from the purview of Article 26 ECT.

455. **Object and Purpose of the ECT and *Travaux Préparatoires***: The Tribunal also finds no indication in the ECT's object and purpose that would justify abandoning the clear text of Article 26 ECT. Likewise, there is no such indication in the *travaux préparatoires* submitted by Respondent, which the Tribunal shall address only for the sake of completeness.

456. The EC suggests that the ECT was always intended to create an international framework of cooperation in the energy sector between the EU and its Member States on the one side participating as one consolidated block, and Russia, the CIS and the countries of Central and Eastern Europe, on the other side.[483] Respondent also relies on a document from the *travaux préparatoires* to make arguments to the same end.[484]

457. This purported object and purpose of the ECT does not come across from within the ECT, nor from the solitary and unrelated *travaux* document submitted by Respondent. Instead, Article 2 ECT stipulates a liberally worded object and purpose of the ECT, when it states that "[t]his Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." The Charter also does not at any point demonstrate a demarcation of this object and purpose between the EU Member States and the non-EU Member States.

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482 C-SoRj, ¶ 83; *relying on* **CL-31**, Marise Cremona, *Disconnection Clauses in EU Law and Practice,* in MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 160, at 164-170 (Christophe Hillion & Panos Koutrakos eds. 2010).

483 EC NDP Submission, ¶¶ 71-86, specifically, ¶ 82; *relying, inter alia, on relying on* **CL-177**, Johann Basedow, "The European Union's International Investment Policy. Explaining Intensifying Member State Cooperation in International Investment Regulation", PhD Thesis, The London School of Economics and Political Science (2014).

484 SoD, ¶¶ 62-65; *relying on* **REX-003**, Commission Proposal for a Council Directive concerning common rules for the internal market in electricity, COM (91)548 final, OJ No C65 of 14 March 1992; *see also* R-SoRj, ¶¶ 131-132.

458. Accordingly, the Tribunal considers that the object and purpose of the ECT or its *travaux préparatoires* do not warrant a counter-textual conclusion that Article 26 ECT does not apply between EU Member States for intra-EU investor-State disputes.

b. Conflict of Treaties

459. The Parties have made extensive submissions on how a conflict, if any, between the ECT and the EU Treaties, specifically Articles 267 and 344 TFEU, should be resolved. In this regard, their submissions deal with the application of Articles 30 and 41 VCLT, Article 351 TFEU and/or Article 16 ECT (see for Respondent's submissions ¶¶ 309-313 above; for Claimants' submissions ¶¶ 323-324 above; and for the EC's observations ¶¶ 347-348 above).

460. In light of the Tribunal's earlier findings, the Tribunal does not consider it appropriate or necessary to examine these submissions. This is for two reasons.

461. *First,* the Tribunal has concluded above (see ¶ 401 above) that the only manner through which EU law, including the EU Treaties, enters this Tribunal's applicable law framework is through the application of Swedish domestic law as *lex arbitri.* Thus, there is no possible conflict between two sources of international law, i.e., the ECT and EU Treaties, to be resolved in this case. Instead, the only question with respect to the interaction between the ECT and EU law, which the Tribunal has already answered, is whether EU law, as a constituent part of Swedish law, creates any outer limits to this Tribunal's jurisdiction. This question has been answered in the negative (see ¶ 444 above).

462. *Second,* and in any event, the Tribunal's finding that EU law does not create any limitations or restrictions on this Tribunal's jurisdiction under Article 26 ECT is also dispositive of the question as to whether there is any conflict between Article 26 ECT and Articles 267 and 344 TFEU. The latter question is also, by implication, answered in the negative. The Tribunal has already found that Articles 267 and 344 TFEU have a different sphere of application than Article 26 ECT, and do not expressly address or prohibit intra-EU investor-State arbitration (see ¶¶ 409-413 above). Accordingly, there is no conflict to be resolved by the application of any international law rules relating to conflict of treaties.

(4) **Conclusion on the Jurisdiction Issue relating to EU Law**

463. The Tribunal has found in the above Sections that (i) the only manner through which EU law enters this Tribunal's applicable law framework for questions of jurisdiction is through the application of Swedish domestic law as *lex arbitri,* and not as a manifestation of international law (see ¶ 401 above); (ii) Swedish and/or EU law does not create any clearly discernible outer limits to this Tribunal's jurisdiction under Article 26 ECT, even after the ECJ Judgment (see ¶ 444 above); and (iii) an interpretation of Article 26 ECT, in accordance with Articles 31 and 32 VCLT, does not lead to the conclusion that intra-EU investor-State disputes were excluded from the scope of Article 26 ECT (see ¶¶ 454 and 458 above).

464. In light of these reasons, Respondent's jurisdictional objection relating to EU law and the ECJ Judgment is rejected.

VII. **OTHER ISSUES OF JURISDICTION AND ADMISSIBILITY**

465. In addition to the jurisdictional objection relating to EU law, Respondent raises three separate objections relating to the Tribunal's jurisdiction and, alternatively, the admissibility of Claimants' claims. These are as follows:

(i) Some of the measures taken by Italy that are at stake in these proceedings are "taxation measures" under Article 21 ECT, and thereby excluded from the jurisdiction of the Tribunal;

(ii) Respondent's consent to arbitrate under Article 26 ECT is excepted by the exclusive jurisdiction clause in favour of the Court of Rome in the GSE contracts entered into with respect to Claimants' photovoltaic plants; and

(iii) The requirement of a prior request for amicable solution under Article 26(1) ECT has not been fulfilled with respect to some of Claimants' claims.

466. In the forthcoming Sections, the Tribunal shall examine each of these jurisdictional and admissibility objections in turn.

B. <u>RELEVANT TREATY PROVISIONS</u>

467. Apart from Article 26 ECT (quoted in ¶ 287 above), Article 21 ECT is relevant for the Tribunal's analysis of the other issues of jurisdiction and admissibility. It is reproduced below to the extent relevant:

> **Article 21: Taxation**
>
> (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.
>
> . . . .
>
> (7) For the purposes of this Article:
>
> (a) The term "Taxation Measure" includes:
>
> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.
>
> (b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
>
> (c) A "Competent Tax Authority" means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.
>
> (d) For the avoidance of doubt, the terms "tax provisions" and "taxes" do not include customs duties

C. THE PARTIES' POSITIONS

(1) Respondent's Position

a. Taxation Measures excluded from the Tribunal's Jurisdiction

468. According to Respondent, a number of measures contested by Claimants in these proceedings qualify as "taxation measures", which term is defined in an open-ended manner in Article 21(7) ECT. For these measures, Claimants claim a breach of Article 10(1) ECT, which is not mentioned in the exceptions to the rule provided in Article 21 ECT.[485] As a result of this, Claimants' claims in respect of these taxation measures are beyond the Tribunal's jurisdiction as per Respondent.

469. Respondent submits that as per the definition of "taxation measure" in Article 21(7) ECT, the two qualifying features for such measures are that (i) they must be sourced either in domestic legislation or in international treaties; and (ii) they must generally relate to fiscal measures.[486]

470. With respect to what qualifies as a fiscal measure and what does not, Respondent contends that the ECT defers to domestic laws of Contracting Parties. Accordingly, Respondent supports its submission by relying on Italian law, according to which taxes (*imposta*), fees (*tassa*) and contributions *(contributo*) qualify as measures of a fiscal nature (*tributi*). In addition, relying on the Italian Constitutional Court's jurisprudence, Italy submits that the characteristics of a fiscal nature (*tributi*) in Italian law are four-fold: (i) dutifulness of the withdrawal or payment, i.e., whether or not the payment of the measure is mandatory; (ii) absence of exact reciprocity between the concerned parties; (iii) connection of the withdrawal or payment to public spending; and (iv) establishment of the fiscal measures by way of law.[487] In Respondent's view, these criterion of fiscal measures in Italian law align with the criterion prescribed in the definitions of "tax" or "tax law" in the glossary of the

[485] SoD, ¶¶ 144-148.

[486] SoD, ¶¶ 148-149; *relying on* **REX-011**, Mena Chambers, Note 13 of 22 July 2015.

[487] SoD, ¶¶ 150-152; *relying on* **REX-013**, Italian Constitutional Court Decision No. 238/2009; article 23, Italian Constitution.

Organisation for Economic Co-operation and Development ("**OECD**"), and in turn with the OECD's Model Law 2014.[488]

471. In any event, to rebut Claimants' contentions regarding the interpretation of the Article 21(7) ECT under international law (see ¶ 491 above), Respondent contends that the provision should be interpreted in broad terms, in light of the application of Articles 31-33 VCLT. Specifically, in Respondent's view, the term "*imposte*" in the Italian version of the ECT should not be equated to the term "*imposta*" used in Italian law to refer to "wealth that is drawn from the citizens in relation to the production of income for the provision of general services provided by the State".[489] Respondent supports its contentions by relying on the language used by the other versions of the ECT, specifically, the English, French and Spanish versions, which also support a wider scope of the term "taxation measures". Also, Respondent juxtaposes the use of "*misure fiscali*" in other parts of Article 21 ECT (Articles 21(3) and 21(5) specifically) to the term "*imposte*", arguing that the latter is broader than and includes the former.[490]

472. Respondent submits that four of the Italian measures under challenge qualify as measures of a fiscal nature, and are thus beyond the Tribunal's jurisdiction. These include Claimants' claims relating to (i) the Administrative Management Fee; (ii) the imbalance costs regime; (iii) the Robin Hood Tax; and (iv) classification of photovoltaic plants as immovable property. In support of this, Respondent places reliance on a recent award rendered by a tribunal in *CEF v. Italy*.[491]

473. With respect to the Administrative Management Fee imposed by the Fifth *Conto Energia* Decree (see Section IV.F(1) above), Italy submits that this fee was mandatory in the sense that the GSE could directly offset it against the tariffs to be paid to photovoltaic producers. Further, Italy contends that the Fee was established as an annual contribution corresponding to a fixed amount per kWh, and was meant for the overall management of

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488 SoD, ¶¶ 153-156; *relying on* **REX-014**, OECD Model Law 2014, articles 2 and 3(2); OECD's website: www.oecd.org.

489 R-SoRj, ¶ 211.

490 R-SoRj, ¶¶ 208-216; *relying on* **REX-011**, Mena Chambers, Note 13 of 22 July 2015.

491 R-PHB, ¶¶ 12-13; R-RPHB, ¶ 67; *relying on* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 294.

the incentivization scheme by covering GSE's management, audit and control expenses. Accordingly, Italy highlights the absence of reciprocity and the connection to public spending.[492]

474. With respect to the imposition of imbalance costs on non-programmable energy sources by Italian Electrical Energy Authority's Resolutions 281 and 522 (see Section IV.F(3) above), Respondent contends that the payment of imbalance costs is mandatory in nature. Further, in Respondent's view, these costs were imposed for the general mechanism of storage of electricity by the Italian system operator, i.e., Terna, which has a monopoly over the activities relating to transmission and dispatching of energy. Wherever there is a monopoly over such a public function reserved for the State, contributions made in that connection qualify as fiscal contributions under Italian law. On this basis, Italy submits that the criteria of absence of reciprocity and the connection to public spending are met by imbalance costs. In this regard, Italy also relies on the submissions of renewable energy producers before Italian courts during the challenge to Resolution 281, wherein they admitted that these imbalance costs qualify as "withdrawal of fiscal nature".[493]

475. Italy supports its above contentions relating to the Administrative Management Fee and the imbalance costs by arguing that if these fiscal contributions was not imposed on energy producers, they would be allocated to the consumers under the A3 Component of the electricity bills. When such allocation would characterize the measure as one of a fiscal nature relating to public spending, this characterization is not altered when the costs are allocated to a different set of stake-holders, i.e., the photovoltaic producers.[494] Additionally, Respondent contends that the Administrative Management Fee and imbalance costs also satisfy the criterion of what constitutes "taxation measures" in investment arbitration case law, particularly, *Murphy v. Ecuador*, which is relied on by

[492] SoD, ¶¶ 164-167; *relying on* **CEX-188**, Fifth *Conto Energia* Decree, article 10 and Recital 22; **REX-017**, AEEG Resolution of 26 May 2016, 266/2016/R/EEL, *Determinazione a consuntivo del corrispettivo a copertura dei costi riconosciuti per il funzionamento del Gestore dei Servizi Energetici – GSE S.P.A., per l'anno* 2015; **REX-018**, Italian Constitutional Court decision No. 30/1957.

[493] SoD, ¶¶ 168-174; *relying on* **REX-019**, Legislative Decree 16 March 1999, No 79, implementing Directive 96/92/CE concerning common rules for the internal market in electricity articles 1(1) and 2(10); **REX-020**; TAR Lombardia, decision of 24 June 2013, No. 1613.

[494] SoD, ¶¶ 166, 169, 173; *relying on* **CEX-230**, AEEG Resolution 522/2014/R/EEL.

Claimants (see ¶ 491 below). This is on the grounds that they are both mandatory levies not corresponding to specific services imposed by the Government for public purposes on a class of persons.[495]

476. To rebut Claimants' arguments regarding VAT being payable on the imbalance costs, or the jurisdiction of tax courts and applicability of Italian double-taxation treaties of Administrative Management Fee and imbalance costs, Italy states that such labels and titles are irrelevant to qualify as a measure as a fiscal or taxation measure.[496] Further, Italy explains the Italian Constitutional Court case law, relied on by Claimants, to submit that an important requirement for qualifying a measure as a fiscal measure was that it should not be based on a synallagmatic relationship between the parties, the existence of which would qualify any payment as a contractual consideration, as opposed to a mandatory contribution towards public spending.[497]

477. With respect to the Robin Hood Tax imposed by Legislative Decree No. 138/2011 (see Section IV.F(4) above), Italy states that the same is "unequivocally" a taxation measure, both as per Italian law, as clarified by the Italian Constitutional Court, and as per the OECD's criterion.[498]

478. Concerning Claimants' characterization of its claims relating to the Robin Hood Tax, which implicates the *ex nunc* application of the Italian Constitutional Court Decision No. 10/2015 (see ¶ 496 below), Respondent states that the Constitutional Court rendered the Robin Hood Tax invalid because of the violation of the principle of equality in contributive capacity, and not due to its extension to renewable energy facilities. Thus, the propriety of an *ex nunc* application of the Constitutional Court Decision and Italy's alleged refusal to

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495 R-SoRj, ¶¶ 218-226; *relying on* **CL-127**, *Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador*, Partial Final Award, ¶ 159.

496 R-SoRj, ¶ 229; *relying on* **CL-129**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award ¶ 155.

497 R-SoRj, ¶¶ 227-237; *relying on* **CEX-354**, Italian Constitutional Court, Decision No. 335; **CEX-355**, Italian Constitutional Court, Decision No. 238.

498 SoD, ¶¶ 157-159; *relying on* **REX-015**, Italian Constitutional Court, Decision No 131/2015 of 27 May 2015, point 4.

reimburse the wrongfully charged Robin Hood Tax would *de facto* go back to becoming a claim about the propriety of the "taxation measure" itself, i.e., the Robin Hood Tax.[499]

479. Similarly, for the classification of photovoltaic plants as immovable property done through Circular No. 36/E by the Revenue Agency in Italy (see Section IV.F(5) above), reliance is placed by Respondent on the OECD Model Law and the very nature of the measure to submit that such a classification has the sole function of defining the scope of taxation, and is at least an ancillary to a taxation measure.[500]

480. Further, Respondent disputes Claimants' characterization of its claims relating to this classification as one that does not relate to the taxation measures *per se,* i.e., the IMU or TASI Charges, but instead only alleges arbitrariness vis-à-vis the decision to classify photovoltaic plants as immovable property. According to Respondent, Claimants guise their claims behind the classification issue, but the substance or "actual target" of their claim are the IMU and TASI Charges. Moreover, Respondent contends that Claimants voluntarily chose to file their tax returns (which are self-assessed) by adhering to the classification of photovoltaic plants as immovable property. Such classification, having been laid down by circulars of the Revenue Agency, were not binding and compliance with them was voluntary. In any event, in Respondent's view, had Claimants had an issue with the classification of photovoltaic plants as immovable property and its fiscal implications, they could have sought an "*interpello*", i.e., a binding interpretation of fiscal laws from the concerned local authorities, or should at least have claimed for the refund of the IMU and TASI Charges from the tax authorities in Italy. Without claiming such a refund, Claimants could not have been entitled to receive the same automatically by Italy.[501]

b. Exclusive jurisdiction clause in GSE contracts

481. Respondent further submits that the existence of an exclusive jurisdiction clause in the contracts entered into between the GSE and the power plant operators of Claimants'

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499 R-SoRj, ¶¶ 190-191.

500 SoD, ¶¶ 160-162; *relying on* **REX-016**, Agenzia delle Entrate, Circolar No 36E/2013; **REX-014**, OECD Model Law 2014, article 6(2).

501 R-SoRj, ¶¶ 193-198.

photovoltaic plants, being subsidiaries or SPVs acquired by Claimants, exclude this Tribunal's jurisdiction under Article 26 ECT.

482. These contracts were entered into between 2011 and 2012, i.e., when Claimants were making their investments in Italy, and each of them, in Article 9, provided for exclusive jurisdiction in favour of the Court of Rome "[f]or any dispute arising out of or in any way connected to the interpretation and execution of this Agreement and the documents referred to therein".[502] In Respondent's view, these exclusive jurisdiction clauses in the GSE contracts are broadly worded and cover not only pure breach of contract disputes, but also apply to any issue related to the incentives received by the investors, through even the *Conto Energia* Decrees.[503]

483. Further, according to Respondent, these jurisdiction clauses are specific in nature and applicability, inasmuch as they create rights and obligations between specific parties, and cannot be overridden by the generic stipulation of State consent in Article 26 ECT, unless the ECT itself provides for such priority. The ECT, instead, permits dispute resolution through any agreed dispute settlement procedure other than international arbitration, including dispute resolution by way of courts.[504]

484. Respondent supports the above submissions by relying on investment arbitration case law, in which tribunals denied jurisdiction over (or the admissibility of) claims covered by contractual exclusive jurisdiction clauses for considerations such as *generalia specialibus non derogant*, or the priority of specifically negotiated contractual clauses over generic expressions of consent in treaties.[505] Further, Respondent highlights that the administrative

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502 **CEX-293**, Santoro GSE Agreement n. I08F13381307; **CEX-294**, San Marco GSE Agreement n. I08F15697007; **CEX-295**, Lenare GSE Agreement n. I0F15697307; *see* SoC, ¶¶ 150-152; **CEX-306**, Campania plant GSE Agreement n. I08F13988007; **CEX-311**, Monaci GSE Agreement n. I0F17928907; **CEX-329**, Rustico GSE Agreement n. O03M27266207; **CEX-330**, Milana GSE Agreement n. O03M28467707; **CEX-341**, Rovigo GSE Agreement n. T03F13776207; **CEX-343**, Fiumicino GSE Agreement n. I08F19354507. Notably, Respondent's translation is at variance from Claimants' ("For any dispute arising out of, or in any way related to the interpretation and/or execution of this Convention and the acts it refers to …"); *see* SoD, ¶ 178.

503 SoD, ¶¶ 179, 182; R-SoRj, ¶¶ 238-242; R-PHB, ¶¶ 8-11.

504 Articles 26(2)(b) and 26(3) ECT; SoD, ¶¶ 175-181.

505 SoD, ¶¶ 183-187; R-SoRj, ¶ 243; *relying on* **RLA-002**, ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶¶ 141, 150, 153; **RLA-003**, ICSID Case No. ARB/02/3, *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶¶ 118-119; **RLA-004**, ICSID Case No.

complaints initiated by investors against the *Spalma-incentivi* Decree, resulting in the Constitutional Court Decision (see Section IV.G(2) above) included Article 26 ECT as one of the legal bases for the claims made in the domestic fora in Italy, which further proves that the ECT (unlike other treaties) is agreeable to dispute resolution by alternative methods of dispute resolution than international arbitration.[506]

485. Notably, Respondent also alternatively raise the above objections as arguments relating to the inadmissibility of Claimants' claims, in the event the Tribunal does not consider them to affect its jurisdiction.[507]

c. The requirement of amicable settlement under Article 26(1) ECT has not been fulfilled

486. Respondent also raises the argument that the requirement of an amicable settlement under Article 26(1) ECT has not been fulfilled in respect of certain of Claimants' claims in this arbitration. While Respondent does not dispute the existence of Claimants' letter dated 4 May 2016, by way of which they attempted to amicably resolve their disputes with Italy,[508] it challenges the scope of that letter vis-à-vis the claims raised in the Request for Arbitration.

487. According to Respondent, Claimants raised two new claims in these arbitration proceedings, which were not mentioned in Claimants' letter of 4 May 2016 to Italy. These are the claims relating to (i) the *ex nunc* application of the Constitutional Court Decision No. 10/2015 relating to the Robin Hood Tax, and Italy's failure to reimburse the taxes wrongly imposed on, and paid by, Claimants under this regime; and (ii) Italy's failure to reimburse or offset payments made by Claimants as a result of the wrongful classification of photovoltaic plants as immovable property (the IMU and TASI Charges), which

ARB/07/9, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, ¶¶ 142-158.

506 SoD, ¶¶ 182, 186; *relying on* **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016.

507 SoD, ¶¶ 196-203.

508 **CEX-7**, Notice of Legal Dispute Arising Under the Energy Charter Treaty and Offer of Amicable Settlement.

classification was later "corrected" by Italy with effect from 1 January 2016 by way of Law No. 208/2015, which was mentioned for the first time in the Statement of Claim.[509]

488. Notably, Respondent also alternatively raise the above objections as arguments relating to the inadmissibility of Claimants' claims, in the event the Tribunal does not consider them to affect its jurisdiction.[510]

(2) Claimants' Position

a. None of Claimants' claims contest the Application of "Taxation Measures"

489. Claimants dispute Respondent's jurisdictional objection relating to Article 21 ECT on the grounds that (i) the Administrative Management Fee and the imbalance costs are not "taxation measures" as per Article 21(7) ECT; and (ii) Claimants' claims relating to the Robin Hood Tax and the classification of photovoltaic plants as immovable property are not claims against the "taxation measures" per se.

490. With respect to the Administrative Management Fee and the imbalance costs, Claimants submit that Italy's argument is based on a flawed premise of equating "taxes" or "taxation measures" to "fiscal measures". Such expansion of the definition of "taxation measures" is not supported in the text of Article 21(7)(a) ECT, the official Italian version of which uses the term "*imposte*" instead of the term used by Respondent for "fiscal measures", i.e., "*tributi*".[511]

491. Alternatively, Claimants submit that the reliance on domestic law for characterization of measures as "taxation measures", while helpful, is not determinative of this issue. In this connection, Claimants rely on investment arbitration case law to enlist an independent criterion for determining what is a "taxation measure" under international investment law. This criterion require (i) taxation measures to be "related to the imposition of a liability on classes of persons to pay money to the State for public purposes and without any direct benefit to the taxpayer"; (ii) accounting for the plain text of the legal provision imposing

509 SoD, ¶¶ 191-195; R-SoRj, ¶¶ 244-251.
510 SoD, ¶¶ 204-205.
511 SoRy, ¶¶ 152-153; *relying on* ECT, article 50.

the taxation measure in addition to the domestic constitutional framework; and (iii) *bona fide* actions motivated by the purpose of raising State revenue.[512]

492. It is Claimants' position that none of these criteria are met by the Administrative Management Fee or the imbalance costs. Claimants contend that both these measures are not motivated towards increasing State revenue, nor are they intended for a public purpose. Instead, they are to be paid by photovoltaic producers for exchange of specific services of either "GSE's management, monitoring and verification tasks" or "to assume the dispatching services costs" of Terna. Further, Claimants highlight that the sources of these measures, be it the Fifth *Conto Energia* Decree or the Italian Electrical Energy Authority's Resolutions 281 and 522, do not use the term "taxes" to describe these measures in their plain text, but instead use terms such as "contributions" or "compensations". In this regard, Claimants also place reliance on the findings of the *Greentech v. Italy* tribunal, which found these that these two measures in question did not qualify as "taxation measures".[513]

493. In addition, Claimants allege that the Administrative Management Fee and the imbalance costs are not *bona fide* taxation measures, since they were enacted to reduce incentive payments previously guaranteed to renewable energy producers.[514]

494. In the further alternative, Claimants submit that the purely domestic understanding of "*imposte*" or taxes under Italian law also does not support Respondent's categorization. In addition to disputing the criterion relied on by Respondent for determining what qualifies as a "taxation measure" in Italian law,[515] Claimants make three further arguments. First,

512 SoRy, ¶¶ 154-157; *relying on* **CL-127**, *Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador*, Partial Final Award, ¶¶ 159, 185; **CL-128**, Thomas Wälde & Abba Kolo, Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty, in INTERTAX, KLUWER L. INT'L 430, Volume 35, Issue 8/9; **CL-129**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award; **CL-130**, *Occidental Petroleum Corp. & Occidental Exploration and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 492-495; **CL-131**, *Yukos Universal Ltd. v. Russian Federation*, Award, ¶ 1407.

513 SoRy, ¶¶ 159-162; C-SoRj, ¶¶ 120-122; C-PHB, ¶ 39; *relying on* **CEX-188**, Fifth *Conto Energia* Decree, article 10.4; **CEX-227**, AEEG Resolution 281/2012/R/EFR, at 10; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy,* SCC Arbitration V (2015/095), Award, ¶¶ 244, 251.

514 C-SoRj, ¶ 119.

515 SoRy, ¶ 164; *relying, inter alia, on* **CEX-348**, P. Boria, *a cura di A. Fantozzi, Il diritto tributario*, III ed. Torino; **CEX-349**, P. Russo, *Manuale di diritto tributario*, II ed., Milan; **CEX-350**, G. Tinelli, *Istituzioni di diritto tributario*, IV ed., Milano **CEX-351**, Enciclopedia Giuridica Treccani – Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, ed. 2009.

Claimants submit that imbalance costs fall within the "network and dispatching service" constituent of the A3 Component, and not the separate "taxes" constituent. Second, Claimants rely on GSE's balance sheet to highlight that imbalance costs are treated as "income from sales and services", which in turn are subjected to corporate income tax and VAT. Third, Claimants point out that the Administrative Management Fee and the imbalance costs are not included in the type of fiscal measures over which Italian tax courts have jurisdiction, primarily because, as clarified in Italian Constitutional Court jurisprudence, measures covering service costs and liable for VAT are excluded from the jurisdiction of tax courts. Similarly, neither the Administrative Management Fee and the imbalance costs are covered under Italian double-taxation treaties.[516]

495. With respect to the Robin Hood Tax and the classification of photovoltaic plants as immovable property, Claimants' position is that their claims concerning these measures do not dispute "taxation measures" as defined by the ECT, nor do they dispute the existence or application of these taxes. Instead, the taxes in question are only relevant to the background of these claims.[517]

496. Claimants' only claim concerning the Robin Hood Tax, which has already been declared unconstitutional by the Italian Constitutional Court in Decision No. 10/2015 (see ¶¶ 244-248 above), is that the Constitutional Court Decision's *ex nunc*, rather than *ex tunc*, application was unfair. Similarly, for the classification of photovoltaic plants as immovable property, Claimants contest the fact that Italy's correction of this classification in 2016 did not result in a refund of the wrongly imposed IMU and TASI Charges under the earlier arbitrary classification of photovoltaic plants as immovable property, which Claimants had paid in good faith.[518]

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516 SoRy, ¶¶ 165-169; *relying on* **CEX-353**, GSE Reports and Financial Statements; **CEX-354**, Italian Constitutional Court, Decision No. 335; **CEX-355**, Italian Constitutional Court, Decision No. 238; **CEX-357**, Italian Constitutional Court, Decision No. 39; *see also* C-SoRj, ¶¶ 114-115.

517 SoRy, ¶ 147.

518 SoRy, ¶ 148; C-SoRj, ¶¶ 107-110.

b. Exclusive jurisdiction clause in GSE contracts

497. In response to Respondent's jurisdictional (and alternatively, admissibility) objection relating to the exclusive jurisdiction clause in the GSE contracts, Claimants make two arguments.

498. First, Claimants challenge the relevance of that argument on the ground that none of the Claimants was a signatory to, or bound by, the contracts entered into with the GSE. The contracts were instead executed by entities separate from Claimants. Thus, the exclusive jurisdiction clauses in the GSE contracts do not apply to Claimants, nor do they amount to a previously agreed dispute resolution mechanism between Claimants and Italy, i.e., the two Parties in this ECT arbitration. On this basis, Claimants also distinguish the cases relied on by Respondent, particularly the *SGS v. Philippines* case and the *BIVAC v. Paraguay* case, in both of which the claimants were party to the contracts being considered.[519] Instead, Claimants place reliance on the *Greentech v. Italy* award, which, as per Claimants, was factually closer to the present case and was correctly decided.[520]

499. Second, Claimants contend that they are not seeking a resolution of a breach of contract claim in these ECT proceedings. Instead, their claims pertain strictly to a breach of treaty, in which the GSE contracts are merely incidentally relevant as evidence of specific obligations that Italy entered into but failed to fulfil in violation of the ECT's Umbrella Clause.[521]

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[519] SoRy, ¶¶ 171-173; C-SoRj, ¶ 130; *relying on* **RLA-002**, ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶¶ 1, 13-14; **RLA-003**, ICSID Case No. ARB/02/3, *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 119; **RLA-004**, ICSID Case No. ARB/07/9, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, ¶¶ 7, 127.

[520] Claimants' PHB, ¶¶ 38-39; *relying on* **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶¶ 204-221.

[521] SoRy, ¶¶ 174-177; C-SoRj, ¶¶ 125-18; *relying on* **RLA-002**, ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶¶ 157-159; **RLA-004**, ICSID Case No. ARB/07/9, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, ¶ 127; **CL-132**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶¶ 96, 101; **CL-135**, *Tenaris S.A. and Talta Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award,

c. The requirement of amicable settlement under Article 26(1) ECT has been fulfilled

500. Claimants rebut Respondent's jurisdiction (and alternatively, admissibility) objection concerning the requirement of amicable settlement by making two arguments.

501. First, Claimants point out that their letter of 4 May 2016 specifically mentioned the harmful impact that Italy's expansion of the Robin Hood Tax and the measures exposing Claimants' plants to the IMU and TASI Charges had on their investments. Thus, these claims cannot be considered as "new" ones.[522]

502. Second, Claimants submit that claims develop over time and over the course of the arbitration proceeding. With such development of claims, claimants cannot be required to initiate fresh disputes by notifying respondents and requesting an amicable settlement on every occasion. So long as the initial notice of dispute and amicable settlement was "related to the same dispute" or concerned "substantially the same subject matter", the formal requirement of amicable settlement should not inhibit a tribunal's jurisdiction. This is even more so when attempts at amicable resolution are unlikely to succeed, and when the notice period for amicable settlement is likely to expire prior to the tribunal having the chance to look at its jurisdiction, as is the case here.[523]

January 29, 2016, ¶ 306; **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 480 (emphasis in original).

522 SoRy, ¶ 181; C-SoRj, ¶ 134; **CEX-7**, Notice of Legal Dispute Arising Under the Energy Charter Treaty and Offer of Amicable Settlement, p. 4.

523 SoRy, ¶¶ 182-200; C-SoRj, ¶¶ 135-137; C-PHB, ¶ 39; *relying, inter alia, on* **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 317–19; **CL-133**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, Sept. 16, 2003, ¶ 14.5; **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶ 339; **CL-135**, *Tenaris S.A. and Talta Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, Jan. 29, 2016, ¶ 245; **CL-88**, *Ltd. Liab. Co. AMTO v. Ukraine*, SCC Arb. No. 080/2005, Award, Mar. 26, 2008, ¶¶ 55-58; **CL-136**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB01/8, Decision on Jurisdiction, July 17, 2003, ¶ 109; **CL-138**, Christoph Schreuer, Traveling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 J. WORLD INVEST. & TRADE 231, 238 (2005); **CL-139**, *Ethyl Corp. v. Gov't of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, ¶ 87; **CL-140**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, at 427–29; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 213.

D. THE TRIBUNAL'S ANALYSIS

503. In this Section, the Tribunal shall determine Respondent's other objections relating to the Tribunal's jurisdiction and to the admissibility of Claimants' claims. This determination shall be made simultaneously for the issues of jurisdiction and admissibility, to the extent they overlap.

504. The Tribunal shall determine (1) first, Respondent's jurisdictional objection relating to Article 21 ECT; (2) second, Respondent's jurisdictional and admissibility objections relating to the exclusive jurisdiction clause in the GSE Contracts; and (3) third, Respondent's jurisdictional and admissibility objections relating to the requirement of amicable settlement of the disputes in Article 26 ECT prior to initiation of arbitration proceedings.

(1) **Taxation Measures under Article 21 ECT**

505. Respondent objects to the jurisdiction of this Tribunal on the basis of the exclusion of "taxation measures" in Article 21 ECT, arguing that since a number of the measures challenged by Claimants amount to "taxation measures", the ECT does not create any rights or impose any obligations in their respect.

506. In this regard, Claimants and Respondent are in dispute about the (a) the legal standard to be applied for a determination of what qualifies as a "taxation measure"; (b) whether the Administrative Management Fee imposed by the Fifth *Conto Energia* (see Section IV.F(1) above) amounts to a "taxation measure"; (c) whether the Imbalance Costs imposed by the Italian Electrical Energy Authority's Resolutions 281 and 522 (see Section IV.F(3) above) amount to "taxation measures"; (d) whether Claimants' claims in relation to the Robin Hood Tax imposed by Legislative Decree No. 138/2011 (see Section IV.F(4) above) constitute disputes relating to "taxation measures"; and (e) whether Claimants' claims in relation to the classification of photovoltaic plants as immovable property done through Circular No. 36/E by the Revenue Agency in Italy (see Section IV.F(5) above) constitute disputes relating to "taxation measures". The Tribunal shall address these disputed issues in turn below.

a. Legal Standard

507. The contested matter between the Parties concerning the legal standard for a determination of what qualifies as a "taxation measure" is whether this standard should be derived from domestic law or from international law.

508. To resolve this matter, the Tribunal considers is beneficial to reproduce the text of Article 21(7)(a) ECT below, which defines the term "taxation measure":

> For the purposes of this Article:
>
> (a) The term "Taxation Measure" includes:
>
> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

509. Interpreting this provision in accordance with Article 31 VCLT (quoted in ¶ 289 above), the Tribunal delineates two key characteristics of a "taxation measure", based on the ordinary meaning of the terms used in the provision: (i) a taxation measure shall be in the form of a provision, either in the domestic law of the Contracting Party in question or in an international convention or agreement of that Contracting Party; and (ii) that provision shall be related to taxes.

510. Given that the provision that contains the taxation measure should either be codified by the Contracting Party in question (or by a political subdivision thereof or a local authority therein) or be part of an international convention or agreement of that Contracting Party, the Tribunal considers it important to look at the law of that Contracting Party for an answer to the question of what constitutes a provision "relating to taxes", and, in turn, a "taxation measure". This is particularly in light of the object and purpose behind treaty provisions such as Article 21 ECT, which the Tribunal considers are intended for the

Contracting Parties to preserve fiscal sovereignty over tax related matters.[524] In the instant case, the Contracting Party in question is Italy.

511. In this connection, it is also important to note that neither Claimants nor Respondent argue that domestic law is immaterial to the question of what constitutes a "taxation measure". The dispute lies in the extent of importance that the Parties afford to domestic law. While Respondent places exclusive reliance on the Italian domestic law understanding of "taxation measures", Claimants rely primarily on an autonomous international law standard, but simultaneously admit that domestic law "may be helpful in ascertaining" the nature of the measure (see ¶ 491 above).[525]

512. The Tribunal further notes that the cases relied upon by Claimants to derive an international law standard for "taxation measures" also recognize the relevance of domestic law for this issue. Although none of those cases involved Article 21 ECT, their respective analyses of the tax carve-outs in the BITs in question did consider domestic law while determining whether the measure in question was a "taxation measure" or a "matter of taxation".

513. For instance, the tribunal in *Murphy Exploration v. Republic of Ecuador* found that:

> The purpose of Article X specifically is to preserve the States' sovereignty in relation to their power to impose taxes in their territory. Most governments view these powers as a central element of sovereignty.
>
> . . . .
>
> The Tribunal finds that, for it to assess whether a measure is one which was meant to be excluded from an international arbitral tribunal's purview because it concerns a State's sovereign power of taxation, it is necessary for the Tribunal to examine whether that measure comes within the State's domestic tax regime.[526]

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524 **CL-127**, *Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador*, Partial Final Award, ¶ 165; **CL-128**, Thomas Wälde & Abba Kolo, Investor-State Disputes: The Interface Between Treaty-Based International Investment Protection and Fiscal Sovereignty, in INTERTAX, KLUWER L. INT'L 430, Volume 35, Issue 8/9, p. 431.

525 SoRy, ¶ 154.

526 **CL-127**, *Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador*, Partial Final Award, ¶¶ 165-166.

514. Similarly, even the tribunals in *EnCana v. Republic of Ecuador* and *Occidental v. Republic of Ecuador* when interpreting the tax carve-out provision of the respective BITs, examined Ecuador's domestic legal tax regime.[527]

515. Accordingly, without conclusively deciding at this stage whether and to what extent domestic law has to be supplemented by an autonomous international law understanding of taxation measures, the Tribunal considers that Italian domestic law is the appropriate starting point to examine whether the measures in question fall within the carve out for taxation measures in Article 21 ECT. However, it is important to clarify that this does not entail declaring a measure as a tax measure simply on the basis that the domestic legal system calls it or characterizes it as such. The Tribunal considers it imperative to look at the criteria prescribed in domestic law for what qualifies as a taxation measure thereunder, and examine the measures in question against this criteria.

516. With respect to the criteria in Italian law for a measure to qualify as a taxation measure, both Claimants and Respondent have made distinct submissions. Respondent uses the understanding of "fiscal measures" (*tributi,* in Italian) in Italian law and extends it to taxation measures.[528] To this end, Respondent advances the following four criteria for measures of a fiscal nature based on the Italian Constitutional Court's jurisprudence[529] (see ¶ 470 above):

(i) dutifulness of the withdrawal or payment, i.e., whether or not the payment of the measure is mandatory;

(ii) absence of exact reciprocity between the concerned parties;

(iii) connection of the withdrawal or payment to public spending; and

(iv) establishment of the fiscal measures by way of law.

527 **CL-129**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award, ¶¶ 146-150; **CL-130**, *Occidental Petroleum Corp. & Occidental Exploration and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 492-495.

528 SoD, ¶¶ 148-149; *relying on* **REX-011**, Mena Chambers, Note 13 of 22 July 2015.

529 SoD, ¶¶ 150-152; *relying on* **REX-013**, Italian Constitutional Court Decision No. 238/2009; article 23, Italian Constitution; **REX-014**, OECD Model Law 2014, articles 2 and 3(2); OECD's website: www.oecd.org.

517. On the other hand, Claimants submit that Respondent's premise of comparing taxation measures to fiscal measures is flawed, since the concept of fiscal measures is very broad, whereas Article 21(7)(a) ECT clearly applies only to one aspect of such fiscal measures, i.e., those that relate to taxes (*imposte* in Italian) (see ¶ 490 above). With respect to the understanding of measures that relate to taxes or *imposte,* Claimants rely on scholarly writings to enlist the following criteria:[530]

(i) the measure is based on the principle of societal solidarity and on the financial ability of the taxpayer to contribute to the general public expenditure;

(ii) the payment is involuntary;

(iii) the payment is not related to any specific benefit, service, or activity provided by public institutions;

(iv) the payment is generally intended for public and social purposes that are not specifically identified;

(v) the payment is based on the principle of redistribution; and

(vi) the payment is conceived of as the ultimate expression of State sovereignty.

518. With respect to the distinction between fiscal measures (*tributi*) and taxation measures (*imposte*), the Tribunal agrees with Claimants' submission that the former term appears to much broader than the latter. Apart from the fact that the term "fiscal measures" does not appear in Article 21(7)(a) ECT, even conceptually, fiscal measures could include a number of measures, including but not limited to measures relating to taxes. Moreover, even from the Italian version of the ECT, which is an authentic text as per Article 50 ECT, it appears that the language used in Article 21(7)(a) ECT corresponding the English phrase "any provision relating to taxes" is "*qualsiasi disposizione sulle <u>imposte</u>*" (emphasis added). Claimants and Respondent agree that the term "*imposte*" or "*imposta*" is a literal

[530] SoRy, ¶ 164; *relying, inter alia, on* **CEX-348**, P. Boria, *a cura di A. Fantozzi, Il diritto tributario,* III ed. Torino; **CEX-349**, P. Russo, *Manuale di diritto tributario,* II ed., Milan; **CEX-350**, G. Tinelli, *Istituzioni di diritto tributario*, IV ed., Milano **CEX-351**, Enciclopedia Giuridica Treccani – Istituto della Enciclopedia Italiana fondata da Giovanni Treccani, ed. 2009

translation of the English word "taxes",[531] whereas the translation of "fiscal measures" appears to be "*tributi*",[532] which term is not mentioned in the Italian version of Article 21(7) ECT. Accordingly, the Tribunal considers the term "fiscal measures" to be broader than, but inclusive of, taxation measures.

519. That being said, in respect of the distinct criteria that Claimants and Respondent enlist for what qualifies as a measure relating to taxes (or taxation measure) in Italian law (see ¶¶ 516-517 above), the Tribunal considers a number of these criterion to overlap with one another. For instance, Respondent's first criteria relating to the dutifulness of the payment, i.e., whether or not the payment of the measure is mandatory, is parallel to Claimants' second criteria, i.e., the payment is involuntary. Similarly, Respondent's second criteria, i.e., the absence of exact reciprocity between the concerned parties, overlaps, in essence, with Claimants' third criteria, i.e., the payment is not related to any specific benefit, service, or activity provided by public institutions. Respondent's third criteria, i.e., the connection of the payment to public spending, aligns, to some extent, with Claimants' first criteria, i.e., the measure is based on the principle of societal solidarity and on the financial ability of the taxpayer to contribute to the general public expenditure. There is also a significant overlap between Respondent's second and third criteria and Claimants' fourth criteria, i.e., the payment is generally intended for public and social purposes that are not specifically identified. Respondent's fourth criteria, i.e., the establishment of the fiscal measures by way of law, is a criteria that already finds place in the bare text of Article 21(7)(a) ECT, as discussed in ¶¶ 508-510 above.

520. In light of the above, the Tribunal considers Claimants' and Respondent's respective criterion for what qualifies as a taxation measure in Italy to be in agreement in many respects. Accordingly, in addition to examining the legal source that imposes the measure in question, the Tribunal shall analyse each of the contested measures in question based on

[531] SoD, ¶ 150; SoRy, ¶ 165; R-SoRj, ¶ 211. Although Respondent attempts to distinguish the term "*imposte*" from "*imposta*", stating that the former is broader in meaning than the latter, the Tribunal does not consider it appropriate to engage in a linguistic dissection of these two terms. It suffices to state that regardless of any distinction between these terms "*imposte*" and "*imposta*", the definition of "taxation measures" (or "*misura fiscale*") in Article 21(7) ECT does not include all kinds of "fiscal measures" (or "*tributi*").

[532] SoD, ¶ 150; SoRy, ¶ 152.

the common denominator in the Parties' respective criterion, which the Tribunal enlists as follows:

(i) Whether the payment is involuntary or mandatory in nature, i.e., dutifulness of the payment;

(ii) Whether the payment is made in exchange of any specific benefit, service, or activity provided by public institutions, i.e., whether the relationship between the payer and the public institution in question evidences reciprocity; and

(iii) Whether the payment is made as a contribution to public spending or public expenditure, and is generally intended for a public purpose.

In order for any measure to qualify as a "taxation measure", the first and third questions above should be answered in the affirmative, whereas the second one should be answered in the negative.

521. The Tribunal also incidentally notes that the above three criteria align with the autonomous international law understanding of a "taxation measure" relied upon by Claimants (see ¶ 491 above). For instance, the tribunal in *Murphy v. Ecuador*, defined a "matter of taxation" (the equivalent phrase in question in the BIT at issue in that case) as being "related to the imposition of a liability on classes of persons to pay money to the State for public purposes and without any direct benefit to the taxpayer".[533] This definition, which as per Claimants is extendable to the term "taxation measures" in Article 21(7) ECT, includes within itself the three requirements enlisted in ¶ 520 above, i.e., (i) the mandatory nature of the payment ("imposition of a liability"); (ii) the absence of reciprocity ("without any direct benefit to the taxpayer"); and (iii) contribution to public spending or expenditure ("for public purposes").

522. During the Hearing, Respondent stated that the most essential criteria amongst the ones discussed above are the mandatory nature of the payment and the absence of reciprocity.[534]

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[533] **CL-127**, *Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador*, Partial Final Award, ¶ 159; *see generally* **CL-129**, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481, Award; **CL-130**, *Occidental Petroleum Corp. & Occidental Exploration and Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award.

[534] Hr. Tr. Day 1, pp. 180(25)-181(16).

The Tribunal agrees with this proposition. With respect to the remaining criterion Claimants have advanced (see ¶ 517 above), i.e., (i) the payment being based on the principle of redistribution; and (ii) the payment being the ultimate expression of State sovereignty, the Tribunal shall consider them only if and to the extent it deems necessary and appropriate, after its examination of the three criteria enlisted in ¶ 520 above.

b. Administrative Management Fee

523. As mentioned in Section IV.F(1) above, the Administrative Management Fee was imposed in the Fifth *Conto Energia* Decree. In particular, the relevant provisions in the Fifth *Conto Energia* Decree imposing the Administrative Management Fee on the photovoltaic power plant operators were Articles 10.4 to 10.6, which are reproduced below:

> **Article 10**
>
> *(Management of incentive system and application rules)*
>
> . . . .
>
> 4. <u>To cover GSE management costs, and the cost of checks and controls by GSE</u>, the plant operators that access incentive tariffs under this decree and decrees issued in implementation of article 7 of legislative decree no. 387, 2003 [Off-Take Regime] and article 25 (10) of legislative decree no. 28, 2011 [Romani Decree], <u>are under an obligation</u>, commencing from 1 January 2013, <u>to pay GSE a contribution of 0.05 euro cents for each kWh of subsidised energy, also by means of offset with incentives owed</u>.
>
> 5. GSE will publish the application rules for enrolment in the registers and access to the incentive tariffs under this decree within thirty days of the effective date of the decree.
>
> 6. The procedures for payment of the contributions under paragraphs 1 and 4 are specified by GSE in the context of the application rules under paragraph 5.[535] (emphasis added)

524. Other legal provisions dealing with Administrative Management Fee that Respondent has specified include (i) Chapter II of Legislative Decree No. 28/2011, i.e., the Romani Decree, which was the chapter titled “Audit and Sanctions”;[536] and (ii) Articles 25(1) and 25(2) of

535 **CEX-188**, Fifth *Conto Energia* Decree, articles 10.4-10.6.

536 SoD, ¶ 409; **CEX-158**, Romani Decree.

the *Spalma-incentivi* Decree of 2014, which provides, *inter alia*, for the imposition, rates and method of payment for such Administrative Management Fee that were imposed "by the GSE for [its] conduct of management, audit and control activities, related to the incentive and support mechanisms . . ."[537]

525. Having laid out the relevant legal provisions dealing with the Administrative Management Fee, the Tribunal shall examine whether this Fee satisfies the three-fold criteria prescribed in ¶ 520 above, in order to qualify as a taxation measure.

526. *First*, with respect to the mandatory nature of the payment, the Tribunal notes that Claimants have not specifically contested the fact that the Administrative Management Fee is mandatory or involuntary in nature. It is evident that the Administrative Management Fee was legislatively imposed by way of the Fifth *Conto Energia* Decree as a mandatory contribution. This is demonstrated, *inter alia,* by the use of the phrase "the plant operators . . . are under an obligation" in Article 10.4 of the Fifth *Conto Energia* Decree, which is emphasised in the quotation in ¶ 523 above. Accordingly, the Tribunal considers this requirement concerning the mandatory nature of the payment to have been satisfied by the Administrative Management Fee.

527. *Second,* with respect to the absence of reciprocity requirement, i.e., whether the Administrative Management Fee is paid in exchange of any specific benefit, service, or activity provided by the concerned public institutions, the Parties are in dispute. Respondent's position is that the motivations behind the imposition of the Administrative Management Fee, i.e., covering GSE's management, audit and control expenses, evidences the absence of reciprocity in the imposition of this Fee (see ¶ 473 above). Claimants argue that since the Administrative Management Fee are to be paid by photovoltaic producers for exchange of specific services of either GSE's management, monitoring and verification tasks, there is an absence of reciprocity characterizing the payment (see ¶ 492 above).

528. The Tribunal considers that the Parties' respective characterizations of the motivations behind the imposition of the Administrative Management Fee are not at divergence.

537 SoD, fn 168-169; **CEX-266**, Legislative Decree No. 91/2014, converted into law by Law No. 116/2014 dated 11 August 2014, article 25(1).

Claimants and Respondent agree that the Administrative Management Fee was intended to cover GSE's management. In fact, as per Respondent, the Administrative Management Fee was meant to sustain GSE's management costs in the face of increase in its functions.[538]

529. The question to be determined is whether against the payment of this Administrative Management Fee, GSE would be providing any benefit, service, or activity for the photovoltaic plant operators. In this regard, the Tribunal considers it appropriate to refer to the legal instruments imposing the Administrative Management Fee, to examine its precise purpose in order to determine whether the same was to be paid in exchange of any benefit, service, or activity to be provided by the GSE. The following indicators are available in these legal instruments:

(i) Article 10.4 of the Fifth *Conto Energia* Decree provides that the Administrative Management Fee was intended "[t]o cover GSE management costs, and the cost of checks and controls by GSE" (see ¶ 523 above);

(ii) One of the Recitals in the preamble of the Fifth *Conto Energia* indicates that the reason for imposing the Administrative Management Fee on the photovoltaic plant operators, as opposed to attributing them entirely to the end consumers, was that it was "advisable and fair that coverage of charges <u>for the management of the photovoltaic incentive system shall involve contributions from persons that benefit from the photovoltaic incentive tariffs</u> . . ."[539] (emphasis added);

(iii) Articles 25(1) and 25(2) of the *Spalma-incentivi* Decree, which confirms that the Administrative Management Fee was imposed "by the GSE for [its] conduct of management, audit and control activities, <u>related to the incentive and support mechanisms, are to be borne by the beneficiaries of the same activities</u> . . ."[540] (emphasis added).

[538] SoD, ¶¶ 20, 374-375, 406.

[539] **CEX-188**, Fifth *Conto Energia* Decree, recital 22; *see* SoD, ¶ 408 (Note: Respondent's translation of recital 22 is at variance from Claimants'.).

[540] SoD, fn 168-169; **CEX-266**, Legislative Decree No. 91/2014, converted into law by Law No. 116/2014 dated 11 August 2014, article 25(1).

530. From the above quoted legal stipulations in the Fifth *Conto Energia* Decree and the *Spalma-incentivi* Decree, it becomes evident that the Administrative Management Fee was (i) imposed only on the photovoltaic plant operators and not the end consumers, since they were the direct beneficiaries of the incentive tariff regime; and (ii) intended to cover GSE's management, audit and control/verification services specifically related to this incentive tariff system. Accordingly, the Administrative Management Fee was imposed specifically in exchange of GSE's services relating to the management of the incentive tariff regime. GSE, as mentioned in ¶ 121 above, was the implementing body for this incentive tariff regime.

531. Further evidence of this link between the Administrative Management Fee and the GSE's services towards the photovoltaic plant operators comes from the fact that, pursuant to its powers in Articles 10.5 and 10.6 of the Fifth *Conto Energia* Decree to determine the method of payment of, *inter alia*, the Administrative Management Fee, GSE clarified on its website in 2013 that the Administrative Management Fee shall be offset against GSE's first payment of incentive tariffs to any producer in a given year.[541] Respondent also admits that "GSE can directly offset [the Administrative Management Fee] against the tariffs to be paid to producers".[542] Given that the Administrative Management Fee can be directly offset against the incentive tariffs paid as per the *Conto Energia* Decrees, it amounts to a mere adjustment of these incentive tariffs, which are in the nature of subsidies, and does not qualify as a measure related to taxes.

532. In this connection, Respondent did not dispute this link between the Administrative Management Fee and the GSE's services upon being questioned about the same during the Hearing:

> THE CHAIRMAN: Now, you can look at it in two ways. One is to say: the whole apparatus of the state, anything you have to contribute to make it work is a tax. Or you say: in order to make the payment of the tariffs and also the management of the tariffs work, you have to pay a fee. That could have been included in the tariff as part of the tariff, that the money was on that side. Or you say: now you have to pay something extra for managing the tariff. But

541 **CEX-217**, GSE website, "*Conto* V", p. 5.

542 R-SoRj, ¶ 222(a).

> why would that be elevated to a tax? It's simply a question I have, because if you say that a subsidy is a tax, then it's something new.
>
> . . . .
>
> MR GIORDANO: Just that they have a mandatory aspect. But I will cover it later.[543]

533. In light of the above, the Tribunal considers that Administrative Management Fee is characterized by a reciprocal relationship between the photovoltaic plant operators and the concerned public institution, i.e., GSE, whereby GSE performs services concerning the management of the incentive tariff regime in exchange of this Fee. Respondent's arguments that the Administrative Management Fee are not "related to a particular activity from GSE"[544] or do not "imply a specific synallagmatic relation with a single market operator"[545] do not convince the Tribunal otherwise. For the absence of reciprocity requirement, it is not necessary that the benefit, service or activity being performed by the public institution concerned arise out of a direct and specific synallagmatic relation between the public institution and the party obliged to pay the concerned fee. It suffices that the payment in question, i.e., the Administrative Management Fee in the present case, is paid in exchange of services or activities rendered for the direct benefit of the party/parties making the payment, i.e., the photovoltaic plant operators including Claimants' SPVs, and in turn Claimants.

534. Another indicator of the Administrative Management Fee not being a taxation measure under Italian law is that the same is excluded from the jurisdiction of Italian tax courts on the grounds that it (i) covers service costs through tariff components; and (ii) is itself liable for VAT.[546] The Tribunal is persuaded by Claimants' submission (see ¶ 494 above), and their reliance on the Italian Constitutional Court jurisprudence in this regard.[547] Respondent, apart from reiterating its arguments on the absence of reciprocity already rejected in preceding paragraphs, and proposing that the nomenclature of a measure is not

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543 Hr. Tr. 1, pp. 179(25)-180(14).

544 Hr. Tr. 1, p. 179(14).

545 Hr. Tr. 1, pp. 178(5)-178(6).

546 See **CEX-460**, Administrative Fees and Imbalance Costs Sample of Invoices.

547 **CEX-354**, Italian Constitutional Court, Decision No. 335; **CEX-355**, Italian Constitutional Court, Decision No. 238.

determinative of whether it qualifies a tax under Italian law, does not *per se* contest Claimants' submission about the jurisdiction of Italian tax courts over measures such as the Administrative Management Fee (see ¶ 476 above).

535. In support of the Tribunal's findings regarding the Administrative Management Fee, reference may be made to the following conclusions of the tribunal in the recently decided *Greentech v. Italy* case:

> In this connection, the Tribunal notes that the administrative fee was established specifically to cover the GSE's costs of managing the incentive programs from which PV producers benefited. This suggests a degree of reciprocity. The Tribunal also notes that Respondent does not deny that the GSE paid value added taxes (VAT) on amounts received from PV producers, and that the fee was not collected for the general revenue of Italy. Taken together, these factors indicate that the administrative fee is not a Taxation Measure under the ECT.[548]

536. Accordingly, the Tribunal concludes that since the relationship between GSE and Claimants evidences reciprocity, the Administrative Management Fee does not qualify as a taxation measure for failure of satisfying the second criteria enlisted in ¶ 520 above, and thus does not fall within the definition of "taxation measure" in Article 21(7) ECT. Therefore, Claimants' claims in relation to the Administrative Management Fee are not excluded from the protection of the ECT pursuant to Article 21(1) ECT, and Respondent's jurisdictional objection in this regard fails.

537. On account of the above findings, the Tribunal need not examine the third criteria enlisted in ¶ 520 above, i.e., whether the Administrative Management Fee qualifies as a payment that is made as a contribution to public spending or public expenditure, and is generally intended for a public purpose. It suffices to state that the above findings regarding the absence of reciprocity requirement (¶¶ 527-536 above) are dispositive of this issue, even in respect of this third criteria.

[548] **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 244.

c. Imbalance Costs

538. With respect to the imbalance costs imposed on non-programmable energy sources by the Italian Electrical Energy Authority's Resolutions 281 and 522 (see Section IV.F(3) above), Respondent correctly states that "[t]he same reasoning" as for the Administrative Management Fee "should apply",[549] albeit advocating for the opposite conclusion. Indeed. the Tribunal considers that a number of factors, discussed in Section VII.D(1)(b) above concerning the Administrative Management Fee, are equally relevant for and determinative of Respondent's jurisdictional challenge concerning the imbalance costs under Article 21 ECT.

539. Again, to determine whether the imbalance costs qualify as a taxation measure excluded from the purview of the ECT pursuant to Article 21(1) ECT, it shall be determined whether they satisfy the three-fold criteria enlisted in ¶ 520 above.

540. *First*, similar to the Administrative Management Fee, there is no dispute between the Parties that the imbalance costs, which were imposed by the Italian Electrical Energy Authority first in the 2012 Resolution 281 and subsequently in the 2015 Resolution 522, were mandatory or non-voluntary in nature. Indeed, the mandatory nature of this payment is evidenced from the language used in Resolution 522, which states that "[t]he production units fed by non-programmable renewable sources <u>must</u> be subject to regulation of imbalances".[550] (emphasis added)

541. *Second*, with respect to the absence of reciprocity requirement, the Tribunal finds significant overlaps in the situations of the Administrative Management Fee and the imbalance costs. For instance:

   (i) Imbalance costs constitute payments that are made in exchange for the dispatching services provided by Terna, which is the Italian system operator that manages the wholesale electricity market and fixes the prices.[551] Respondent has admitted the same in clear terms in its submissions and during the Hearing. As per Respondent,

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549 SoD, ¶ 168.

550 **CEX-230**, AEEG Resolution 522/2014/R/EEL.

551 Hr. Tr. Day 1, pp. 61(7)-61(19); *see also* SoD, ¶ 168.

imbalance costs were imposed "for the general mechanism of storage of electricity by Terna"[552] and thus "relate to the dispatching of energy . . . [which] is reserved to the State and granted in concession to Terna".[553] During the Hearing, Respondent confirmed that "imbalance costs are linked to the organisation of the supply of [photovoltaic] electricity into the national grid by Terna, which executes such activities in a regime of monopoly, and whose functions are of general interest."[554] Indeed, the language of Resolution 281 clearly confirms that the imbalances costs relate to "dispatching services".[555]

(ii) Further, imbalance costs are enlisted as "income from sales and services" in the balance sheets of GSE, and are subjected to corporate income tax and to ordinary VAT, just as any commercial income derived from services would be.[556] Similar to the Administrative Management Fee, imbalance costs would thus not fall within the jurisdiction of Italian tax courts for reasons mentioned in ¶ 534 above.[557] Respondent does not dispute any of this.

(iii) The Tribunal is not persuaded by Respondent's counter-arguments that there is no specific service that the photovoltaic plant operators obtain from Terna,[558] or that Terna has a monopoly over the dispatch services, and thus any fee paid in that regard should be considered as a fiscal measure.[559] As mentioned in ¶ 533 above, a reciprocal relationship based on services performed by a public institution such as Terna does not require that the said services be derived from a specific synallagmatic relation, or be specifically directed at certain photovoltaic plant operators. Further, the fact that Terna does not have a competitor also does not alter the nature of the

552 SoD, ¶ 168.

553 R-SoRj, ¶ 222(b).

554 Hr. Tr. Day 1, pp. 245(12)-245(16).

555 AEEG Resolution 281/2012/R/EFR, at 3 and 10.

556 **CEX-352**, GSE Reports and Financial Statements, 2012, pp. 75, 155-156; **CEX-353**, GSE Reports and Financial Statements, 2016, pp. 71-72, 146-150.

557 **CEX-354**, Italian Constitutional Court, Decision No. 335; **CEX-355**, Italian Constitutional Court, Decision No. 238.

558 R-SoRj, ¶ 223.

559 SoD, ¶ 170.

payment being made by photovoltaic plant operators in exchange of the services being performed by Terna.

542. In light of the above, the Tribunal concludes that imbalance costs cannot be considered as measures that are, or in any way relate to, taxes under Italian law, since they are predicated on a reciprocal relationship. This conclusion also finds support in the following passages from the award in *Greentech v. Italy* case:

> In reaching this conclusion, the Tribunal notes that the imbalance costs relate to electricity dispatching services, an identified service, and thus are not allocated to the State's general revenue. Further, Respondent did not deny Claimants' assertion that corporate income taxes and VAT were paid on amounts received from PV producers, that the AEEG did not categorize imbalance costs under the category of "taxes" but instead categorized them as "network and dispatching services", and that Italy has not otherwise treated imbalance costs as a tax. Taken together, these factors minimize the significance of Respondent's assertion that the mandatory nature of the charges make them similar to charges for municipal waste services, which themselves might not constitute a Taxation Measure under the ECT.[560]

543. Accordingly, Claimants' claims in relation to the imbalance costs are not excluded from the protection of the ECT pursuant to Article 21(1) ECT, and Respondent's jurisdictional objection in this regard fails.

544. On account of the above findings, the Tribunal need not examine the third criteria enlisted in ¶ 520 above, i.e., whether the imbalance costs qualify as a payment that are made as a contribution to public spending or public expenditure, and are generally intended for a public purpose. It suffices to state that the above findings regarding the absence of reciprocity requirement (¶¶ 541-542 above) are dispositive of this issue, even in respect of this third criteria.

d. Robin Hood Tax

545. The dispute between the Parties in respect of the Robin Hood Tax does not pertain to whether the said Tax qualifies as a taxation measure as per the criteria under Italian law

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[560] SoRy, ¶¶ 159-162; C-SoRj, ¶¶ 120-122; C-PHB, ¶ 39; *relying on* **CEX-188**, Fifth *Conto Energia* Decree, article 10.4; **CEX-227**, AEEG Resolution 281/2012/R/EFR, at 10; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶¶ 244, 251.

enlisted in ¶ 520 above, and/or any other criteria that may be relevant for the purposes of Article 21(7) ECT. For Respondent, the Robin Hood Tax is "unequivocally" a taxation measure.[561] Claimants, too, do not present any objections to the proposition that the Robin Hood Tax, which was imposed by Law No. 133/2008 on 6 August 2008 as a tax on windfall profits and later extended to photovoltaic plants by Law No. 148/2011 on 14 September 2011, was a taxation measure.

546. Instead, Claimants' opposition to Respondent's jurisdictional objection under Article 21(1) ECT is limited to the argument that their claim in these arbitration proceedings concerns only the propriety and implications of an Italian Constitutional Court's Decision No. 10/2015 concerning the Robin Hood Tax (see ¶ 244 in Section IV.F(4) above), and not the Tax itself. This Constitutional Court Decision No. 10/2015 declared the Legislative Decree No. 112/2008, upon which the Law No. 133/2008 was based, unconstitutional in part. The Constitutional Court Decision was applicable *ex nunc,* i.e., prospectively.[562] While, at this stage, it is not necessary or appropriate to revisit the precise motivations behind the Constitutional Court Decision No. 10/2015, it suffices to state that the two aspects that are disputed between the Parties in this regard are (i) firstly, whether the Decision should or should not have been applied *ex nunc*, instead of *ex tunc*, by the Constitutional Court; and (ii) secondly, whether the Constitutional Court invalidated the Robin Hood Tax for violation of the principle of equality in contributive capacity or was the finding of unconstitutionality influenced by the extension of the Tax to renewable energy facilities.

547. With respect to the above disputed issues about the Constitutional Court Decision No. 10/2015, Claimants' position is that none of these issues pertains to or implicates a taxation measure under Article 21(7) ECT, and thus Respondent's jurisdictional objection under Article 21(1) ECT must fail (see ¶ 496 above). To the contrary, Respondent contends that Claimants' characterization of their claims relating to the Robin Hood Tax, i.e., concerning the propriety of an *ex nunc* application of the Constitutional Court Decision and Italy's alleged refusal to reimburse the Robin Hood Tax that was wrongfully imposed on

561 SoD, ¶ 157.

562 **CEX-253**, Italian Constitutional Court Decision No. 10/2015, p. 16.

photovoltaic plants, would *de facto* go back to becoming a claim about the propriety of the taxation measure itself, i.e., the Robin Hood Tax (see ¶ 478 above).

548. For the purposes of Respondent's jurisdictional objection under Article 21(1) ECT, the Tribunal is only required to determine the Parties' disagreement about Claimants' characterization of their claim relating to the Robin Hood Tax. This entails, in particular, the question of whether Claimants' claim will inevitably require a determination of the propriety of the Robin Hood Tax itself.

549. Based on a review of the Parties' submissions, the Tribunal is convinced by Respondent's submission that the Tribunal's examination of Claimants' claim on the Robin Hood Tax, as presented by Claimants, "would go back to the evaluation of the substantive content of the Robin Hood Tax and become *de facto* a claim on the taxation measure itself."[563] Indeed, it is not possible to decide the two disputed issues emanating from the Constitutional Court's Decision No. 10/2015, mentioned in ¶ 546 above, without also determining, or at least addressing, the substantive propriety of the Robin Hood Tax itself and its subsequent extension to photovoltaic facilities.[564]

550. It is apparent from Claimants' own submissions on the merits that their claim relating to the Robin Hood Tax is not restricted only to the propriety and implications of the Constitutional Court Decision No. 10/2015. At the centre of Claimants' claim is their contention that the Constitutional Court Decision was directed at the unlawful application of the Robin Hood Tax to photovoltaic facilities.[565] Regardless of whether or not that was indeed one of the motivations behind the Constitutional Court Decision, in order to establish their claim, Claimants predicate their arguments on the merits on the impropriety of the Robin Hood Tax's extension to photovoltaic facilities. To this end, Claimants, *inter alia*, submit that they had legitimate expectations that the Robin Hood Tax would not be applied to renewable energy facilities. Once the Robin Hood Tax was so applied, these

563 R-SoRj, ¶ 191.

564 ; R-SoRj, ¶ 191.

565 SoRy, ¶ 147.

legitimate expectations were breached, resulting in a breach of the ECT.[566] In Claimants' own words:

> When Claimants first invested in Italy, they reasonably expected that the Robin Hood [T]ax would not apply to their plants. Italy had explicitly affirmed the exclusion of renewable energy producers from the Robin Hood [T]ax in a 2010 circular issued by the Italian Revenue Agency.
>
> However, in August 2011, Italy unexpectedly and arbitrarily broadened the scope of the Robin Hood [T]ax by extending it to all energy producers, including renewable energy producers, with a gross annual income of over [EUR] 10 million and taxable income of over [EUR] 1 million.
>
> . . . .
>
> [I]n June 2013, Italy again unexpectedly and arbitrarily extended the scope of the Robin Hood [T]ax by reducing the applicable income thresholds to gross annual income over [EUR] 3 million and taxable income over [EUR] 300,000. This resulted in the application of the Robin Hood [T]ax to Claimants' photovoltaic plants.[567]

551. The above arguments of Claimants evidence that in order to adjudicate Claimants' claim, the Tribunal will need to examine the nature of the Robin Hood Tax and whether it should have been extended to photovoltaic facilities. Accordingly, Claimants' characterization of their claim as relating only to the propriety and implications of the Constitutional Court Decision No. 10/2015 is contradicted by their own submissions on the merits. The Tribunal considers that any determination on the Constitutional Court Decision, which was a sequel to the imposition of the Robin Hood Tax, will implicitly entail a decision on the preceding incidence of the Robin Hood Tax itself. In this regard, the Tribunal agrees with Respondent's argument that "[i]t is not possible to separate the application of a decision regarding a tax from the same tax measure."[568]

552. Further evidence of the fact that Claimants' claim, in reality, relates to the propriety and application of the Robin Hood Tax and not the ensuing Constitutional Court Decision No. 10/2015, comes from Claimants' request for relief on this issue. Claimants request this Tribunal, as part of their damages claim, to compensate them for sums they paid to Italy

566 SoRy, ¶¶ 481-485.

567 SoC, ¶¶ 208-212.

568 Hr. Tr. Day 1, pp. 234(25)-235(4).

under an unconstitutional taxation regime. Thus, Claimants' requested relief on this issue directly relates to and requests the reimbursement of the Robin Hood Tax itself, and does not concern the Constitutional Court's Decision No. 10/2015 *per se,* which Claimants themselves laud as a correct decision, barring its *ex nunc* or prospective effect.[569] In light of this, Claimants cannot dissociate their claim, which they unsuccessfully attempt to root in the Constitutional Court Decision, from the underlying taxation measure at issue, i.e., the Robin Hood Tax.

553. Accordingly, the Tribunal finds that Claimants' claim concerning the Robin Hood Tax is a claim with respect to taxation measures. Therefore, Respondent's jurisdictional objection under Article 21(1) ECT succeeds, insofar as it concerns Claimants' claim relating to the Robin Hood Tax.

554. In light of the fact that none of the Parties disputes that the Robin Hood Tax and its imposition on the photovoltaic facilities is a taxation measure (see ¶ 545 above), the Tribunal need not separately examine whether the specific requirements for qualifying as a taxation measure under Article 21(7) ECT (see ¶ 520 above) are satisfied by the Robin Hood Tax. The above findings of the Tribunal about the nature and characterization of Claimants' claim on the Robin Hood Tax (see ¶¶ 547-553 above) are conclusively determinative of this issue.

e. Classification of Photovoltaic Plants as Immovable Property

555. With respect to the (re)classification of photovoltaic plants as immovable property, Claimants primarily take issue with the Circular No. 36/E of the Italian Revenue Agency dated 19 December 2013, but also more generally complain about the inconsistent positions adopted by the Italian Revenue Agency and Cadastral/Land Agency prior to 2013 in this regard (see Section IV.F(5) above). In its jurisdictional objection under Article 21(1) ECT, Respondent argues that Claimants guise their claims in these proceedings behind the issue concerning the classification of photovoltaic plants as immovable property, but the substance or "actual target" of their claims are the IMU and TASI Charges that are a consequence of such classification. In essence, classification of a property as immovable

569 See, *inter alia*, SoC, ¶ 214; SoRy, ¶¶ 484-485.

property allegedly subjects it to municipal charges on buildings and road maintenance known as IMU and TASI Charges, respectively, which are not applicable for movable property.

556. Thus, similar to the Robin Hood Tax, here too the principal dispute between the Parties on the jurisdictional issue under Article 21(1) ECT pertains to the characterization of Claimants' claims, i.e., whether they pertain only to the classification of photovoltaic plants as immovable property by the Italian Revenue Agency or in the process also implicate and require a determination on certain taxation measures. In other words, none of the Parties disputes that the IMU and TASI Charges qualify as taxation measures under the criteria in Italian law enlisted in ¶ 520 and/or under any other criterion that may be relevant for the purposes of Article 21(7) ECT. In the course of their submissions, both Claimants and Respondent refer to the IMU and TASI Charges as "taxes".[570] Accordingly, the Tribunal's findings below are limited to a determination of whether Claimants' claims pertaining to the classification of photovoltaic plants as immovable property, as characterized by them, are implicitly claims relating to taxation measures that fall beyond this Tribunal's jurisdiction.

557. Based on a review of the Parties' submissions, the Tribunal considers that Respondent has convincingly demonstrated that Claimants' claims concerning the classification of photovoltaic plants as immovable property are, in essence, claims relating to the underlying taxation measures, i.e., the IMU and TASI Charges. In this regard, Respondent correctly points out that the very nature of such a measure classifying any property as movable or immovable property has the function of defining the scope of taxation (see ¶ 479 above).

558. Therefore, notwithstanding Claimants' characterization of their claims in their arguments on jurisdiction, the Tribunal derives the real nature of Claimants' claims from their pleadings on the merits of the case. In these pleadings, Claimants themselves highlight that the reason they object to the classification of photovoltaic plants as immovable property in these proceedings relates directly to the imposition of the IMU and TASI Charges. In

570 See SoRy, ¶ 148 where, with reference to the IMU and TASI Charges, Claimants clarify that they "are not contesting the existence or application of those *taxes*" (emphasis added).

Claimants' words, "[t]he characterization of photovoltaic plants is important, because immovable and movable property are subject to different depreciation rates and thus different effective tax rates, as well as different municipal charges."[571] These municipal charges constitute the IMU and TASI Charges.[572] From the following passage of Claimants' submissions, it is evident that while they present their claims as being against only the "arbitrary and unfair" classification of photovoltaic plants as immovable property, at bottom, their complaint pertains to the fact that such a classification results in the charging of unwarranted municipal charges:

> The "consolidated" position from Italy's fiscal authority in 2013 was clearly arbitrary and unfair, as Claimants explained in their Statement of Claim. PV facilities – which can comprise panels installed on a residential rooftop – are clearly not themselves "immovable" real property that should be subject to municipal charges for services normally due on such property, including road maintenance and public lighting.[573]

559. Moreover, the fact that the IMU and TASI Charges lie at the centre of Claimants' claims is also reflected from the relief they request from this Tribunal in respect of this issue. While Italy reversed the classification of photovoltaic plants in 2016, classifying them as movable property again prospectively, Claimants take issue with the fact that the IMU and TASI Charges they paid since 2013 until 2016 were neither offset nor credited by Italy or its concerned authorities. Thus, Claimants' request for damages from this Tribunal includes a reimbursement of the IMU and TASI Charges that Claimants were charged from 2013 until 2016. In other words, Claimants' requested relief from this Tribunal on this issue relates only to these IMU and TASI Charges and does not relate to the classification of photovoltaic plants as immovable property *per se*, which in Claimants' own admission was rightly reversed by Italy in 2016.[574] This itself shows that Claimants' claims on the classification issue are directly related to these IMU and TASI Charges.

560. Therefore, the Tribunal finds that Claimants' claim concerning the classification of the photovoltaic plants as immovable property is a claim with respect to taxation measures,

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571 SoC, ¶ 218.

572 SoC, ¶ 219.

573 SoRy, ¶ 492.

574 See, *inter alia*, SoC, ¶ 222; SoRy, ¶¶ 493-494.

i.e., the IMU and TASI Charges. Consequently, Respondent's jurisdictional objection under Article 21(1) ECT succeeds, insofar as it concerns this claim.

561. Given that none of the Parties disputes that the IMU and TASI Charges are taxation measures (see ¶ 555 above), the Tribunal need not separately examine whether the specific requirements for qualifying as a taxation measure under Article 21(7) ECT (see ¶ 520 above) are satisfied by these Charges. The above findings of the Tribunal about the nature and characterization of Claimants' claim on the IMU and TASI Charges (see ¶¶ 556-560 above) are conclusively determinative of this issue.

f. Conclusion on Article 21 ECT

562. For the reasons discussed in the preceding sub-sections, the Tribunal concludes that Respondent's jurisdictional objection under Article 21(1) ECT succeeds in respect of Claimants' claims relating to the (i) Robin Hood Tax; and (ii) the classification of photovoltaic plants as immovable property. Therefore, the Tribunal does not have jurisdiction over these matters. On the remaining aspects, i.e., (i) the Administrative Management Fee; and (ii) the imbalance costs, Respondent's jurisdictional objection under Article 21(1) ECT fails, since these measures do not qualify as taxation measures.

(2) Exclusive Jurisdiction Clause in GSE Contracts

563. It is not disputed between the Parties that the GSE contracts were executed between GSE on the one side and the SPVs acquired by the First, Second or Third Claimants on the other side, as the case may be (see Section IV.E above). It is also not disputed between the Parties that Article 9 of each of the seven GSE contracts under the Second *Conto Energia* and Article 13 of the two GSE contracts under the Third *Conto Energia* relating to Rustico and Milana Plants contained an exclusive jurisdiction clause in favour of the Court of Rome, providing as follows:

> For any dispute arising out of or in any way connected to the interpretation and execution of this Agreement and the documents referred to therein, the Parties agree on the exclusive jurisdiction of the Court of Rome.[575]

564. The Tribunal notes that Respondent's translation of the above exclusive jurisdiction clause is at variance from Claimants', inasmuch as Respondent's translation of the first part of the clause provides: "[f]or any dispute arising out of, or in any way related to the interpretation and/or execution of this Convention and the acts it refers to …"[576] However, the Tribunal also notes that throughout the Hearing, Respondent relied on Claimants' translation of the GSE contracts.[577] Accordingly, without prejudice to the accuracy of the Parties' respective translations, the Tribunal's findings below shall also rely on Claimants' translation of the exclusive jurisdiction clause in the GSE contracts. In any event, the Tribunal considers that its conclusions would not be any different if Respondent's translation were to be used.

565. The disputed issues between the Parties pertain to (a) the fact that Claimants were not party to the GSE contracts and the implications thereof; and (b) the nature of the claims brought by Claimants before this Tribunal under Article 26 ECT. The Tribunal shall address these disputed issues in turn below.

a. Implications of Claimants and Respondent not being party to the GSE Contracts

566. In relation to item (a) in ¶ 565 above, the Tribunal is persuaded by Claimants' argument that since Claimants were not party to any of the GSE contracts, the exclusive jurisdiction clauses in question do not apply to them. In fact, given that Respondent was also not party to any of the GSE contracts, the exclusive jurisdiction clauses do not apply to Respondent either. Accordingly, these exclusive jurisdiction clauses could not be resorted to for resolving any disputes between Claimants and Respondent. Instead, these clauses could only be relied upon for disputes arising between GSE and whichever one of Claimants'

575 **CEX-293**, Santoro GSE Agreement n. I08F13381307, Article 9; **CEX-294**, San Marco GSE Agreement n. I08F15697007, Article 9; **CEX-295**, Lenare GSE Agreement n. I0F15697307, Article 9; **CEX-306**, Campania plant GSE Agreement n. I08F13988007, Article 9; **CEX-311**, Monaci GSE Agreement n. I0F17928907, Article 9; **CEX-329**, Rustico GSE Agreement n. O03M27266207, Article 13; **CEX-330**, Milana GSE Agreement n. O03M28467707, Article 13; **CEX-341**, Rovigo GSE Agreement n. T03F13776207, Article 9; **CEX-343**, Fiumicino GSE Agreement n. I08F19354507, Article 9.

576 SoD, ¶ 178.

577 Hr. Tr. Day 2, pp. 115(4)-115(6).

SPVs is a party to the relevant contract. Therefore, the Tribunal finds that the presence of the exclusive jurisdiction clauses in the GSE contracts does not *per se* inhibit this Tribunal's jurisdiction to resolve the dispute between Claimants and Respondent, pursuant to Article 26 ECT.

567. In this regard, Article 26(2)(b) ECT assumes relevance. The Tribunal agrees with Respondent that this provision indicates that the ECT is agreeable to dispute resolution by alternative methods of dispute resolution than international arbitration (see ¶ 484 above). However, Article 26(2)(b) ECT limits this alternative option to resolve disputes "in accordance with any applicable, previously agreed dispute settlement procedure". Given that Claimants and Respondent were not parties to the GSE contracts, the exclusive jurisdiction clauses therein are neither "applicable" between them, nor do they qualify as "previously agreed" dispute settlement procedures under Article 26(2)(b) ECT.

568. Further, in respect of the case law relied upon by the Parties, the Tribunal notes, as rightly pointed out by Claimants (see ¶ 498 above), that two of the three cases relied upon by Respondent in support of its arguments were factually distinct from the present case. Those cases, i.e., *SGS v. Philippines* and *BIVAC v. Paraguay,* involved contracts (containing exclusive jurisdiction clauses) that were signed by the claimant(s) and the respondent-State (or the concerned Ministry of the respondent-State) in those cases.[578] This, as mentioned in ¶ 566 above, is not the situation in the present case.

569. The third case relied upon by Respondent, i.e., *Aguas del Tunari v. Bolivia,* saw the tribunal denying respondent-State's jurisdictional objection, while recognizing that "in order for the [Concession] raised by the Respondent to be in conflict with this Tribunal's exercise of jurisdiction, that [Concession] must both deal with the same matters and Parties".[579] Along the same lines, most recently, in *Greentech v. Italy,* which Claimants correctly point out was a case factually close to the present case (see ¶ 498 above), the

[578] **RLA-002**, ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶¶ 13-14; **RLA-004**, ICSID Case No. ARB/07/9, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, ¶¶ 7.

[579] **RLA-003**, ICSID Case No. ARB/02/3, *Aguas del Tunari S.A. v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶¶ 111, 114.

tribunal rejected a similar jurisdictional objection on the ground that claimants there were not party to the GSE contracts.[580]

570. Accordingly, case law confirms this Tribunal's understanding that the exclusive jurisdiction clauses in the GSE contracts do not inhibit this Tribunal's jurisdiction under the ECT, since the GSE contracts were not signed and executed between Claimants and Respondent (see ¶ 566 above). The Tribunal's understanding is not affected by Respondent's attempt to distinguish between the ECT and the GSE contracts on the ground that the GSE contracts were specifically negotiated documents and would prevail over the generic expression of consent in the ECT, pursuant to the doctrine of *generalia specialibus non derogant* (see ¶ 484 above). Notwithstanding the merit of this argument, the fact that the GSE contracts were specifically negotiated between the parties to those contracts does not vest any procedural right or obligation upon entities that were not parties to those contract, such as Claimants or Respondent, to resolve disputes between them under the contractual exclusive jurisdiction clauses.

b. The Nature of the Claims brought by Claimants before this Tribunal

571. In relation to item (b) in ¶ 565 above, i.e., the nature of the claims brought by Claimants before this Tribunal under Article 26 ECT, the Tribunal is persuaded by Claimants' submission that they are not seeking a resolution of a breach of contract claim in these ECT proceedings. In fact, Respondent does not directly contest that Claimants' allegations in these proceedings do not relate to a breach of the GSE contracts. Instead, Respondent's submission is that the claims that Claimants are raising in these proceedings, pertaining to the incentives received by investors under the *Conto Energia* Decrees, are also covered by the broadly worded exclusive jurisdiction clauses in the GSE. This overlap, as per Respondent, renders Claimants' treaty claims in these proceedings beyond this Tribunal's jurisdiction and/or inadmissible (see ¶ 482 above).

572. There is no doubt that since Claimants are not party to the GSE contracts, they cannot claim a breach of those contracts before this Tribunal. Indeed, the Tribunal need not go any

580 **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶¶ 220-221.

further in its considerations on this issue. However, for the sake of completeness, the Tribunal shall briefly address Respondent's submission relating to the potential overlap between the scope of the present dispute and a theoretical dispute that can be initiated under the exclusive jurisdiction clauses in the GSE contracts.

573. In this regard, the Tribunal is mindful that the same set of facts and circumstances can simultaneously give rise to claims for breach of municipal law brought before national courts and claims for breach of a treaty brought before an international tribunal. However, with respect to this potential overlap of claims, the Tribunal agrees with findings of the *ad hoc* annulment committee in *Vivendi I v. Argentina* and the other awards and decisions relied upon by Claimants. In each of these cases, it was found that when the "essential" or "fundamental basis of a claim" is a breach of a treaty, an international tribunal constituted under that treaty can exercise its jurisdiction over such a claim.[581] Even the cases relied upon by Respondent agree with this general principle.[582]

574. In the instant case, Claimants' claims, while touching upon the GSE contracts, in reality deal with a number of other factual and regulatory aspects beyond those contracts. To name a few, Claimants' claims under Article 10(1) ECT deal with aspects such as the alleged application of Administrative Management Fee to photovoltaic plants, the alleged imposition of "imbalance costs" on photovoltaic plants, and the alleged remodulation of the entire *Conto Energia* framework with the *Spalma-incentivi* Decree.

575. Therefore, it is apparent that Claimants' claims in these proceedings address a number of Respondent's alleged actions or inactions going beyond the GSE contracts, and present them as violations of Respondent's international obligations under Article 10(1) ECT. In other words, Claimants' claims trigger Respondent's obligations under international law.

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581 **CL-132**, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ¶¶ 98-101; **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶¶ 475-480; **CL-85**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶ 53; **CL-135**, *Tenaris S.A. and Talta Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, January 29, 2016, ¶ 306.

582 **RLA-002**, ICSID Case No. ARB/02/6, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 158; **RLA-004**, ICSID Case No. ARB/07/9, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, Decision on Objections to Jurisdiction, 29 May 2009, ¶ 127.

These claims do not require this Tribunal to make a finding regarding either a breach of the GSE contracts, not least because Claimants or Respondent are not parties to them, or a violation of Italian law. Thus, the Tribunal considers that the claims that are at issue in these proceedings are fundamentally and essentially in the nature of breach of treaty claims, i.e., claims that implicate an alleged breach of treaty obligations, particularly those under Article 10(1) ECT.

576. The fact that the factual context behind some or all of these claims may also theoretically be presented before the Court of Rome under the exclusive jurisdiction clauses in the GSE contracts does not come in the way of the existence or the exercise of this Tribunal's jurisdictions over Claimants' claims in these proceedings. In this connection, the Tribunal agrees with the findings of various tribunals, relied on by Claimants,[583] and in particular the following extract from the award in *Crystallex v. Venezuela:*

> As explained in *Vivendi I*, the same set of facts can give rise to different claims grounded on differing legal orders, i.e. the municipal and the international legal orders. However, an exclusive jurisdiction clause in relation to disputes concerning possible *contractual* breaches, such as Clause 19 of the MOC, may not divest an international tribunal of its jurisdiction under an international treaty in relation to possible *treaty* breaches.[584] (emphasis in the original)

577. The above considerations apply equally to the jurisdiction of this Tribunal and the admissibility of Claimants' claims. In conclusion, the Tribunal finds that the presence of the exclusive jurisdiction clauses in the GSE contracts does not take away this Tribunal's jurisdiction under Article 26 ECT, nor does it render Claimants' claims under the ECT inadmissible. Therefore, Respondent's objections to this end are rejected.

(3) The Requirement of Amicable Settlement under Article 26(1) ECT

578. This jurisdictional objection, which Respondent also raises as a challenge to the admissibility of Claimants' claims, relates to the requirement of amicable settlement of the disputes prior to the initiation of the arbitration proceedings. This requirement emanates from Articles 26(1) and 26(2) ECT (quoted in ¶ 287 above), which provide that disputes

583 **CL-85**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶ 53.

584 **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 480.

between the investor(s) and the State concerning an alleged breach of an obligation of the former under Part III "shall, if possible, be settled amicably", and if the disputes "cannot be settled [amicably] within a period of three months from the date on which either party to the dispute requested amicable settlement", the investor(s) may choose to initiate arbitration.

579. From the aforementioned regime, three conditions are required to be met for this requirement of amicable settlement to be satisfied: (i) there shall be an attempt to settle the disputes amicably; (ii) the disputes for which amicable settlement is sought are the disputes ultimately referred to arbitration; and (iii) arbitration cannot be initiated until three months have expired from the date on which the request for amicable settlement was provided by any of the disputing parties. Each of these conditions appears to be mandatory in nature.

580. Respondent's jurisdictional and admissibility objections do not dispute that the first and the third of the above three conditions were satisfied.

581. Claimants sent a "Notice of Legal Dispute Arising under the Energy Charter Treat and Offer of Amicable Settlement" on 4 May 2016 to various Ministries of the Italian Republic.[585] Respondent does not dispute that this notice qualified as an attempt to settle the disputes amicably (see ¶ 486 above). Further, Claimants filed their RfA on 26 August 2016 (see ¶ 7 above), which was more than three months expired since the letter of 4 May 2016 was sent to Respondent. Thus, there is no dispute that the third condition enlisted in ¶ 579 above was also satisfied.

582. Respondent objects to the satisfaction of the second requirement enlisted in ¶ 579 above. Specifically, as per Respondent, Claimants raised two new claims in these arbitration proceedings, which were not mentioned in Claimants' letter of 4 May 2016 to Italy. The new claims that Respondent's jurisdictional and admissibility objections pertain to are the claims relating to (i) the *ex nunc* application of the Constitutional Court Decision No. 10/2015 relating to the Robin Hood Tax, and Italy's failure to reimburse the taxes wrongly imposed; and (ii) Italy's failure to reimburse or offset payments made by Claimants as a result of the wrongful classification of photovoltaic plants as immovable property (the

585 **CEX-7**, Notice of Legal Dispute Arising Under the Energy Charter Treaty and Offer of Amicable Settlement.

IMU and TASI Charges). For these two claims, due to the incongruity between Claimants' letter of 4 May 2016 and its subsequent submissions in these arbitration proceedings, Respondent submits that the requirement of amicable settlement under Article 26 ECT has not been satisfied (see ¶¶ 487 above).

583. However, the Tribunal has already found in Section VII.D(1) above that it does not have jurisdiction over the aforementioned two claims, since they qualify as "taxation measures" under Article 21 ECT (see ¶¶ 553 and 560 specifically). Having already denied jurisdiction over these two claims on other grounds, the Tribunal no longer considers it appropriate or necessary to examine Respondent's additional jurisdictional and admissibility objections pertaining to the requirement of amicable settlement. Specifically, it is no longer required to compare the scope of Claimants' letter of 4 May 2016 with its submissions in these arbitration proceedings to determine whether the second requirement enlisted in ¶ 579 above was satisfied for these two claims. Accordingly, this issue is rendered moot by the Tribunal's previous findings.

(4) Conclusion on Other Issues of Jurisdiction and Admissibility

584. In light of the reasons discussed in the preceding Sections, the Tribunal concludes that Respondent's jurisdictional objections and its objections relating to the admissibility of Claimants' claims must be rejected, except in respect of Claimants' claims relating to the (i) Robin Hood Tax; and (ii) the classification of photovoltaic plants as immovable property. These two issues fall outside the Tribunal's jurisdiction for being "taxation measures" under Article 21 ECT. The remainder of the disputed issues between the Parties fall within the Tribunal's jurisdiction, and Claimants' claims in those respects are not inadmissible.

VIII. RESPONDENT'S BREACH OF ANY OBLIGATIONS UNDER THE ECT OR INTERNATIONAL LAW

585. Claimants allege that Respondent breached its obligations under Article 10(1) ECT on three counts. First, Claimants allege that Respondent failed to accord to its investments fair and equitable treatment, as per the first and second sentences of Article 10(1) ECT.

Second, Claimants allege that Respondent impaired Claimants' investments through unreasonable and discriminatory measures, and thereby breached the so-called "impairment clause" in the third sentence of Article 10(1) ECT. Third, Claimants claim that Italy failed to observe all its obligations entered into with respect to Claimants' investments, and thereby breached the so-called "Umbrella Clause" or "observance of undertakings" clause in the fifth sentence of Article 10(1) ECT.

586. The Tribunal shall first reproduce the Parties' submissions on these three allegations in turn, following which it shall lay down its considerations on each of them.

A. RELEVANT TREATY PROVISIONS

587. Article 10(1) ECT provides as follows:

> **Article 10: Promotion, Protection and Treatment of Investments**
>
> (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

B. ARTICLE 10(1) ECT: FAIR AND EQUITABLE TREATMENT

(1) Claimants' Position

588. According to Claimants, Respondent has violated its obligation to provide fair and equitable treatment ("**FET**") to Claimants' investment in the following three distinct ways: (i) by undermining Claimants' legitimate expectation of predictable and stable support for their photovoltaic facilities; (ii) by failing to treat Claimants' investments transparently and

consistently; and (iii) by failing to act in good faith towards Claimants and their investments.[586]

a. The Legal Standard

589. Claimants contend that the FET standard is to be applied in accordance with the treaty's object and purpose. In this connection, Claimants submit that the "fundamental aim" of the ECT is "to strengthen the rule of law on energy issues", and in turn to catalyse economic growth by promoting long-term cooperation. Claimants further contend that the ECT Contracting Parties accepted limitations on their power to alter the legislative or regulatory framework governing an investment when their acts have given rise to legitimate expectations of stability on the part of foreign investors.

590. Further, Claimants do not endorse the view that the FET standard requires a fundamental or radical change in the regulatory regime, or that the host State's conduct should be manifestly unfair or unreasonable.[587] In this regard, they also dispute the articulation of the FET legal standard by the tribunal in *AES v. Hungary*, characterizing it as an "outlier" for being closer to the customary international law minimum standard, which is not applicable under Article 10(1) ECT.[588]

(i) Legitimate Expectations

591. Claimants contend that the protection of legitimate expectations is one of the "major components" of the FET standard.[589]

592. According to Claimants, such legitimate expectations can be created through, both, explicit and implicit promises, assurances or guarantees, and even by the overall circumstances

[586] SoC, ¶ 252.

[587] SoC, ¶ 251; Hr. Tr. Day 1, pp. 89:20-90:2; *relying on* **CL-45**, *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013, ¶ 942; **CL-48**, Energy Charter Secretariat, "An Introduction to the Energy Charter Treaty" in The Energy Charter Treaty and Related Documents (2004), at 14.

[588] Hr. Tr. Day 4, pp. 198:5-200:10; C-RPHB, ¶ 29; *distinguishing* **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award.

[589] SoC, ¶¶ 253-254, *relying on* **CL-52**, *EDF (Services) Limited v. Romania*, ICSID Case no. ARB/05/13, Award, October 8, 2009, ¶ 216*;* **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, March, 17, 2006, ¶ 302*;* **CL-54**, *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April, 30, 2004, ¶ 98*;* **CL-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154.

surrounding an investment. In this regard, Claimants rely on investment arbitration case law, particularly the *Parkerings v. Lithuania* and *Total v. Argentina* cases, to contend that explicit promises of the host State include: (i) the legal framework of the host State at the time the investor made its investment; (ii) contractual undertakings by the host State; (iii) public statement or declarations by the host State; and (iv) State conduct and policy goals. The key question, as per Claimants, is whether the host State through any of the above forms of conduct as induced investments.[590]

593. Claimants also contend that it is only in the absence of specific promises in contracts or otherwise that the investors' alleged expectations are required to be balanced against the host State's regulatory authority. On this basis, Claimants seek to distinguish the various cases relied upon by Respondent and the cases relating to the Spanish renewable energy framework, on the ground that none of those cases involved specific commitments, either by way of a contract or otherwise, regarding the investments in question, as the present case allegedly does. [591]

594. For Claimants, legitimate expectations do not, however, indispensably require specific representations or guarantees from the host State. Such expectations can be inferred from promises or representations in framework legislation. In any event, Claimants contend that in the present case legitimate expectations were created by the promises in the overall

[590] SoC, ¶¶ 255-264, Hr. Tr. Day 1, pp. 83:11-85:14; Hr. Tr. Day 1, pp. 86:23-87:7; *relying, inter alia, on* **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 331*;* **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶ 669*;* **CL-60**, *Enron Corporation Ponderosa Assets, L.P. v. Argentina,* ICSID Case. No. ARB/01/3, Award, May, 22, 2007, ¶¶ 260-266; **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶¶ 130-133; **CL-63**, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, September 5, 2008, ¶ 261*;* **CL-47**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 119; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, Sept., 12, 2014, ¶ 563.

[591] SoRy, ¶¶ 364-369; Hr. Tr. Day 1, pp. 88:25-89:16; **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶ 669; *and distinguishing* **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award; **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012.

regulatory framework and by specific commitments in the GSE tariff confirmation letters and/or contracts.[592]

595. Furthermore, while Claimants admit the broad proposition that investors' legitimate expectations should be assessed at the time of investment, they submit that limiting the investors' legitimate expectations only to rights that have been "crystallised" at the time of the investment would be inappropriate. According to Claimants, investment arbitration case law recognizes that an examination of investors' legitimate expectations is to be grounded on the overall legal order or conditions offered by the host State, and need not focus on rights, contractual or otherwise, that have been formally crystallized at the date of the investment. Accordingly, legitimate expectations arising after the date of the investment, in the form of crystallized rights have also been respected by arbitral tribunals.[593] Moreover, as per Claimants, such a limitation to crystallized rights would create a distinction between investors in development projects and subsequent acquirers of the same projects, which distinction would be inconsistent with the ECT, transparency and economic rationality.[594] Thus, Claimants' contention is that even absent the crystallised contractual rights, statutory regulatory frameworks can also create legitimate expectations.[595]

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592 C-RPHB, ¶¶ 22-29; Hr. Tr. Day 4, pp. 204:2-206:5; *relying on* **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶¶ 360, 366, 399.

593 C-PHB, ¶¶ 62-67; *relying on* **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, Dec. 23, 2018, ¶¶ 131-142; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶¶ 154, 165; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶¶ 92-95, 344, 362, 512; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, ¶¶ 120-121; **CL-193**, *Kardassopoulos and Ron Fuchs v. Georgia*, Award of March 3, 2010, ¶ 441.

594 C-PHB, ¶¶ 68-71, 87; C-RPHB, ¶¶ 46-49; *relying on* **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 557; **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April8, 2013, ¶¶ 542-544; **CL-185**, U. Kriebaum; C.H. Schreuer; "At What Time Must Legitimate Expectations Exist?", A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought, TDM 1 (2012), p. 274, available at: https://www.transnational-disputemanagement.com/downloads/tw-liberamicorum.pdf.

595 Claimants' Comments on the *Belenergia S.A. v. Italy* Award, 13 September 2019, ¶ 10; *relying on* **CL-196**, *Cube et al. v. Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum, Feb. 19, 2019; **CL-51**, *El Paso Energy v. Argentina*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011; **CL-119**, *9Ren v. Spain*, Award; **CL-169**, *Antin v. Spain*, ICSID Case No. ARB/13/31, Award.

596. In this connection, Claimants also submit that investments should be considered as a process, and not as a one-stop occurrence. To this end, Claimants rely on the broad definition of "Investment" in the ECT (including the definition of "making of investments" in Article 1(8) ECT), and submit that the investment is a complex process involving multiple steps that must be viewed as part of an integrated whole.[596] Further, they also criticize the *CEF v. Italy* tribunal's restrictive understanding of legitimate expectations standard as covering only "crystallised rights" on the date of the first investment in that case, as opposed to treating the investment as a multi-staged process.[597]

(ii) Transparency and Consistency

597. Additionally, according to Claimants, a State's duty of transparency and consistency is another distinct facet of the FET standard, separate from the obligation to preserve investors' legitimate expectations.[598]

598. It is Claimants' position that this duty of transparency and consistency requires the absence of any ambiguity, i.e., it, *inter alia*, requires (i) the legal framework for the investor's operations to be readily apparent at the outset of the investment; (ii) the State to correct or clarify uncertainties that develop in a regime; (iii) the State to adequately inform investors regarding possible changes to a legal regime to enable the investor to plan accordingly; and

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596 C-PHB, ¶¶ 81-87; *relying on* **CL-185**, U. Kriebaum; C.H. Schreuer; "At What Time Must Legitimate Expectations Exist?", A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought, TDM 1 (2012), pp. 269-271, available at: https://www.transnational-disputemanagement.com/downloads/tw-liberamicorum.pdf; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, May 16, 2018, ¶¶ 344, 362, 93; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 120-21; **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April8, 2013, ¶¶ 542-544; **CL-193**, *Kardassopoulos and Ron Fuchs v. Georgia*, Award of March 3, 2010, ¶ 441.

597 Claimants' Comments on *CEF Energia B.V. v. Italy* (SCC Arb. No. 2015/158), 20 March 2019.

598 SoC, ¶¶ 277-278; SoRy, ¶¶ 370-371; *relying, inter alia, on* **CL-49**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, ¶ 570; **CL-66**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010, ¶ 284; **CL-60**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May, 22, 2007, ¶¶ 267-268; **CL-68**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007 ¶ 250; **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 131; **CL-56**, *Occidental Exploration and Production Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, July 1, 2004 ¶ 185; **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶ 872.

(iv) the State to consistently apply the legal framework or rules governing an investment.[599]

(iii) Good Faith

599. Regarding the good faith obligation of a State under the FET standard, Claimants contend that it entails "a sincere intention to deal fairly with others". Claimants rely on investment arbitration case law to contend that the duty of good faith includes a duty to treat investors in an "even-handed and non-discriminatory" manner. Further, as per Claimants, reliance on internal structure to excuse non-compliance with contractual obligations could also amount to a violation of good faith. In this connection, Claimants contend that the FET standard "imposes obligations beyond customary international requirements of good faith treatment".[600]

b. Italy's Alleged Breach of the FET Standard

(i) Legitimate Expectations

600. Claimants contend that Italy breached the FET standard under the ECT by violating Claimants' legitimate expectations of predictable and stable support for their photovoltaic facilities.

Basis of Claimants' Legitimate Expectations

601. According to Claimants, their legitimate expectations regarding the level of support that would be afforded to their photovoltaic facilities in Italy was based on the following factors:[601]

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599 SoC, ¶¶ 279-280; *relying, inter alia, on* **CL-71**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB/96/3, Award, Aug. 30, 2000, ¶ 76; **CL-73**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010, ¶ 285; **CL-54**, *Tecmed Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154; **CL-74**, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/07, Award, May 25, 2004, ¶ 165.

600 SoC, ¶¶ 286-287; *relying, inter alia, on* **CL-75**, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, ¶¶ 298-299; **CL-53**, *Saluka Investments B.V. v. The Czech Republic*, Partial Award, March 17, 2006, ¶¶ 303-307; **CL-73**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, Nov. 12, 2010, ¶ 300; **CL-77**, *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, ¶ 156.

601 SoC, ¶¶ 267-271; C-RPHB, ¶¶ 25, 30.

(i) Respondent's policy goals, which as per Claimants, created reasonable expectations of stability. According to Claimants, the fundamental purpose of Respondent's support framework was to encourage substantial investment in the photovoltaic sector and ensure that Respondent would meet binding EU targets for renewable energy;[602]

(ii) The five *Conto Energia* Decrees enacted by Respondent from 2005 to 2012, containing explicit promises to investors that the support that they would receive through the *Conto Energia* incentives and other elements of the regime would remain constant for 20 years;[603]

(iii) GSE's tariff confirmation letters and the GSE contracts entered into with respect to each photovoltaic plant receiving the tariffs, which expressly confirmed that the tariff rate granted to a particular facility would be applicable for a period of 20 years. Claimants submit that the *Conto Energia* Decrees themselves did not automatically convey a specific right on any particular investor. Rather, according to Claimants, the specific rights emanated from tariff confirmation letters sent by GSE confirming the operator's right to receive tariff at a fixed rate for 20 years, and subsequently, from the "contractual relationship" with the GSE that was created by contracts entered into with the plant operators. Claimants rely on the opinion of their expert, Professor Antonio D'Atena to contend that the GSE contracts were "individual and actual measures", on which investors' "legitimate expectations" of fixed tariffs for 20 years were based;[604]

(iv) The numerous public statements made by Respondent's officials confirming the stability of the incentive rates and their fixed 20 year duration, specifically, the statements of the Italian Minister of Environment confirming that "the system

[602] **CEX-24**, EC Directive 2001/77/EC; **CEX-115**, EC Directive 2009/28/EC.

[603] SoRy, ¶¶ 212-218.

[604] SoRy, ¶¶ 223-229; Supplementary Opinion of Professor Antonio D'Atena, Mar. 19, 2018 ("**Second D'Atena Opinion**"), Section 2.2.2.

guarantees a certain income for 20 years for those who produce electricity from solar panels";[605]

(v) The confirmation by Respondent's agencies at every level of the Government, including the Ministries of Environment and Economic Development, the Italian Electrical Energy Authority, as well as municipal, provincial, and regional authorities, and even the GSE, regarding the fundamental aspects of constant tariff rates and fixed duration of the *Conto Energia* regime to investors.[606]

602. Claimants contend that Respondent's (i) explicit promises of fixed incentive tariff to be paid for a duration of 20 years; (ii) policy goals of encouraging photovoltaic investment and ensuring that the photovoltaic facilities would be competitive with other types of electricity producers in the State; and (iii) requirement to meet its domestic and international energy target, formed the basis for Claimants' investment in Italy.[607]

603. Claimants further dispute Respondent's assertion that no legitimate expectation regarding a fixed tariff rate for a 20 year period can be derived from the *Conto Energia* Decrees as the underlying legislative framework surrounding the Decrees only promised investors a "fair return" on their investment. Claimants contend that the underlying legislative framework to the *Conto Energia* Decrees, namely, Legislative Decrees 387/2003 and the Romani Decree explicitly instructed the relevant Ministries to establish specific rates for various types of facilities, which according to Claimants, was done in the *Conto Energia* Decrees.[608] Claimants submit that these Legislative Decrees promised fair remuneration to investors, which Respondent incorrectly interprets to mean "fair return".[609]

The Timing of Claimants' Investment made in reliance of Legitimate Expectations

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605 SoC, ¶¶ 269-270; *relying, inter alia, on* **CEX-67**, Statement from Minister for the Environment, Land and Sea, Alfonso Pecoraro Scanio, pamphlet called *"Il Sole In Casa"*.

606 SoRy, ¶¶ 232-233, *relying, inter alia, on* **CEX-42**, GRTN, Presentation "GRTN, the Italian Body who will manage photovoltaic system"; **CEX-43**, GRTN Presentation "Incentivazione degli impianti alimentati da fonti rinnovabili," Padova University **CEX-45**, GRTN Presentation "Le attività del GRTN per le fonti rinnovabili"..

607 SoC, ¶¶ 271-272; C-RPHB, ¶¶ 30-31.

608 SoRy, ¶¶ 252-262.

609 SoRy, ¶¶ 263-273.

604. Although Claimants began investing in Italy before many of their plants formally received the GSE letters or contracts, Claimants submit that this fact should not impact the Tribunal's determinations on Claimants' legitimate expectations from a factual or legal standpoint. These determinations should be common for all of Claimants' photovoltaic plants, regardless of the timing of investment in each of them.[610]

605. According to Claimants, even though Italy's offer to grant incentive tariffs had not yet crystallized into enforceable rights for some of the plants that Claimants invested in, Claimants' reliance on the conditions offered by Italy when they acquired their shares for these plants should nonetheless be protected as legitimate expectations. These conditions offered by Respondent entailed the performance of subsequent acts by Respondent that would eventually entitle all of Claimants' plants to receive the tariffs upon entry into operation. Claimants also dispute, from a legal and factual standpoint, Respondent's submission that there was no discussion between Italian authorities and Claimants for their individual investments, and thus, there could be no specific undertaking or promises that Italian authorities made to Claimants (see ¶ 641 below).[611]

606. Claimants, in any event, submit that the effective date when the tariff rights crystallised for each of Claimants' plants was the date of entry into operation of the concerned plant. That is how the "effective date" of the GSE contracts was stipulated, and consequently the GSE contracts executed after a plant's entry into operation backdated the payment of tariffs to the effective date. As part of this "integrated and sequential" regulatory framework, Claimants characterise the delay between the entry into operation of a plant and the receipt of the tariff confirmation letters or the GSE contracts as "bureaucratic delay" that had no material impact on tariff payments.[612]

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[610] C-PHB, ¶¶ 42, 46 *et seq.*

[611] C-PHB, ¶¶ 57-67; C-RPHB, ¶¶ 33-35.

[612] C-PHB, ¶¶ 72-80; *relying, inter alia, on* **CEX-293**, Santoro GSE Agreement n. I08F13381307; **CEX-294**, San Marco GSE Agreement n. I08F15697007; **CEX-295**, Lenare GSE Agreement n. I0F15697307; *see* SoC, ¶¶ 150-152; **CEX-306**, Campania plant GSE Agreement n. I08F13988007; **CEX-311**, Monaci GSE Agreement n. I0F17928907; **CEX-329**, Rustico GSE Agreement n. O03M27266207; **CEX-330**, Milana GSE Agreement n. O03M28467707; **CEX-341**, Rovigo GSE Agreement n. T03F13776207; **CEX-343**, Fiumicino GSE Agreement n. I08F19354507.

607. Furthermore, Claimants also submit that the relevant time of investment in the present case should be considered as the time when each plant's tariff rights crystallized and not the time of the share acquisition. In the present case, Claimants' investments, in their submission, comprise, *inter alia,* (i) their shares in the companies or SPVs operating the photovoltaic plants; (ii) those companies' claims to money pursuant to the *Conto Energia* regime; and (iii) their claims to performance pursuant to the GSE contracts. Claimants also support their submission in this regard by emphasising that the Framework Agreement, which was the basis for Claimants' parent joint venture (see ¶¶ 184-185 above), envisaged the investments to be structured such that the payments would be made in a stage-wise manner in three milestones. Since the majority of the payments were reserved until after the plants would enter into operation, the time of the share acquisition would not function as the relevant time of investment in this case. Instead, the most relevant time for considering would be the time for entry into operation of each plant.[613]

608. Moreover, Claimants dispute Respondent's submission that Claimants did not exercise sufficient due diligence prior to investing in the Italian photovoltaic market, on the grounds that reasonable due diligence suffices to meet the standard of due diligence required, and that Respondent has not been able to establish that such reasonable due diligence would have revealed the possibility regulatory change of which Claimants complain in these proceedings. As per Claimants, the due diligence they conducted prior to investing "far exceeds" the standard of reasonability (see, in this regard, Sections IV.E(2) and IV.E(3) above).[614]

Frustration of Claimants' Legitimate Expectations by Italy

609. It is Claimants' case that Respondent breached Claimants' legitimate expectations regarding the fixed duration of the *Conto Energia* tariffs and the stable economic support to be granted to Claimants' photovoltaic facilities, by implementing the following specific

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613 SoC, ¶ 31; RfA, ¶ 68; C-PHB, ¶¶ 81-87; *relying on* **CEX-346**, Framework Agreement, Articles 2 and 3, Exhibit D.

614 C-RPHB, ¶¶ 41-45; *relying on* **CL-119**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. the Kingdom of Spain*, SCC Arbitration (2015/063), Final Award, Feb. 15, 2018, ¶ 679; Claimants' Closing Presentation, slide 12; *disputing Respondent's reliance on* **CEX-322**, Gianni, Origoni, Grippo & Partners law firm report "Legal Due Diligence Report on Photovoltaic Projects in the Sicily Region Project Milana - Project Rustico", p. 2.

measures: (i) the imposition of the retroactive Administrative Management Fee on all existing photovoltaic facilities through the enactment of the Fifth *Conto Energia* Decree (see Section IV.F(1) above); (ii) the creation of a requirement for photovoltaic producers to pay "imbalance costs" (see Section IV.F(3) above); and (iii) the enactment of the *Spalma-incentivi* Decree which forced Claimants to accept a reduction of the tariff rates granted under the *Conto Energia* regime (see Section IV.G above).[615]

610. Claimants contend that the *Spalma-incentivi* Decree was the "most egregious measure" carried out by Respondent against the photovoltaic investors, as it both reduced and delayed, retroactively, the constant tariffs that Respondent had generated to photovoltaic investors under the five successive *Conto Energia* Decrees for a fixed period of 20 years.[616] Claimants dispute Respondent's assertion that the *Spalma-incentivi* Decree was not a retroactive measure because it only reduced tariffs to be paid in the future. Claimants maintain that the *Spalma-incentivi* Decree was tantamount to a retroactive modification of the incentive framework that Respondent guaranteed to investors, because Respondent applied it to facilities that were already operating *after* substantial fixed costs had been invested and for which Respondent had promised payment of specific tariff rates over a period of 20 years to induce those upfront investments. In this connection, Claimants point out that several Italian senators, including Senator Arrigioni and Senator Piccolo, the UK ambassador Christopher Prentice, the EC and the European Parliament have recognized the *Spalma-incentivi* Decree to be retroactive in nature.[617]

611. Claimants dispute Respondent's assertion that they were earning excessive returns on their investment or that the *Spalma-incentivi* Decree only had a minimal impact on Claimants and their investments, and not a radical or fundamental one. Claimants rely on the opinion of their expert, FTI Consulting, to contend that they suffered a loss of EUR 28 million

615 SoC, ¶ 272.

616 SoRy ¶ 203.

617 SoRy, ¶¶ 242-248; **CEX-273**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 291, pp. 74-78; **CEX-274**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 292; **CEX-275**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 278; **CEX-276**, Congress of Deputies of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 279; **CEX-277**, Congress of Deputies of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 280; **CEX-278**, Senate of the Italian Republic, XVII Legislature, Assembly, Transcript of Session no. 304; *see* SoC, ¶¶ 234-237.

approximately on account of the *Spalma-incentivi* Decree alone. In this regard, Claimants also rely on the testimony of their witnesses, Mr. Florian and Mr. Blum.[618]

612. Claimants reject Respondent's argument that the *Spalma-incentivi* Decree was necessary due to the increased monetary burden on consumers attributable to the photovoltaic support costs. Claimants further argue that such increased expenditure for the consumers had been foreseen and factored in by Respondent at the time of implementing the *Conto Energia* regime.[619]

613. Claimants disagree that the alleged options offered by Respondent to photovoltaic producers at the time of implementation of the *Spalma-incentivi* Decree made the enactment of the Decree reasonable or proportional. Claimants also dispute the existence and efficacy of the alleged safeguard measures built in the *Spalma-incentivi* to assist photovoltaic investors.[620]

614. With respect to the Italian Constitutional Court Decision No. 16/2017 upholding the legitimacy of the *Spalma-incentivi* Decree (see Section IV.G(2) above), Claimants contend that the Decision was not a "firm" or conclusive determination of the constitutionality of the *Spalma-incentivi* Decree. Claimants rely on Professor D'Atena's opinion to contend that the Constitutional Court Decision is a *sentenza di rigetto* or decision to dismiss, meaning that "Italian judges were not bound to follow it". Claimants further contend that Respondent's reliance of this Decision was inappropriate as Italian law is not the law governing the present dispute. Similarly, Claimants consider Respondent's assertions regarding the *Salva Alcoa* Decree being an unexpected benefit for Claimants as being factually and contextually incorrect.[621]

615. Claimants contend that Respondent's reliance on the *Blusun v. Italy* tribunal's decision is misplaced as that case did not concern the *Spalma-incentivi* Decree. Rather it concerned the Romani Decree, which, according to Claimants, unlike the *Spalma-incentivi* Decree,

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618 SoRy, ¶¶ 274-279; C-RPHB, ¶¶ 36-39; *see* Hr. Tr. Day 2, pp. 5(3)-5(9) (Florian Testimony); Hr. Tr. Day 2, pp. 13(3)-13(18) (Florian Testimony); Florian Second Witness Statement, ¶¶ 14, 16; Hr. Tr. Day 2, pp. 93(19)-94(19) (Blum Testimony); Hr. Tr. Day 3, pp. 183(11)-183(17) (Dr. Moselle Testimony).

619 SoRy, ¶¶ 280-303.

620 SoRy, ¶¶ 304-339.

621 SoRy, ¶¶ 409-423; *see* Second D'Atena Opinion, Section 2.1.

did not abolish incentives for which plant operators had already qualified.[622] Similarly, Claimants also attempt to factually distinguish the *Antaris v. Czech Republic* case.[623]

Other Legitimate Expectations and their Frustration by Italy

616. In addition to their alleged expectations regarding the stability and duration of the *Conto Energia* regime, Claimants challenge the Italian Electrical Energy Authority's Resolution 618/2013 fixing the minimum guaranteed price for 2014 at EUR 38.9/MWh as being violative of Claimants' legitimate expectations (see Section IV.F(2) above). Claimants contend that they had legitimate expectations regarding the availability of minimum guaranteed prices in the off-take regime, based, *inter alia*, on Resolution 280/2007.[624]

617. As per Claimants, Resolution 280/2007 had advocated the policy goal of establishing minimum guaranteed prices to ensure the "economic survival" of photovoltaic facilities under 1 MW, notwithstanding market conditions, thereby creating a legitimate expectation for Claimants that the minimum guaranteed prices would remain available and above a certain competitive threshold. Claimants argue that their expectations, in this regard, were also strengthened by the Italian Electrical Energy Authority's practice of fixing the minimum guaranteed price between EUR 72/MWh and EUR 106/MWh for a period of six years. In this regard, Claimants dispute Respondent's assertions that there was a reduction in the operating costs of the plant operator, which justified the reduction of minimum guaranteed prices as being factually incorrect and unproven.[625]

618. Moreover, Claimants also argue that the imposition of the Administrative Management Fee and the imbalance costs on Claimants' plants constituted another violation of their legitimate expectations, since these costs, in essence, altered the promise of fixed tariffs for twenty years.[626]

619. Claimants maintain that Respondent's aforementioned measures are invalid under international law. In this regard, Claimants (i) dispute Respondent's argument that the

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622 SoRy, ¶¶ 422-427.

623 C-RPHB, ¶¶ 27-28.

624 SoC, ¶¶ 274-275.

625 SoRy, ¶¶ 470; *see* **CEX-213/REX-034**, AEEG Resolution No. 280/2007.

626 SoRy, ¶¶ 512-515.

measures were valid in view of the regulatory public policy powers of the State, since such powers are limited by a State's international legal obligations and commitments towards investors; (ii) challenge the relevance of the arbitral decisions relied upon by Respondent in support of its assertion, since in none of those cases did the State make specific promises or commitments to the investors; and (iii) contest Respondent's entitlement to rely on the "necessity" defence under international law.[627]

(ii) Transparency and Consistency

620. In addition to its arguments relating to legitimate expectations, Claimants contend that Respondent's conduct of (i) retroactively applying an Administrative Management Fee to all photovoltaic plants; (ii) imposing "imbalance costs"; and (iii) "remodulation" of the entire *Conto Energia* framework with the *Spalma-incentivi* Decree, was inconsistent with the framework established under the *Conto Energia* Decrees, which should have governed Claimants' facilities for 20 years. On this basis, Claimants contend that Respondent repeatedly violated its duty to provide transparent and consistent conditions for Claimants' investments in the Respondent State.[628]

621. Claimants contend that Respondent replaced what was once a stable, transparent regime with uncertainty that undermined the economic predictions that had Claimants made when deciding to invest. According to Claimants, the *Spalma-incentivi* in particular, made the investment environment in the Respondent State impossible to predict, because investors could no longer rely in future on the legal framework that was to govern their facilities for more than a decade.[629]

622. Claimants further contend that the drastic reduction of the minimum guaranteed prices to EUR 38.9 EUR/MWh was also inconsistent, in light of the Italian Electrical Energy Authority's past practice (see ¶ 617 above).[630]

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[627] SoRy, ¶¶ 340-357.

[628] SoC, ¶¶ 281-282.

[629] SoC, ¶ 282.

[630] SoC, ¶ 283; *see* **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices for years 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016.

(iii) Good faith

623. Claimants contend that Respondent reneged on its commitments to Claimants in bad faith. Claimants argue that Respondent's decision to reap the full benefits of the photovoltaic plants and the energy capacity that Claimants developed and in which they invested, while denying Claimants the full, originally-promised support scheme that induced those investments, was not in good faith. Claimants challenge Respondent's purported political justification for the retroactive "redistribution" of *Conto Energia* incentives, namely, to bring down the costs of electricity bills for end-consumers, as being in bad faith and an excuse for unilaterally abrogating the support framework or breaching the contracts plant operators had with GSE.[631]

624. In this regard, Claimants contend that several members of parliament, recognized that the *Spalma-incentivi* Decree was "retroactive, discriminatory, and likely to be challenged as it violates essentially the certainty of international and national law".[632] According to Claimants, the *Spalma-incentivi* Decree, in fact, targeted the photovoltaic sector. Claimants argue that the *Spalma-incentivi* Decree produced no meaningful savings and, therefore, its alleged end did not justify the means undertaken by Respondent to achieve that end.[633] Claimants further contend that the imposition of the Administrative Management Fee and the imbalance costs was also in bad faith.[634]

(2) **Respondent's Position**

a. The Legal Standard

625. Respondent contends that Article 10(1) of the ECT does not define FET and, therefore, reliance must be placed on customary law principles to determine the meaning and scope of the FET standard under the ECT. Respondent contends that the meaning of FET under the ECT is to be derived from the practices developed in the field of international treatment of foreign investments and from the application of general principles of international law.

631 SoC, ¶¶ 288-289.

632 SoC, ¶¶ 290-291.

633 SoRy, ¶ 375.

634 ` SoC, ¶¶ 292-293, 515.

According to Respondent, the FET standard should be understood as a sort of general clause, having a composite meaning and operating in continuous evolution, according to general principles such as good faith and proportionality.[635]

626. Further, as per Respondent, only manifestly unfair, unreasonable or inequitable regulatory modifications can create a breach of the FET standard, such that these regulatory modifications cause a disruptive change to the investments.[636]

(i) Legitimate Expectations

627. Respondent agrees with Claimants that the protection of legitimate expectations of an investor is an element of the host State's FET obligation. However, it disputes the "latitude and scope" of legitimate expectations proposed by Claimants.[637]

628. Respondent emphasizes that the legitimacy of the investors' expectations is the qualifying condition for protection to be offered under the FET standard. According to Respondent, the legitimacy of investors' expectations must be assessed by taking into account and balancing the positions of, both, the foreign investor and the host State, by giving due relevance to the right of States to enact their legislations pursuant to their regulatory powers.[638]

629. Respondent's position is that this consideration of the overall circumstances implies that the FET standard under Article 10(1) ECT cannot be equated to a stabilization or freezing clause. In this connection, Respondent relies, *inter alia*, on the arbitral tribunal decisions in *Plama v. Bulgaria*, *Electrabel v. Hungary*, *Charanne v. Spain*, *Antaris v. Czech Republic*,

635 SoD, ¶¶ 497-498; *relying on* **CL-92**, *Amoco International Finance vs. Iran*, Iran-US Claim Tribunal Award; **RLA-007**, *ICJ Judgment in the ELSI case (case concerning Electronica Sicula S.p. A. (ELSI) – United States of America v. Italy*, 20 July 1989, § 50.

636 SoD, ¶¶ 526-528; R-SoRj, ¶¶ 42-53; R-PHB, ¶¶ 76, 161-162; *relying on* **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 332; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 362-365; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 654; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶ 503; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Final Award, 27 December 2016; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award; **CL-118**, *JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, ¶ 469.

637 SoD, ¶ 499.

638 SoD, ¶¶ 506-511.

Blusun v. Italy and *Belenergia v. Italy*, which according to Respondent, confirm that the legal standard for legitimate expectations may not be interpreted as requiring the host State to freeze its regulatory activity. Instead, it requires tribunals to take into account factors such as reasonableness, proportionality and public interest while making its determinations of investors' legitimate expectations. In support of this proposition, Respondent also relies on Italian law, specifically the Constitutional Court Decision No. 16/2017.[639]

630. Amongst the various factors to be considered, Respondent also emphasises the importance of due diligence to be conducted by prudent investors before investing in any regime that is prone to regulatory changes, which the Italian renewable energy market allegedly was.[640]

631. Another factor that Respondent highlights is the timing of the investment in consideration. With respect to the investors' expectations, Respondent contends that the protection offered under the FET standard is limited to those expectations of the investors that existed at the time when they made their investment. In this regard, the relevant time of making of the investment, in Respondent's view, is when the investor acquired the relevant assets or a controlling stake thereof.[641]

632. Further, it is Respondent's position that in the absence of a specific commitment to investors such as a stabilization clause, changes to regulatory framework established by means of general legislation do not qualify as a breach of legitimate expectations. Along these lines, Respondent attempts to distinguish the Spanish laws that promised incentives to investors from the Italian regime in this regard, since the former contained stabilization

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639 SoD, ¶¶ 513-525; R-SoRj, ¶¶ 376-379, 386-388; Hr. Tr. Day 1, pp. 217:20-219:17; Hr. Tr. Day 4, pp. 228:4-229:25; Respondent's Brief Comments on the *Belenergia Award* and its Consequence on this Case, 13 September 2019, ¶¶ 5-9; *relying on* **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award; **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 219; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 305; **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 332; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶ 503; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Final Award, 27 December 2016; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award; **REX-032**, Italian Constitutional Court Decision No. 16/2017 of 7 December 2016.

640 Hr. Tr. Day 4, pp. 234:13-235:18; R-PHB, ¶¶ 81-89; *relying, inter alia, on* **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, ¶ 494.

641 SoD, ¶ 507; R-SoRj, ¶ 373; Hr. Tr. Day 4, pp. 230:1-230:10; R-PHB, ¶¶ 96-97, 170; R-RPHB, ¶¶ 50-57; *relying on* **RLA-18**, *CEF Energia B.V. v. Italy*, SCC Arbitration No. 2015/158, Award, ¶¶ 186-189; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 686.

clauses and also, on certain occasions, involved specific assurances given by Spanish authorities in discussions or meetings held with investors.[642]

633. Moreover, while Respondent acknowledges that a State's regulatory powers cannot protect any and all modifications made by the State to its legal regime, according to Respondent, such regulatory powers do preserve a State's authority to fairly, equitably and reasonably modify its legislative regimes.[643]

(ii) Transparency and Consistency

634. Respondent disputes that a State's duty to assure transparency and/or consistency is an autonomous obligation of the host State under its FET obligations. For Respondent, the State's duty to maintain stability and/or consistency forms a part of its duty to protect the legitimate expectations of the investor, whereas the State's duty to maintain transparency is part of the general standard of FET. Accordingly, Respondent disputes that there is a relation between consistency and transparency, on the basis of which Claimants have put forth an autonomous argument under the FET standard. According to Respondent, the case law relied upon by Claimants does not support their assertions in this regard.[644]

(iii) Good Faith

635. Respondent disagrees with Claimants that good faith constitutes an autonomous category of a State's FET obligations. For Respondent, the principle of good faith along with the principle of proportionality, are essential to correctly interpret and apply the FET standard and are not autonomous categories of the FET standard.[645]

636. According to Respondent, the very concept of "fairness" that qualifies FET is an expression of good faith. Further, "reasonableness" as a parameter to assess the legitimacy

642 SoD, ¶ 585-595; R-PHB, ¶¶ 61-63, 90-93, 148-149; *relying on* **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶ 372; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain,* ICSID Case No. ARB/14/1, Award.

643 SoD, ¶¶ 526-528; R-SoRj, ¶¶ 380-387; Hr. Tr. Day 4, pp. 2217:19-228:9; R-PHB, ¶¶ 76, 161-162; *relying on* **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 332; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 362-365; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 654.

644 SoD, ¶¶ 500-502, 648-658; R- SoRj, ¶¶ 390-391.

645 SoD, ¶ 503; R-SoRj, ¶ 392.

of the host State's conduct is in turn a fundamental expression of good faith. On this basis, Respondent contends that good faith cannot be considered as an autonomous obligation under the FET standard, distinct from a State's other obligations under FET standard.[646]

b. Italy's Alleged Breach of the FET Standard

(i) <u>Legitimate Expectations</u>

637. Respondent disputes that Claimants could have any legitimate expectations based on the overall legal regime in Italy, and in particular the *Conto Energia* Decrees or the GSE letters and contracts that followed.

<u>*Lack of any Basis for Claimants' Legitimate Expectations*</u>

638. At the outset, Respondent disputes that the GSE contracts relied upon by Claimants, can constitute a basis for Claimants' FET claims. In the alternative to its jurisdictional and/or inadmissibility objection in this regard (see Section VII.C(2)b above), Respondent contends that the nature of the GSE contracts precludes it from forming a basis for Claimants' alleged legitimate expectations. According to Respondent, the GSE contracts are "accessory contracts" to public acts. GSE did not have any autonomy in signing those contracts as their essential elements were pre-determined by regulatory acts, specifically the applicable *Conto Energia* Decrees. GSE was only administering the implementation of these legislative mechanisms and had a purely executory role, and despite being a public limited company was a body governed by public law. In support of this contention, Respondent also submits that the incentives being disbursed by GSE did not originate from money owed by GSE, but instead originated from public funds, specifically the A3 component of the consumers' electricity bills (see ¶ 165 above). Thus, Respondent contends that such contracts entered into by GSE for broader public interest, in themselves, cannot form the basis of the investors' legitimate expectations as their role was exclusively to support and confirm what has resulted from the Italy's public acts, and to regulate the modalities of these legislative acts.[647]

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646 SoD, ¶¶ 664-665.

647 SoD, ¶¶ 535-536; R-PHB, ¶¶ 107-129; Respondent's Brief Comments on the *Belenergia Award* and its Consequence on this Case, 13 September 2019, ¶¶ 20-27; *relying on* **CEX-30**, AEEG Resolution no. 188/05, 14

639. Regarding Claimants' other alleged bases for their legitimate expectations, namely, (i) the overall legal environment in Italy supporting the photovoltaic sector; (ii) public statements by politicians and authorities in the Respondent State regarding Respondent's policy goals; and (iii) *Conta Energia* Decrees, Respondent contends that these factors, at best, could only create a reasonable expectation of stability of the system as a whole, and of the fact that specific measures would be apt always to guarantee a "fair return". Respondent, however, disputes that Claimants could have a legitimate expectation that the specific incentives granted by Respondent would be ironclad (in the nature of a stabilization clause).[648]

640. In this regard, Respondent contends that the *Conto Energia* Decrees were secondary rules, which were to be interpreted and applied according to the principles and standards set forth in the "hierarchically superordinate" Legislative Decrees 387/2003 (see ¶¶ 112-116 above) and the Romani Decree (see ¶¶ 147-152 above), and the EC Directives they implemented.[649]

641. Along the same lines, Italy also highlights the lack of any specific assurances given to Claimants, the absence of any specific discussions with Claimants or their SPVs and the fact that the entire incentive tariffs regime was directed towards investors in general, and not towards specific investors. Thus, Respondent disputes Claimants' reliance on the public statements and presentations made by the Italian authorities, since they were only intended to repeat what was already mentioned in the *Conto Energia* Decrees.[650]

The Relevant Point in Time to examine Claimants' alleged Legitimate Expectations

642. Respondent submits that the point in time in reference to which the existence of Claimants' alleged legitimate expectations should be examined is the time of making the investment. In the present case, that point in time, in Respondent's view, is when the investor acquired

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September 2005; **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016; **REX-064**, Italian Court of Cassation Order No. 10795/2017, 11 April 2017; **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶¶ 254-255; *relying on* **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 579-580; Hr. Tr. Day 2, pp. 204:5-204-13 (Bacchiocchi Testimony); Hr. Tr. Day 3, pp. 21:10-21:20 (Miraglia Testimony); Hr. Tr. Day 3, pp. 93:10-93:12 (D'Atena Testimony).

648 SoD, ¶¶ 538-539; R-PHB, ¶ 16.

649 SoD, ¶¶ 564-565; R-PHB, ¶ 70.

650 R-PHB, ¶¶ 71-73.

the relevant assets or a controlling stake thereof, which for Claimants happened when they invested 80% of their money upfront.[651]

643. Accordingly, Respondent disputes the existence of any of Claimants' alleged legitimate expectations on the basis of the GSE tariff confirmation letters and/or the GSE contracts, since for eight out of the nine power plants Claimants had made the majority of their investments prior to receiving these letters and/or contracts from GSE. Thus, Claimants could not rely upon these letters and/or contracts for their alleged legitimate expectations while investing in the Italian renewable energy market. For the only photovoltaic plant wherein Claimants invested after having received the GSE tariff confirmation letter, i.e., Fiumicino, Respondent argues that the said letter was only an administrative letter that could not by itself create any guarantee of non-modifiability of tariffs.[652]

Claimants' Legitimate Expectations were not frustrated by Italy's Subsequent Conduct

644. Under the assumption that Claimants did have any legitimate expectations, Respondent also makes the following arguments to submit that none of the Italian measures in issue breached or violated such legitimate expectations:

645. *Administrative Management Fee:* For the Administrative Management Fee, Respondent submits that the same did not affect Claimants' expectations regarding the subsistence of the *Conto Energia* regime. Rather, according to Respondent, the scope and ratio of such measure was completely outside Claimants' alleged expectations regarding the payment of *Conto Energia* tariffs.[653]

646. Respondent maintains that the imposition of the Administrative Management Fee was aimed at compensating the management, verification, and control charges made by the GSE. Respondent disputes that Claimants' investments were harmed by the imposition of the Administrative Management Fee, since the cost of the fee was very limited,

651 R-PHB, ¶¶ 96-97; R-RPHB, ¶ 53.

652 R-PHB, ¶¶ 96-106; R-RPHB, ¶¶ 50-57; *relying on* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶¶ 151, 156, 186-189.

653 SoD, ¶ 543,

corresponding to Euros 0.0005/kWh, which is 0.15% of the average of the incentive tariffs enjoyed by Claimants.[654]

647. Further, Respondent submits that if Claimants' contentions were to be upheld, it would be tantamount to imposing a double chilling effect on the earlier photovoltaic regulations as (i) incentive regimes would be unmodifiable; and (ii) such non-modifiability would extend to any measure which might have a negative impact on investors' interests arising from the incentive schemes.[655]

648. *Imbalance Costs*: Respondent contends that the re-allocation of imbalance costs to renewable energy suppliers by Respondent is completely unrelated to Claimants' alleged expectation that the incentive tariffs would be frozen for a period of 20 years. Respondent argues that costs and tariffs are two separate factors, and, therefore, only if the costs imposed were fictitious in nature, which Respondent contends is not the case here, could the re-allocation of imbalance costs qualify as a disguised reduction of the tariffs.[656]

649. Respondent submits that there is no dispute between the Parties that national authorities have the discretionary power to decide whether such costs should be borne by consumers or producers, according to the outcomes of their energy policies. On this basis, Respondent contends that Claimants could not have had a reasonable expectation, nor were they specifically assured, that such costs would have indefinitely remained at the charge of the consumers.[657]

650. In support of its contention, Respondent relies on the Italian Supreme Administrative Court's Decision in 2014, where the Court confirmed the authorities' power to alter imbalance costs, so long as they were "in compliance with the principle of equal treatment of economic operators in the sector, the arrangements to share imbalance costs taking into account the particular features of the source".[658]

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654 SoD, ¶ 544.

655 SoD, ¶ 547.

656 SoD, ¶ 550.

657 SoD, ¶¶ 551-552.

658 SoD, ¶¶ 553-554; *relying on* **CEX-229**, *Consiglio di Stato*, decision of 9 June 2014 n 2936/2014.

651. *<u>Spalma-incentivi Decree</u>*: It is Respondent's case that the enactment of the *Spalma-incentivi* Decree and the modification of the *Conto Energia* Decrees was consistent with the framework and goals of the Legislative Decrees 387/2003, the Romani Decree and the EU Directives, since they only required that investors are ensured a "fair" or "equitable" remuneration. This was the regulatory outer limit for Italy to act within, which it did.[659]

652. In this connection, Italy compares its regulatory regime to the Spanish and Czech regulatory regimes for renewable energy sources. It relies on arbitral awards that have found Spain and Czech Republic to not be in breach of the FET standard under the ECT, on the ground that their challenged measures did not fundamentally alter the existing regime. According to Italy, the *Spalma-incentivi* Decree was comparable to the Spanish Royal Decrees of 2010, in terms of their effects of re-modulating the incentives offered to investors.[660] Further, Italy relies, *inter alia*, on *Isolux v. Spain* and *Antaris v. Czech Republic* to submit that investors should have foreseen such re-modulation, in light of the kind of market for renewable energy generally, and more specifically in light of the framework legislation such as the Romani Decree that is comparable to what also existed in Czech Republic.[661] In support of its position, Italy also relies on the dissenting opinion rendered by Prof. Sacerdoti in *Greentech v. Italy*, and the awards in *CEF v. Italy* and *Belenergia v. Italy.*[662]

653. Respondent contends that subsequently, due to technological progress and scale economies in the photovoltaic energy market, the operational costs to produce photovoltaic energy had

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[659] SoD, ¶¶ 564-568; R-PHB, ¶¶ 64-70; *relying on* **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶¶ 9.3.31 and 9.3.34.

[660] R-PHB, ¶¶ 138-227; *relying on* **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶¶ 686-688; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 368-370; *distinguishing* **CL-4**, *Charanne B.V. & Construction Investments S.a.r.l. v. Kingdom of Spain*, SCC Arb. No. 062/2012, Award, Jan. 21, 2016; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award.

[661] **CL-122**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, July 17, 2016; **CL-118**, *JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, Oct. 11, 2017; **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018.

[662] R-PHB, ¶¶ 225-227; R-RPHB, ¶¶ 58-62; Respondent's Brief Comments on the *Belenergia Award* and its Consequence on this Case, 13 September 2019, ¶¶ 10-14; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095); **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award; **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019.

sharply reduced creating an imbalance between the photovoltaic investors' remuneration and the reduced costs for producing electricity. This was detrimental for consumers, who bore in entirety the growing economic weight of the incentives. According to Respondent, it was in this backdrop that the *Spalma-incentivi* Decree was enacted to adjust the balance between consumers and investors.[663]

654. Further, Respondent points out that it had at the end of 2010, i.e., after the start of Claimants' investment, Italy adopted the so-called *Salva Alcoa* Decree (see ¶¶ 130-130 above), which extended the incentives of the Second *Conto Energia* Decree to all parties having concluded the construction of the photovoltaic system by 31 December 2010, but entered into operation by 30 June 2011. This resulted in improving the overall economic situation of Claimants more than what they would have reasonably expected at the time of their investments. According to Respondent, the *Salva Alcoa* Decree evidences the reasonableness and consistency of the modification of the *Conto Energia* regime.[664]

655. In addition, Respondent also states that Claimants did not conduct reasonable due diligence expected from prudent and sophisticated investors such as them while investing in the highly regulated market that the Italian renewable energy sector is. Moreover, according to Respondent, Claimants' investment model was prone to high risks, given the high leverage (between 70% to 80%). In light of these factors, there was no disruptive impact on Claimants sufficient to characterize Respondent's conduct as a breach of its FET obligations.[665]

656. *<u>Off-take Regime</u>*: Respondent submits that the Italian Electrical Energy Authority's Regulations, pertaining to the grant of minimum prices for purchase of renewable energy by the GSE were not the primary rules governing grant of minimum guaranteed prices. Respondent contends that the primary rules underlying these Regulations, were Article 13 of Legislative Decree No. 387/03 and Article 1(41) of Law No. 39/2004. These provisions were limited to creating the off-take regime, without referring in any way to a further

[663] SoD, ¶ 569-570; Respondent's Brief Comments on the *Belenergia Award* and its Consequence on this Case, 13 September 2019, ¶¶ 15-16; *relying on* **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 605-606.

[664] SoD, ¶¶ 582-584.

[665] R-PHB, ¶¶ 82-95; R-RPHB, ¶ 65; Hr. Tr. Day 4, pp. 48:8-51:20.

favourable mechanism such as that of minimum guaranteed prices, which was only a regulatory offshoot of the off-take regime. It is Respondent's case that Claimants' reliance on the Italian Electrical Energy Authority's Regulations as a basis for its legitimate expectations regarding the grant of minimum guaranteed price is thus misplaced.[666]

657. Respondent disputes Claimants' reliance on the preamble of the Resolution 280/2007 (see ¶ 617 above), by contending that the text of the Preamble refers to the grant of the "economic survival" of smaller plants, not to a high and durable profitability separated from the economic conditions of the investment. Further, as per the regime in Resolution 280/2007, Claimants should have expected a yearly revision of the minimum guaranteed prices.[667]

658. Respondent also disputes Claimants' reliance on the Italian Electrical Energy Authority's past practice during 2008 to 2013 in fixing the minimum guaranteed price as being "legally baseless", since such a trend in fixed prices is not sufficient *per se* to create an expectation regarding their maintenance prices over time.[668]

659. Respondent further relies on Article 7(4) of the Annex A to the Resolution 280/2007 to contend that the rules establishing the minimum prices system had taken into account the possibility that the prices determined by the Authority be lower than the market prices.[669]

660. Respondent submits that notwithstanding the above, Resolution 618/2013, which is under challenge by Claimants for having established a lower minimum guaranteed price than expected is reasonable and coherent with the objectives of the minimum prices system. Respondent submits that the price guaranteed under the Resolution 618/2013 achieves the objective of ensuring economic survival of small plants by covering the producers' operational costs, with a basic remuneration of capital.[670]

661. Likewise, with respect to the Legislative Decree No. 145/2013 or the *Destinazione Italia*, Respondent contends that this rule is absolutely reasonable and coherent with the system.

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[666] SoD, ¶¶ 609-617.

[667] SoD, ¶¶ 609-611, 618-614.

[668] SoD, ¶¶ 612-615.

[669] SoD, ¶¶ 616-617.

[670] SoD, ¶¶ 627- 632; **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013.

Respondent argues that there is no relevant rule to suggest that incentive tariffs and minimum prices should be cumulative for photovoltaic plants with capacity until 1 MW, nor is such accumulation of the two always financially sustainable. Respondent contends that Legislative Decree No. 145/2013 is also consistent with the Resolution 280/2007, in that it allows for the maintenance of cumulative effects of incentive tariffs and minimum prices for plants not exceeding the capacity of 100 kW.[671]

(ii) Transparency and Consistency

662. Respondent disputes Claimants' allegations relating to inconsistent and non-transparent conduct. According to Respondent, all of the measures in question, i.e., application of the Administrative Management Fee, the attribution of imbalance costs and the *Spalma-incentivi* Decree were "reasonable and consistent measures".[672]

663. In this regard, Respondent recalls its submissions relating to Claimants' alleged legitimate expectations (see ¶¶ 644-661 above). Furthermore, Respondent states that the manner in which the *Spalma-incentivi* Decree was enacted was not devoid of transparency. Respondent characterizes the *Spalma-incentivi* Decree as a "physiological adaptation" or fine tuning of the incentive tariff scheme already in existence, which was foreseen by Article 23 of the Romani Decree, and the Third and Fourth *Conto Energia* Decrees.[673]

(iii) Good faith

664. According to Respondent, Claimants do not, in relation to any of the measures under challenge, contend that these measures were directed individually against Claimants in bad faith. Respondent contends that Claimants also do not raise any question regarding the Italian organ's bad faith. According to Respondent, this belies Claimants' FET claim on grounds of bad faith.[674]

665. To establish its good faith, Respondent, in any event, reiterates that the imposition of the retroactive Administrative Management Fee and enactment of the *Spalma-incentivi* Decree

[671] SoD, ¶¶ 633-638.
[672] SoD, ¶ 661.
[673] R-PHB, ¶¶ 74-80; *relying on* **CEX-161**, Fourth *Conto Energia* Decree, article 2.3; **CEX-132**, Third *Conto Energia* Decree; **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019.
[674] SoD, ¶ 671.

were aimed at maintaining the sustainability of the electricity sector and drawing a balance between the interests of the end-consumers and the photovoltaic producers.[675]

(3) **The Tribunal's Analysis**

666. At the outset, the Tribunal considers it appropriate to reproduce Article 10(1) ECT, in its relevant part:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, <u>encourage and create stable, equitable, favourable and transparent conditions for Investors</u> of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to <u>accord at all times</u> to Investments of Investors of other Contracting Parties <u>fair and equitable treatment</u> . . . <u>In no case shall such Investments be accorded treatment less favourable than that required by international law</u>, including treaty obligations. (emphasis added)

667. To determine whether Respondent is in breach of its obligation to accord fair and equitable treatment to Claimants' investments, the Tribunal shall first resolve the Parties' differences in respect of the legal standard for the FET obligation, including the legal standard for each tenet of the FET obligation that the Parties address, i.e., legitimate expectations, transparency and consistency and good faith. Thereafter, in light of the legal standard determined, the Tribunal shall determine whether Respondent's conduct qualifies as a breach of its FET obligation under Article 10(1) ECT.

a. The Legal Standard

668. With respect to the general legal standard for the FET obligation under Article 10(1) ECT, the Parties are in dispute about two interrelated matters: (i) whether the legal standard for the FET obligation in the ECT is the same as the customary international law minimum standard for FET obligations; and (ii) the precise scope of the legal standard for the FET obligation under Article 10(1) ECT.

675 SoD, ¶¶ 679-683.

(i) The Customary International Law Standard for FET obligations

669. Claimants have rejected the assimilation of the legal standard for the FET obligation in Article 10(1) ECT to the customary international law minimum standard for FET obligations (see ¶ 589 above). Specifically, Claimants' rejection is premised on the grounds that (i) the international minimum standard of treatment "is exactly that: it is the absolute bare minimum required under customary international law" and nothing more; and (ii) Article 10(1) ECT is not comparable to Article 1105 of the North American Free Trade Agreement ("**NAFTA**"), wherein the FET obligation is not autonomous and is expressly subsumed by a reference to international law. As per Claimants, the ECT's FET obligation has an autonomous legal standard that is not linked to this customary international law minimum standard.[676]

670. To the contrary, Respondent has endorsed the link between the legal standard for the ECT's FET obligation and the customary international law minimum standard (see ¶ 625 above), relying on the hermeneutical principle that, according to Respondent, requires international treaties to be interpreted, if possible, in a manner consistent with general international law.[677]

671. The Tribunal is not persuaded by Respondent's submission for the following reasons.

672. *First,* the Tribunal considers that the text of Article 10(1) ECT itself creates a distinction between the FET obligation therein, and the international minimum standard for FET obligations. After laying out the FET obligation in the second sentence, Article 10(1) ECT, in its fourth sentence, provides that "[i]n no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations" (see emphasised part in ¶ 666 above). This independent reference to the treatment required by international law creates a demarcation between the legal standard for the FET obligation contained in the second sentence and the treatment required by international law. This demarcation becomes apparent when Article 10(1) ECT is juxtaposed against Article 1105 NAFTA, which is titled "Minimum Standard of

676 Hr. Tr. Day 4, pp. 198:16-203:18.

677 SoD, ¶ 497.

Treatment", and requires the host State to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment . . ." Thus, as Claimants rightly submit, NAFTA explicitly equates the standard of treatment to the international law minimum standard, within which the FET obligations are subsumed. Article 10(1) ECT does not create any such link between the FET obligation therein and the customary international law minimum standard.

673. *Second*, the phrase "less favourable than . . . required by international law, including treaty obligations" in the fourth sentence of Article 10(1) ECT indicates that the customary international law minimum standard does get incorporated into the ECT, but only as the bare minimum threshold that the host State's treatment of investments must meet. Accordingly, the Tribunal agrees with Claimants' submission that the customary international law minimum standard is nothing more than the absolute bare minimum standard of treatment required under international law. In other words, as stated by the tribunal in *Azurix v. Argentina*, when interpreting a similarly drafted FET clause in another treaty, this minimum standard constitutes a "floor, [but] not a ceiling", of the standard of treatment that may be required from host States under the ECT.[678]

674. *Third*, while the ECT does not define the FET obligation or the legal standard for the same, the Tribunal does not consider such absence of definition to warrant an automatic resort to the customary international law minimum standard. In this regard, the Tribunal is neither persuaded by Respondent's suggestion that there exists a hermeneutical principle of interpretation that requires international treaties to be interpreted consistent with customary international law, nor does it consider that interpretation of Article 10(1) ECT in accordance with the principles of interpretation in international law results in the application of the customary international law minimum standard. Articles 31 and 32 VCLT constitute the principles of interpretation of treaties in international law. In the next sub-section, the Tribunal shall determine the precise legal standard for the FET obligation, based on an interpretation of Article 10(1) ECT in accordance with the principles in Articles 31 and 32 VCLT.

678 **CL-79**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 361.

(ii) The Legal Standard under Article 10(1) ECT

675. As mentioned in ¶ 674 above, Article 10(1) ECT does not define the FET obligation or the legal standard, nor are the terms "fair and equitable" ascribed a definition.

676. Accordingly, in order to delineate the elements of the legal standard for the FET obligation under Article 10(1) ECT, the relevant part of the provision – "a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment" – is required to be interpreted according to Article 31(1) VCLT. Article 31(1) VCLT (quoted in ¶ 289 above) requires a treaty provision to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

677. As part of the context of the above quoted part of Article 10(1) ECT, the Tribunal notes the immediately preceding sentence in the said provision, which states that "[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area". (emphasis added) The Tribunal considers it important to note here that the FET obligation, contained in particular in the second sentence of Article 10(1) ECT, is stipulated as being included within this broad contextual framework of encouraging and creating stable, equitable, favourable and transparent conditions for investors.

678. As part of the object and purpose of the ECT, the Tribunal notes Article 2 ECT, which stipulates the purpose of the treaty as being to establish "a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." Pursuant to the reference to the International Energy Charter in Article 2 ECT, the Tribunal also considers it appropriate to extract the following passages from the Objectives (Title I) and Implementation (Title II) of the International Energy Charter:

- "Recognising the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations, and in a spirit of political and economic cooperation, they decide to promote the development of efficient, stable and transparent energy markets at regional and global levels based on the principle of non-discrimination and market-oriented price formation, taking into account environmental concerns and the role of energy in each country's national development";

- "formulation of stable and transparent legal frameworks creating conditions for the development of energy resources in the context of sustainable development";

- "creating a favourable environment for investments, including joint venture investments, for design, construction and operation of energy installations"; and

- "provide, at national level, for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade." (emphasis added)

679. From the above passages concerning the object and purpose behind the ECT, and in turn the International Energy Charter, the Tribunal delineates two key features that lend to an understanding of the FET legal standard, taking into account the context of Article 10(1) ECT as well (see ¶ 677 above).

680. Firstly, the ECT prioritizes the objectives of stability and transparency in the legal framework both at the national and the global level. Both these objectives are often repeated as aspirational goals in the International Energy Charter, and also constitute a part of the broader contextual framework laid down in the first sentence of Article 10(1) ECT.

681. Secondly, it becomes apparent from Article 2 ECT and the objectives of the International Energy Charter that the ECT is intended to establish a "legal framework" so as to promote long-term cooperation between the ECT Contracting Parties. In this regard, the Tribunal notes that both Parties consider one of the fundamental objectives of the ECT to be strengthening "the rule of law on energy issues".[679] The Tribunal agrees that strengthening the rule of law constitutes an important purpose behind the ECT, and the objectives of stability and transparency are constituent parts of this larger purpose.

682. Taking into account the above context and in light of the object and purpose of the ECT, the Tribunal makes the following observations with respect to the standard of FET obligation under Article 10(1) ECT.

679 For Claimants' position, see ¶ 589 above; for Respondent's position, see Hr. Tr. Day 4, pp. 228:15-228:17.

683. *First*, the Tribunal considers that fairness and/or equitability are not absolute concepts that are capable of being reduced to universally applicable definitions. Instead, what constitutes fair and/or equitable treatment is a question to be determined by taking into account all circumstances of a given case. Claimants' submission that an understanding of the terms "fair" and "equitable" should be derived from their dictionary meanings[680] does not persuade this Tribunal, and is contradicted by the cases that they rely on in this connection. For instance, the *Micula v. Romania* tribunal specifically found that "[t]he plain meaning of these terms . . . does not provide much assistance".[681] Similarly, the tribunal in *Saluka v. Czech Republic* found that the terms "fair" and "equitable" can "only be defined by terms of almost equal vagueness".[682]

684. *Second*, stability and transparency in the legal framework are important ingredients of the host State's FET obligation. This is evidenced not only from the above discussed context and object and purpose of the ECT, but is also unanimously accepted in investment arbitration case law.[683] In this connection, it is also important to note that as part of this general obligation to maintain stability and transparency in the legal framework, host States are also required to generally create a favourable environment for investments.

685. *Third*, keeping in mind that the FET obligation requires all relevant circumstances to be considered in a case (see ¶ 683 above), the objectives of creating a stable, transparent and favourable legal framework for investments are required to be balanced against the host State's right to regulate. The importance of the host State's sovereignty and its right to regulate is recognized in the International Energy Charter, when it mentions the "sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory" (see ¶ 678 above).

686. Accordingly, to this end, the Tribunal endorses Respondent's submission that any determinations relating to the FET obligation shall take into account and balance the

680 Hr. Tr. Day 4, pp. 202:1-202:23.

681 **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ¶ 504.

682 **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 297.

683 **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award; ¶ 173; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶¶ 380-381; **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶¶ 360(8)-(9).

positions of, both, the foreign investor and the host State (see ¶ 628 above). This proposition, and the important role of the host State's right to regulate, has been accepted by other investment arbitration tribunals as well.[684]

687. It is important to note that Claimants do not completely reject the relevance of the host State's right to regulate in their submissions relating to the FET legal standard. The disagreement between the Parties is rather about the extent to which this right to regulate should be considered by the Tribunal. In particular, as per Claimants, it is only in the absence of specific (contractual or other) promises made by host States to investors that the investors' alleged expectations are required to be balanced against the host State's regulatory authority (see ¶ 593 above). The Tribunal shall examine the Parties' disagreement, and Claimants' specific submission in this regard, in the forthcoming sub-section, when it analyses the legal standard for the tenet of legitimate expectations, and after it determines the role of specific promises made by host States therein.

688. *Fourth*, the Tribunal considers that keeping in mind the balancing of the above factors, the overall standard to establish a breach of the FET obligation is high. Not every shortcoming in a State's action will justify a claim for breach of the FET standard. To constitute a breach of the FET standard, it must be shown 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 wilful neglect of duty or a wilful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards. As articulated by the tribunals in *AES v. Hungary*,[685] the conduct must be such as to shock judicial propriety.

689. In this regard, the Tribunal recalls that it had invited the Parties to provide their comments on the legal standard for the FET obligation laid down in the *AES v. Hungary* case, in particular in the following passage:

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684 **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶¶ 304-305; **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 332

685 **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶ 9.3.40.

> The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – . . . that the standard can be said to have been infringed.[686]

690. While Respondent has consistently endorsed the above formulation of the FET standard in the *AES v. Hungary* case,[687] Claimants have characterized it as an "outlier" for being closer to the customary international law minimum standard (see ¶ 589 above).

691. The Tribunal is not persuaded by Claimants' characterization. Certain elements of the above articulation of the FET standard overlap with the formulation of the customary international law minimum standard of treatment in case law. For instance, the phrase "shock, or at least surprise a sense of juridical propriety" finds resonance in *Tecmed v. Mexico*[688] and *Waste Management v. Mexico.*[689] However, that does not imply that the articulation of the FET standard by the tribunal in *AES v. Hungary,* which was laid down precisely in the context of Article 10(1) ECT, is the same as the customary international law minimum standard or that it is an outlier. For instance, numerous tribunals have alluded to the FET standard being high, such that only "manifestly" unfair, unreasonable or inequitable conduct by the host State would create a breach of the FET standard.[690] This includes the *Micula v. Romania* case relied upon by Claimants, which has taken inspiration from the *Waste Management v. Mexico* case to find that, in order for a breach of the FET standard, the host State's conduct has to be "substantively improper, whether because it is arbitrary, manifestly unreasonable, discriminatory or in bad faith".[691]

[686] **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶ 9.3.40.

[687] Hr. Tr. Day 4, pp. 232:14-232:25; R-PHB, ¶¶ 3, 64.

[688] **CL-54**, *Tecmed Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154.

[689] **CL-55**, *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April, 30, 2004, ¶ 98.

[690] **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶¶ 360(13); **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 309; **CL-75**, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, ¶ 318.

[691] **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ¶ 522.

692. In light of the above, the Tribunal considers that the overall legal standard to establish a breach of an FET obligation is high. Along the same lines, the Tribunal is convinced by Respondent's contention that for any regulatory change brought by the host State to amount to a breach of the FET obligation, such regulatory change should rise to the level of a "radical or fundamental" change. To this end, the Tribunal agrees with the findings of the tribunals in *Greentech v. Spain*, *Novenergia II v. Spain* and *Eiser v. Spain*.[692] In this connection, the Tribunal is not persuaded by Claimants' submission that any departure from the regulatory regime, for instance even a "one thousandth of a euro cent" reduction in the promised tariffs,[693] would constitute a breach of the FET obligation of the host State.

693. With the above contours of the general legal standard for the FET obligation in mind, the Tribunal shall next examine the legal standard for each of the independent tenets that Claimants advance as constituent parts of the FET obligation, i.e., (i) legitimate expectations; (ii) transparency and consistency; and (iii) good faith. With respect to the latter two, the Tribunal is mindful that Respondent disputes whether they exist as independent tenets of the FET obligation or are subsumed within the legitimate expectations tenet and/or the general legal standard for the FET obligation itself. The Tribunal shall examine this disputed issue in the forthcoming sub-sections as well.

(iii) Legitimate Expectations

694. Both, Claimant and Respondents, agree that the protection of legitimate expectations of investors is a constituent element of the host State's FET obligation (see ¶¶ 591 and 627 above). However, the disagreement between the Parties pertains to the elements of the legal standard for examining whether the investors' legitimate expectations have been frustrated by the host State.

695. At the outset, the Tribunal notes that there are broadly three questions to be answered as part of this examination: (a) whether the investors in the case had any expectations based

692 **CL-180**, *Foresight Luxembourg Solar 1 S.A.R.L, Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. The Kingdom of Spain,* SCC Arbitration V (2015/150), Final Award, ¶ 359; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 654; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶ 382.

693 Hr. Tr. Day 1, pp. 89:20-90:13.

on any conduct of the host State, and if so, whether these expectations were legitimate; (b) whether the investors relied on these expectations to make their investments in the host State; and (c) whether the host State by its subsequent conduct frustrated these expectations. If any of these three questions is answered in the negative, the investors' claim for breach of the FET obligation fails.

696. The Tribunal shall examine the specific legal contours of the above three questions next, and in the process, analyse the Parties' submissions with respect to the legal standard for protection of legitimate expectations.

The Legitimacy of the Investors' Expectations

697. With respect to the first question in ¶ 695 above, at the outset, the Tribunal endorses Respondent's position that the legitimacy of the investors' investments must be assessed by taking into account all prevailing circumstances, and by objectively balancing the positions of the foreign investors and the host State (see ¶ 628 above). This is supported by the Tribunal's findings relating to the overall legal standard for the FET obligation discussed above (see ¶ 683 above). In this regard, the Tribunal agrees with the tribunal in *Saluka v. Czech Republic,* when it stated that "the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances."[694] (emphasis added) Thus, the issue under examination is whether the investors' expectations rise to a level of legitimacy and reasonableness in light of all the circumstances.

698. Having laid out the above context, the Tribunal shall next examine the various differences between the Parties with respect to this first question in ¶ 695 above. These are (i) whether specific promises or commitments by the host State are required to create legitimate expectations; (ii) whether these legitimate expectations should emanate from so-called "crystallized rights"; and (iii) whether and to what extent the investors' due diligence is a

694 **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 304.

factor to examine in the overall circumstances to be considered while examining the legitimacy and reasonableness of the investors' expectations.

699. On the *first* disputed matter mentioned in ¶ 698 above, the Tribunal considers that legitimate expectations can be created in the absence of specific promises or commitments by the host State. Claimants have rightly submitted that explicit promises, by way of contractual undertakings or otherwise, are not indispensable to the creation of legitimate expectations. Respondent does not specifically call in issue this proposition either.

700. Moreover, this view has been consistently endorsed in investment arbitration case law, most notably in the *Parkerings v. Lithuania* case, relied upon by Claimants, where the tribunal found that "[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, <u>or if implicitly</u>, the host-State made assurances or representation that the investor took into account in making the investment."[695] (emphasis added) Accordingly, a number of tribunals have found that these expectations may be derived from the "conditions that were offered by the State to the investor at the time of the investment", and need not be manifested in explicit promises.[696]

701. The aspects relating to the *first* issue mentioned in ¶ 698 above that are debated between the Parties pertain to whether and how the legal standard for assessing the legitimacy of investors' expectations is affected when such expectations are not created or confirmed by specific commitments. In this regard, two points are relevant to mention.

702. Firstly, Respondent contends that the obligation to protect legitimate expectations of investors cannot be treated as an obligation to keep the host State's legal regime frozen in time, unless the host State has specifically committed to a stabilization or freezing clause. The Tribunal agrees with Respondent's submission. The Tribunal has already found that

[695] **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 331; *see also* **CL-47**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 119.

[696] **CL-60**, *Enron Corporation Ponderosa Assets, L.P. v. Argentina*, ICSID Case. No. ARB/01/3, Award, May, 22, 2007, ¶ 262; **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶¶ 130-133; **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶¶ 360(3), 360(5), 366, 399; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶¶ 489-492; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, Dec. 27, 2016, ¶¶ 367-371.

the maintenance of a stable and transparent legal framework is an important ingredient of the host State's FET obligation (see ¶ 684 above), and is thus also a relevant feature of the constituent obligation to protect the investors' legitimate expectations. However, in the absence of a stabilization clause, this obligation cannot magnify itself such as to require host States to freeze their regulatory systems. This proposition has been universally endorsed in investment arbitration case law.[697]

703. Secondly, Claimants propose that it is only in the limited situation when there are no specific commitments made by the host State that the host State's regulatory authority should be considered in the legitimate expectations analysis as a balancing element. The Tribunal does not endorse this proposition as a matter of principle under Article 10(1) ECT. The Tribunal has already found above that the general legal standard for the FET obligation requires a consideration of the host State's regulatory powers (see ¶¶ 685-686 above). That general proposition does not depend on the presence or absence of specific commitments for the purposes of a legitimate expectations analysis. In other words, the presence of specific commitments, contractual or otherwise, cannot automatically eliminate or diminish the significance of the host State's regulatory powers for the purposes of its FET obligation under Article 10(1) ECT. Instead, as helpfully explained by the tribunals in *Electrabel v. Hungary*[698] and *Antaris v. Czech Republic*,[699] specific commitments only "make a difference to the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectations". They do not render the host State's regulatory powers nugatory.

704. This brings the Tribunal to the *second* disputed matter mentioned in ¶ 698 above concerning the requirement, if any, for legitimate expectations to stem from "crystallized rights". In this regard, the Tribunal notes that Claimants derive the term "crystallized

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697 See, for instance, **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 219; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 305; **CL-58**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/08, Award, September 11, 2007, ¶ 332; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶ 503; **CL-114/RLA-011**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Final Award, 27 December 2016, ¶¶ 367-372; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶ 572.

698 **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 7.78.

699 **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 360(5); see also ¶ 360(8).

rights" from the following finding of the *CEF v. Italy* tribunal, which they criticize for being an incorrect application of the legitimate expectations standard:

> Claimant, in reality, at the time of the making of both the Megasol and the Phenix investments still had a number of steps to take before it knew for certain that the hoped-for incentives were actually awarded to it. It enjoyed no guarantee of success at the time of investment, and nothing in any of Respondent's Contos could infer that a party in Claimant's position as of such dates was inevitably going to be awarded the incentives. The fact that Claimant did indeed, at a later time, succeed in all respects for both Megasol and Phenix does not assist it as of the dates upon which it made those investments. <u>What is decisive is that as of those dates the protection of Claimant's investment rights had not yet crystallized</u>.[700] (emphasis added)

705. Keeping aside the factual matters at issue in the *CEF v. Italy* case, the Tribunal is of the view that Claimants, in their criticism of the legal motivations of the *CEF v. Italy* tribunal, read more into the above emphasised phrase than warranted. According to Claimants, this passage represents a limited understanding of an "investment" as covering only "crystallised rights" on the date of the first investment, as opposed to the more liberal understanding of an "investment" as a multi-staged process. Furthermore, Claimants are of the view that this passage is also an incorrect application of the temporal issue of the point in time in reference to which legitimate expectations should be analysed (see ¶¶ 595-596 above).

706. In order to appropriately understand the above emphasised passage from the *CEF v. Italy* award, this Tribunal considers it important to read the passage in the right context. Immediately prior to the above quoted paragraph, the *CEF v. Italy* tribunal had clarified that its determinations herein were focussed on the "important temporal point" about whether any legitimate expectations existed at the time the investors made their investment.[701] Accordingly, the above quoted paragraph commences with the phrase "at the time of the making of . . . investments". Thus, Claimants' first point of criticism, about the *CEF v. Italy* tribunal's allegedly limited understanding of an "investment" is misplaced. A contextual reading of the above quoted passage indicates that the *CEF v. Italy* tribunal was not examining the issue of what constitutes an "investment", and

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700 **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 188.

701 **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 186.

whether an investment is a single-step or a multi-step process. Instead, the *CEF v. Italy* tribunal was only examining the temporal issue about when legitimate expectations should exist. This distinct issue is analysed in greater detail in ¶¶ 715 *et seq.* below.

707. In the above quoted passage, the *CEF v. Italy* tribunal also discussed the form in which the legitimate expectations should exist at the time the investor makes its investment, i.e., whether the investor in that case "knew for certain that the hoped-for incentives were actually awarded to it" and "was inevitably going to be awarded the incentives".[702] (emphasis added) Thus, in referring to "crystallized" investment rights, the *CEF v. Italy* tribunal was only distinguishing expectations that are merely "hoped-for" and those that the investor "knew for certain". Contrary to how Claimants perceive it,[703] this distinction between mere hopes and knowable, certain expectations does not *per se* relate to the distinction between promises created in general framework legislation versus promises created by specific letters or contracts. The latter is a separate matter, with respect to which this Tribunal has already found that legitimate expectations do not necessarily need to be sourced from specific promises in contracts (see ¶¶ 699-701 above).

708. Instead, the Tribunal considers that the distinction between hopes and knowable expectations goes towards the level of certainty of expectations that the host State's conduct creates for investors, and in turn, "the level of legitimacy and reasonableness"[704] alluded to earlier (see ¶ 697 above). A number of tribunals have alluded to this distinction, albeit in different manners. This includes tribunals whose decisions and awards Claimants rely on. For instance, the tribunal in *Electrabel v. Hungary* found that "expectations must be based on more than subjective beliefs",[705] and the assessment of whether they are must be "against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State".[706] (emphasis added) Similarly, the tribunals in *Saluka v. Czech Republic,*[707] *Charanne v.*

[702] **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 188.

[703] Claimants' Comments on *CEF Energia B.V. v. Italy* (SCC Arb. No. 2015/158), 20 March 2019, ¶ 17.

[704] **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 304.

[705] **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 7.76.

[706] **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 7.78.

[707] **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 304.

Spain,[708] and *Belenergia v. Italy*[709] have also emphasised on the "objective standard" for assessing the expectations, based on the information that investors knew or should have known at the time of investing. Similarly, the tribunal in *Antaris v. Czech Republic* found that "[a] claim based on legitimate expectation must proceed from an identification of the origin of the expectation alleged, so that its scope can be formulated with precision."[710]

709. This Tribunal considers the above articulations to have the same effect as the *CEF v. Italy* tribunal's reference to "crystallized" investment rights, which is to say that investors' subjective hopes or beliefs do not qualify to create legitimate and reasonable expectations. These expectations are required to be "crystallized" in a form that is objectively discernible, or as the tribunal in *LG&E v. Argentina* put it, the expectations "must exist and be enforceable by law" in order to be protected.[711]

710. Therefore, with respect to the *second* disputed matter in ¶ 698 above, this Tribunal finds that legitimate expectations should be "crystallized", inasmuch as they are required to be objectively knowable and certain, and not based on subjective hopes or beliefs.

711. This leads the Tribunal to the *third* disputed matter mentioned in ¶ 698 above, pertaining to the requirement of due diligence on part of the investors prior to investing in the host State. The Tribunal has already found in ¶¶ 683 and 697 above that an examination of the legitimacy of expectations should take into account all relevant circumstances in a given case. Whether and to what extent the investors' duty to conduct due diligence falls within this gamut of circumstances is what the Tribunal shall determine next.

712. Claimants do not dispute the existence of the investors' duty of due diligence, but presents a different standard for this duty than that presented by Respondent. Respondent relies on the above quoted passage from *Electrabel v. Hungary* (see ¶ 708 above) and on *Masdar v. Spain* to argue the standard of "appropriate due diligence [showing] that [the investor] has

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708 **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶ 495.

709 **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶ 583.

710 **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 360(2).

711 **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 130.

familiarized itself with the existing laws".[712] Claimants rely on a passage from the award in *Novenergia II v. Spain* to submit that for the host State to establish a deficiency in the investor's due diligence, the State must establish that reasonable due diligence would have revealed the regulatory change of which the investor complains.[713]

713. The Tribunal is not persuaded by Claimants' proposed standard for due diligence. To require the host State to establish what due diligence could or would have revealed is to place the burden of proof on the host State with respect to the investors' duty of due diligence. That is an anomaly, since the duty of due diligence is the investor's and hence the burden to establish the same, in turn, falls on the investor.

714. This placement of the burden of proof is in line with investment arbitration case law. The standard of due diligence that investors are expected to adhere to should meet the threshold of what a "prudent investor" would "reasonably" do to know about regulatory framework in question. This standard of reasonable due diligence, as opposed to "extensive legal investigation", has found the endorsement of many tribunals, including the tribunal in *Electrabel v. Hungary* (quoted in ¶ 708 above) and several others in more recent cases.[714] A more specific articulation of this standard, with which the Tribunal agrees, can be found in the *Antaris v. Czech Republic* award, in the following passage:

> [G]iven the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State."[715]

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[712] **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, ¶ 494.

[713] C-RPHB, ¶¶ 41-42; *relying on* **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶ 679.

[714] **CL-122**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, July 17, 2016, ¶ 781; **CL-168**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, ¶ 494; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 583-584.

[715] **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 360(6).

Investors' Reliance on Legitimate Expectations to make their Investments

715. The second question in ¶ 695 above, i.e., whether the investor relied on these expectations to make their investments in the host State, is primarily a question of fact. The only legal aspect that the Tribunal is required to determine for the purpose of this question concerns the point of time in reference to which the investor's legitimate expectations should be assessed.

716. Both, Claimants and Respondent, agree with the general proposition that the relevant point of time to assess an investor's legitimate expectations is the time of making of the investments (see ¶¶ 595 and 631 above). This proposition has also met the consistent approval of investment arbitration tribunals.[716]

717. However, in response to the Tribunal's question during the Hearing about the moment "at which . . . legitimate expectations have to be taken into account",[717] Claimants presented a nuanced line of argument, pointing out that often it is not possible to narrow an investment down to an exact date when it was made, since investments are usually multi-staged, sophisticated and complex transactions that are spread out over a period of time.[718] In furtherance of this, Claimants submit that the investor's legitimate expectations may be grounded on the overall legal order or conditions offered by the host State when the investment was made, and may continue to evolve over time. Claimant' submission is that if the process of investment continues in reliance of the evolved legitimate expectation, those subsequent transactions forming part of the overall investment may also be protected. Claimants rely on multiple sources for this proposition.[719]

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[716] See, for instance, **CL-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, March, 17, 2006, ¶ 301; **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 130; **CL-60**, *Enron Corporation Ponderosa Assets, L.P. v. Argentina*, ICSID Case. No. ARB/01/3, Award, May, 22, 2007, ¶ 262; **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 7.76; **CL-47**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 117; **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 360(7).

[717] Hr. Tr. Day 3, pp. 247:24-248:2.

[718] Hr. Tr. Day 4, pp. 177:22-178:6; C-PHB, ¶¶ 62-71; C-RPHB, ¶¶ 46-49.

[719] See, for instance, **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 557; **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April8, 2013, ¶¶ 542-544; **CL-185**, U. Kriebaum; C.H. Schreuer; "At What Time

718. The Tribunal considers that Claimants are correct to point out the nuances about the investment making process. On occasions, it may indeed be difficult to reduce the investment to one day, or to pin-point exactly at what time the investment was made. The Tribunal considers that in such situations, the timing of the investors' *decision to make the investment,* as opposed to the timing of the investment itself, becomes significant. Claimants accepted this proposition in the following submission made during the Hearing:

> We believe it is well established in treaty case law that the date on which to assess whether a claimant's expectations are legitimate is the date of the decision to invest. <u>So it is the date when the decision to invest was made</u>.[720] (emphasis added)

719. In support of their submission, Claimants cited the awards in *Bayindir v. Pakistan* and *Novenergia II v. Spain*.[721] Both these cases have indeed focussed their temporal analysis of legitimate expectations on the date of the decision to invest.[722] The *Novenergia II v. Spain* award examined this issue in detail, in the following passages:

> Based on the above, the Tribunal is of the view that the relevant time for making the assessment of the Claimant's legitimate expectations is at the time when the investment was made. The more difficult issue is to determine in an actual case when such investment was in fact made. It is of course not unusual in larger projects that the investment phase transcends through various stages; negotiations, due diligence, internal corporate decisions, external contractual commitments, financing, acquisition, construction, registration, start-up and the first generation of revenues. In addition, the investment is sometimes structured to be executed in consecutive stages even if there are binding commitments predating such subsequent stages.

Must Legitimate Expectations Exist?", A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought, TDM 1 (2012), p. 274, available at: https://www.transnational-disputemanagement.com/downloads/tw-liberamicorum.pdf; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, Dec. 23, 2018, ¶¶ 131-142; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶¶ 154, 165.

720 Hr. Tr. Day 4, pp. 177:6-177:10.

721 Hr. Tr. Day 4, pp. 178:7-178:16.

722 **CL-148**, *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 190; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶ 539.

> The Tribunal is of the view that the timing of the investor's *decision* to invest sets a backstop date for the evaluation of legitimate expectations . . .[723] (emphasis in original)

720. The Tribunal agrees with the above findings of the tribunal in *Novenergia II v. Spain.* Accordingly, for an investment that was made in multiple stages, the temporal analysis should focus on the legitimate expectations that existed, if any, at the time the investor decided to make that investment. It falls upon the investor to establish that at this point in time, there existed legitimate expectations upon which the investor relied and decided to make its investment in the host State.

721. In addition to the situation where an investment evolves over multiple stages, Claimants also discuss the evolution of the legitimate expectations over a course of time, and how legitimate expectations created or "crystallized" after the investment is first made can also be protected under Article 10(1) ECT. According to Claimants, in such circumstances, if multiple investment decisions were made in reliance of the legitimate expectations that evolved over time, such legitimate expectations and investments also deserve protection. In these circumstances, Claimants submit that it is not possible to focus only on one particular point in time for the identification of legitimate expectations.[724]

722. The Tribunal considers that in situations where legitimate expectations evolve over time, while it may not be feasible to identify a singular point in time for creation of legitimate expectations, it is still required that the legitimate expectations being claimed are objectively knowable and certain for the multiple stages of the investment. In this regard, the Tribunal agrees with the following findings of the tribunal in *Crystallex v. Venezuela*, relied upon by Claimants:

> A legitimate expectation is normally said to arise "at the time of making the investment". In the Tribunal's eyes, this is logical, as it is the investor's

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723 **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, ¶¶ 538-539.

724 C-PHB, ¶¶ 70-71, 87; *relying on* **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 557; **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April8, 2013, ¶¶ 542-544; **CL-185**, U. Kriebaum; C.H. Schreuer; "At What Time Must Legitimate Expectations Exist?", A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought, TDM 1 (2012), p. 274, available at: https://www.transnational-disputemanagement.com/downloads/tw-liberamicorum.pdf.

> *reliance* on a promise which may prompt, or contribute to, its decision to invest and proceed with that investment, and which makes in turn the expectation worthy of legal protection. In certain cases, however, "investments are made through several steps, spread over a period of time" . . . <u>[I]n these instances "legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment"</u>.[725] (emphasis added and footnotes omitted)

723. Thus, even in cases of multiple stages of one investment or multiple related investments made by the investor, it still falls upon the investor to identify for each such stage the precise legitimate expectation that was created by the host State and relied upon by the investor to make or expand the investment.

724. Accordingly, the Tribunal does not agree with Claimants' characterization of this issue as one wherein the "reliance" by the investor to make or expand an investment is somehow more "critical" than the "precise 'timing' of a particular investment decision."[726] The Tribunal considers that both the timing of the decision to invest and the reliance on any legitimate expectations are related issues. The precise timing of each investment decision is important to examine whether the investment decision was made in reliance of any legitimate expectations. In this regard, the tribunal in *Franck Charles Arif v. Republic of Moldova*, also relied upon by Claimants, pertinently observed that "a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision."[727]

725. Therefore, the Tribunal concludes that the precise timing of the investor's decision to make (or expand) the investment(s) remains the focal point in time to examine the existence and scope of any legitimate expectations created by the host State and relied upon by the investor, regardless of whether the investment(s) were made as one-stop transactions or multi-step processes.

[725] **CL-178**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 557.

[726] C-PHB, ¶ 71.

[727] **CL-69**, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April8, 2013, ¶¶ 534-535.

The Standard for Frustration of Legitimate Expectations

726. Finally, the Tribunal turns to the third question in ¶ 695 above, i.e., whether the host State by its subsequent conduct frustrated the investors' legitimate expectations.

727. In this connection, the Tribunal need only recall the general legal standard for examining the host State's conduct under Article 10(1) ECT discussed in ¶¶ 675-693 above. Along those lines, the Tribunal emphasises here that not every conduct of the host State that breaches investors' legitimate expectations would automatically amount to a breach of the international law obligation under Article 10(1) ECT. For a breach of legitimate expectations to qualify as a breach of the FET obligation under Article 10(1) ECT, the high standard of the FET obligation is required to be satisfied by the host State's conduct in question.

728. As mentioned in ¶ 689 above, to constitute a breach of the FET standard, it must be shown that the host State's subsequent conduct was manifestly or grossly unfair or unreasonable, was arbitrary or discriminatory, or that the host State engaged in a wilful neglect of duty or a wilful disregard of due process of law, or showed an extreme insufficiency of action falling far below international standards, such that the conduct would shock judicial propriety.

(iv) Transparency and Consistency

729. The Parties are in dispute about whether the host State's duty to act transparently and consistently constitutes an independent tenet of the FET obligation, and if so to what extent. While Claimants endorse the independence of this tenet of the FET obligation (see ¶¶ 597-598 above), Respondent submits that the duty to act transparently and consistently overlaps with the duty to protect investors' legitimate expectations (see ¶ 634 above).

730. The Tribunal notes that Respondent's view is that a host State's duty to maintain stability and/or consistency forms a part of its duty to protect the legitimate expectations of the investor, whereas the State's duty to maintain transparency is part of the general standard of FET. Claimants have also acknowledged in their submissions that the principles of transparency and consistency "may be related to each other and they may both relate to

general notions of stability and fairness."[728] Moreover, although Claimants argue that a breach of an FET obligation can theoretically be predicated on inconsistent or non-transparent conduct even if the investor's legitimate expectations were not frustrated, they also admit that "transparency and consistency are probably most relevant to this Tribunal in terms of its analysis of Italy's defence to SunReserve's legitimate expectations claims."[729]

731. The Tribunal does not consider the Parties' positions to be too far apart from each other. Both Parties agree that the host State's duty to conduct itself in a transparent and consistent manner forms part of the FET obligation in general, and that the demarcation between this duty and the duty to preserve legitimate expectations is not watertight. In other words, claims relating to the notions of transparent and consistent conduct may often factually overlap with claims relating to the investor's legitimate expectations. The Tribunal finds this proposition uncontroversial. In this regard, the Tribunal recalls that it has already found stability and transparency to be inherent in the meaning of the FET obligation under Article 10(1) ECT (see ¶ 684 above).

732. The case law relied upon by the Parties has also treated the notions of transparency and consistency as a part of the investor's legitimate expectations. For instance, the tribunal in *Saluka v. Czech Republic* found that "[a] foreign investor protected by the Treaty may in any case properly expect that . . . [the host State's] conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination."[730] Similarly, other cases relied upon by Claimants, in particular *Micula v. Romania* and *Tecmed v. Mexico,* also recognize that transparency and consistency form part of investor's legitimate expectations.[731]

733. That being said, the Tribunal agrees with Claimants that it may be theoretically possible for a breach of the FET obligation to be rooted in the host State's inconsistent and/or non-

[728] SoRy, ¶ 371; *see also* SoC, ¶ 278.

[729] Hr. Tr. Day 4, pp. 208:18-208:21.

[730] **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 307.

[731] **CL-54**, *Tecmed Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 154; **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶¶ 532-534; *see also* **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 131.

transparent conduct, even though the host State's conduct does not amount to a frustration of legitimate expectations. Whether that is the case or not depends on the overall facts and circumstances of each case, which need to be considered in totality as part of the Tribunal's examination of any claim relating to a breach of an FET obligation (see ¶ 683 above).

734. As part of these overall circumstances, the Tribunal considers it important to emphasise here that the host State's duty to conduct itself transparently and consistently should not be "taken too literally", and should therefore not "impose upon host States obligations which would be inappropriate and unrealistic", for instance requiring full disclosure or full access to all information.[732] This is especially when the notions of transparency and consistency are under scrutiny independently of any legitimate expectations that may be supported in specific contractual or other undertakings.

735. In the absence of such specific undertakings, when the question of breach only implicates a host State's regulatory changes, not every non-transparent or inconsistent regulatory change of conduct would amount to a breach of the FET obligation. As already observed by the Tribunal above (see ¶ 692 above), in order for the regulatory change to amount to a breach of the FET obligation, such a change should rise to the level of a "radical or fundamental" change, in light of the high standard to satisfy a breach of the FET obligation.[733] In this connection, it is obvious that the host State's regulatory authority should be afforded due deference in any determination of whether the regulatory change is a radical or fundamental one (see ¶ 685 above).

(v) Good Faith

736. Similar to the host State's duty towards transparency and consistency, the Parties are in disagreement about whether the requirement of good faith constitutes an independent facet

[732] **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶ 533; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 304.

[733] **CL-180**, *Foresight Luxembourg Solar 1 S.A.R.L, Foresight Luxembourg Solar 2 S.A.R.L., Greentech Energy Systems A/S et al. v. The Kingdom of Spain*, SCC Arbitration V (2015/150), Final Award, ¶ 359; **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 654; **CL-117**, *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶ 382.

of the FET obligation, and if so to what extent. Claimants propose that the host State's obligation to treat investors in a *bona fide* manner, i.e., an even-handed and non-discriminatory manner, constitutes a distinct obligation under the FET legal standard (see ¶ 599 above). Respondent argues that the principle of good faith is inherent to the interpretation and application of the FET standard and does not constitute an autonomous obligation under the FET legal standard (see ¶¶ 635-636 above).

737. The Tribunal does not consider the requirement of good faith or *bona fide* conduct to constitute a separate obligation under Article 10(1) ECT. Instead, the Tribunal is persuaded by Respondent's view that good faith is a fundamental concept that permeates across the FET obligation in general, and all independent facets thereof.

738. In this regard, the Tribunal notes that good faith is, first and foremost, a requirement for interpretation of any treaty provision, including Article 10(1) ECT, in accordance with Article 31(1) VCLT (quoted in ¶ 289 above, and see ¶ 676 above).

739. Second, the Tribunal considers that good faith performance forms the essence of any international law obligation, including the obligation of fair and equitable treatment. It is obvious that no conduct which evidences bad faith can qualify as fair or equitable in international law. Investment arbitration case law has consistently understood good faith as being "at the heart of the concept of fair and equitable treatment",[734] or recognized that "the concept of legitimate expectations is based on the requirement of good faith."[735] This holds equally true for cases relied upon by Claimants, for instance, *Micula v. Romania*, which, *inter alia*, examined good faith as "a fundamental principle of international law that States Party to a treaty must perform treaty obligations in good faith."[736]

740. In any event, the Tribunal considers it important to emphasise that in order for bad faith or *mala fide* conduct to be established, the burden on the investor is high. In light of the overall high standard to establish a breach of the FET obligation alluded to above (see ¶

[734] **CL-75**, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, ¶¶ 298-299.

[735] **CL-47**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, Dec. 27, 2010 ¶ 128.

[736] **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶¶ 833-835; *see also* **CL-53**, *Saluka Investments B.V. v. The Czech Republic*, Partial Award, March 17, 2006, ¶ 307.

688 above), the Tribunal considers that for any course of action to qualify as bad faith or *mala fide*, a wilfulness or intention, on part of the host State, of committing the unfair or inequitable action has to be established. Not every unfair or inequitable action automatically qualifies as an action in bad faith.[737]

b. Whether Italy Frustrated any of Claimants' Legitimate Expectations by enacting the *Spalma-Incentivi* Decree

741. Having determined the legal standard for each tenet of the FET obligation under issue, the Tribunal shall next discuss Claimants' alleged legitimate expectations, and whether they were frustrated by Italy. To examine this issue, the Tribunal shall (i) first, determine the relevant point in time when Claimants decided to make their investment in Italy; (ii) second, analyse whether Claimants' decision to make their investment was based on any expectations, and if so, whether these expectations were legitimate; and (iii) third, examine whether any of Italy's subsequent conduct results in the frustration of any of Claimants' legitimate expectations.

(i) The Relevant Point in Time when Claimants Decided to make their Investment in Italy

742. The Tribunal considers it appropriate to commence its analysis by first establishing the temporal reference point that will form the basis for the Tribunal's forthcoming considerations as to the existence and frustration of any legitimate expectations that Claimants may have relied upon.

743. In this regard, the Tribunal recalls the legal standard determined above, as per which in a situation when a single investment is made in multiple stages, the temporal analysis should focus on the legitimate expectations that existed, if any, at the time the investor decided to make that investment (see ¶¶ 718-720 above). The same holds true if multiple investment decisions are made in reliance of an evolving set of expectations, in which situation the temporal analysis should focus on the legitimate expectations that existed, if any, at the different points in time the investor made distinct decisions to make or expand its investment (see ¶ 723 above). Thus, the issue currently under analysis concerns the point in

[737] *See, in this regard,* **CL-14**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, 2013, ¶¶ 835-836.

time Claimants decided to make their investment in Italy, and whether that can be singled out as one decisive point in time or is spread out into multiple different investment decisions.

744. Claimants submit that their investments are comprised of various distinct facets, i.e., (i) shares and equity participation in the Italian companies and the corresponding photovoltaic facilities, as well as debt obligations with respect to those companies and facilities; (ii) those companies' rights to returns, claims to money and claims to performance pursuant to the *Conto Energia* regime and the GSE contracts; (iii) tangible and intangible property and property rights, including various photovoltaic facilities; (iv) rights conferred by law, specifically, the rights to fixed incentive tariffs conferred through various *Conto Energia* Decrees; and (v) rights conferred by licenses, permits, and contracts, including rights to incentive tariffs.[738]

745. Further, Claimants emphasise that their investments were structured in a manner that the payments would be made in a stage-wise manner in three milestones, as per the Framework Agreement (see ¶¶ 184-185 above). Hence, even if the SPVs developing or operating the photovoltaic plants were acquired earlier in time, since the majority of the milestone payments were reserved until after the plants entered into operation, the relevant temporal reference point for making of the investments, and in turn for a legitimate expectations analysis should be the entry into operation for each plant (see ¶ 607 above).

746. For Respondent, the point in time Claimants' investment(s) were made, and in turn, the point in time in reference to which the existence of Claimants' alleged legitimate expectations should be examined, is when Claimants acquired the relevant assets or controlling stakes in the SPVs developing or operating the photovoltaic plants (see ¶¶ 642-643 above).

747. Taking the above into account, the Tribunal identifies two related questions for examination in this Section, in order to determine the relevant temporal reference point for its analysis of Claimants' alleged legitimate expectations: (i) what constitutes Claimants'

[738] SoC, ¶ 31; RfA, ¶ 68.

investment(s); and (ii) whether Claimants' investments were structured such as to comprise multiple distinct investment decisions or a singular investment decision.

748. With respect to the first question in ¶ 747 above, the definition of the term "investment" under Article 1(6) ECT assumes relevance. According to this definition:

> "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

749. The Tribunal considers that the various facets of Claimants' investment(s) in Italy that Claimants advance (see ¶ 744 above) fall within sub-clauses (a) through (c) and (f) in Article 1(6) ECT. This is not a disputed proposition in this case.

750. Moreover, Claimants do not argue that their investments in Italy were comprised of multiple portfolios or many different investment activities. Accordingly, in the present case, the Tribunal is not faced with investors that made multiple distinct investments at different points of time. Instead, Claimants' position is that their consolidated or homogenous investment activity in the photovoltaic plants they acquired in Italy were structured in multiple stages distributed over a course of time.

751. This brings the Tribunal to the second question in ¶ 747 above, i.e., whether the various facets of Claimants' investments in Italy were made as a result of one or multiple investment decisions. To answer this question, the Tribunal considers the appropriate starting point to be Article 1(8) ECT, which defines the term "Making of Investments" as

"establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity."

752. From the above definition, it is apparent that the ECT envisions the making of an investment as an active mode of doing as opposed to a passive method of being granted acquisition over assets. In other words, making an investment refers to the active conduct of establishing or acquiring investments. As a natural corollary, the Tribunal considers that the point in time when an investor decides to make its investments refers to the time when the investor actively decided to establish or acquire investments in the host State. The fact that the investments happened to evolve over time as a result of any rights being conferred by statute or contract does not imply that each stage of evolution constitutes a distinct investment decision.

753. In the present case, the Tribunal considers the point in time when Claimants decided to make their investments in Italy to be the time when they acquired their shareholding in the SPVs developing and/or operating the photovoltaic plants at issue. Accordingly, the Tribunal agrees with Respondent's line of argument (see ¶¶ 642-643 above). This is for the following reasons.

754. *First*, each of the different facets of Claimants' investments (see ¶ 744 above) can, in legal terms, be sourced back to the original acquisition of shares in the SPVs. Be it the SPVs' alleged rights to returns granted by statute or contract, their claims to money or their claims to performance pursuant to the *Conto Energia* regime and the GSE contracts, each of these facets assumes legal relevance for Claimants under the ECT only as a consequence of the original acquisition of the shareholding in the SPVs.

755. This was explained by Claimants' witness, Mr. Mark Florian, during the Hearing in the following exchange:

> Q. So is this the document [CEX-335] by which the Claimants would have acquired Rovigo? Is this the complete document, do you know?
>
> A. I'd have to go back and look. But basically what we were doing was we were buying Emmezeta, which was the entity that owned the Rovigo plant. But the plant wasn't fully constructed at the time, and so -- and we weren't going to take risk on the completion of the construction, the commissioning of the plant and ultimately the feed-in tariff being applied. <u>So while the</u>

> acquisition date may be relevant in terms of the legal ownership of the entity that ultimately would own the power plant, the more economically important date was when we actually had a completed plant that had the feed-in tariff applied to it.[739] (emphasis added)

756. It is clear from the above statement that Claimants understood the legal relevance of the date on which the shareholding in the concerned SPVs was acquired by them. The significance of that date also comes across in the document that Mr. Florian was being directed to in the above exchange during the Hearing. That document, i.e., CEX-335, is the Emmezeta Solar Energy S.r.l. Quota Transfer Deed dated 30 September 2010, whereby the Second Claimant acquired the SPV, which was developing the Rovigo Plant, Emmezeta Solar Energy S.r.l (see ¶ 204 above). Article 1(c) of this Quota Transfer Deed stated that "[t]he sale of the Quota shall cause immediate transfer of the legal and beneficial title there over."[740] (emphasis added) For clarification, as per this Deed, "Quota" represented "100% of the corporate capital" of the concerned SPV.[741] Similar provisions can be found in other Quota Transfer Deeds pertaining to the other eight photovoltaic power plants acquired by Claimants.[742]

757. The fact that Claimants allocated their risks in such a manner that the risk of the completion or the commissioning of the plants would not fall on them does not interfere with the legal significance of the acquisition of shares in the SPVs developing and/or operating these plants. The allocation of risk pertains to the manner in which the investments were to be structured, which is distinct from the legal and beneficial transfer of ownership of shares. The latter occurrence is the decisive point in time to be considered.

758. *Second*, the Tribunal does not agree that the date of acquisition of shares is less "economically important" in comparison to the date when the Claimants' plants became entitled to the incentive tariffs (see ¶ 755 above). Along these lines, Claimants also submitted during the Hearing that the "date on which the shares were acquired in the local

739 Hr. Tr. Day 2, pp. 54:13-55:3.

740 **CEX-335**, Emmezeta Solar Energy S.r.l. Quota Transfer Deed, article 1(c).

741 **CEX-335**, Emmezeta Solar Energy S.r.l. Quota Transfer Deed, article 1(a).

742 For instance, see **CEX-303**, Saniso S.r.l. Quota Transfer Agreement article 4.4(iii); **CEX-304**, Saniso S.r.l. Quota Transfer Deed article 1(c).

SPVs by the SunReserve Luxco entity . . . occurred prior to the infusion of any substantial amount of equity or shareholder loans."[743]

759. At the outset, the Tribunal notes that the above factual statement does not hold true for all of Claimants' power plants. For instance, for the Lenare Plant (997.92 kW), operated by the SPV, Sunny Lenare S.r.l, the Quota Transfer Deed mentions the transfer price of EUR 1,421,962.[744] For the San Marco Plant (985.71 kW), operated by the SPV, SunEdison Apulia 007, the Quota Transfer Deed mentions the transfer price of EUR 1,720,357.[745] For the Santoro Plant (968.31 kW), operated by the SPV, SunEdison Apulia 008 S.r.l., the Quota Transfer Deed mentions the transfer price of EUR 1,634,147.[746] Similarly, for the Campania Plant (20.41 MW) operated by the SPV, Saniso S.r.l., the Quota Transfer Agreement and the Quota Transfer Deed mention the provisional transfer price as EUR 2,110,000 and the purchase price is defined to include tranches of EUR 4.5 million and EUR 6.5 million, to be paid in advance.[747]

760. Notwithstanding the above, the Tribunal also considers that, as a conceptual matter, even if the equity was infused in the SPVs and/or the plants they were operating subsequent to the initial acquisition of shares, this lapse in time does not take away from the fact that the economic decision to invest in the plants had already been made when the shares in the SPVs were acquired. The subsequent contribution of money would only contribute to the value of the concerned SPVs and the photovoltaic plants, and, in turn, Claimants' own shareholding therein. However, it would not have any impact on Claimants' already existing shareholding in (and ownership of) these SPVs.

761. The economic significance of the acquisition of shares is also demonstrated by the fact that Claimants' damages calculation in this arbitration, as presented by their quantum expert, FTI Consulting, is based specifically on "losses from the diminution in the value of their investments in the Italian Plants (both the shares and the shareholder loans made to the

743 Hr. Tr. Day 4, pp. 179:21-180:2.

744 **CEX-288**, SunEdison Apulia 007, SunEdison Apulia 008 and Sunny Lenare S.r.l. Quota Transfer Deeds.

745 **CEX-288**, SunEdison Apulia 007, SunEdison Apulia 008 and Sunny Lenare S.r.l. Quota Transfer Deeds.

746 **CEX-288**, SunEdison Apulia 007, SunEdison Apulia 008 and Sunny Lenare S.r.l. Quota Transfer Deeds.

747 **CEX-303**, Saniso S.r.l. Quota Transfer Agreement article 2.2; **CEX-304**, Saniso S.r.l. Quota Transfer Deed article 1(b).

Parent Companies)."[748] Similarly, Claimants' witness, Mr. Florian, also admitted during the Hearing, that when Claimants sold their shares in the SPVs to a third party in August 2016,[749] they divested their entire investment portfolio in Italy:

> THE CHAIRMAN: Can you be shown RE-128, please. It is an exhibit to the Edwards report, the FTI report. You have it in front of you?
>
> A. I have the shares purchase agreement in front of me, yes, sir.
>
> THE CHAIRMAN: And is that the shares purchase agreement for SunReserve portfolio in Italy?
>
> A. I believe so, yes, sir.
>
> THE CHAIRMAN: And that's what you referred to that was sold for which price?
>
> A. €104 million.[750]

762. In light of the above, the Tribunal considers Claimants' acquisition of shares to not only be legally relevant, but also economically relevant to determining the time when Claimants decided to invest in Italy. Without Claimants' initial acquisition of shares, the other facets of its investment (see ¶ 744 above) would not hold legal or economic significance.

763. *Third*, the Tribunal is not persuaded by Claimants' submission that the different Milestone Payments that were made pursuant to the Framework Agreement constituted distinct investment decisions based on an evolving set of legitimate expectations. The fact that Claimants structured their capital contributions in the acquired SPVs in three milestones does not imply that Claimants made distinct investment decisions every time they made these Milestone Payments.

764. In this connection, at the outset, the Tribunal notes that the term "Milestone Payments" is defined in the Framework Agreement as referring to "the payments . . . to be made . . . pursuant to the EPC Agreement for [each] Project."[751] Thus, Milestone Payments were to be made pursuant to the Engineering, Procurement and Construction Agreements, and not pursuant to the share or quota transfer agreements relating to the acquisition of the SPVs.

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748 First FTI Quantum Report, ¶¶ 1.8, 1.19.

749 First Florian Witness Statement, ¶¶ 27-28; **RE-128**, Share Purchase Agreement with Tages Capital SGR S.p.A., 5 August 2016.

750 Hr. Tr. Day 2, pp. 58:7-58:17.

751 **CEX-346**, Framework Agreement, Article 1.

The Tribunal has already determined above (see ¶ 762 above) that the legally and economically relevant event for examining the timing of Claimants' decision to invest is the acquisition of shares.

765. Further, the Framework Agreement is dated 21 May 2010 (see ¶¶ 184-185 above). Accordingly, it predates Claimants' acquisition of the shareholding in any of the SPVs that operated the power plants at issue in this case (see table at ¶ 768 below). Thus, when Claimants decided to invest in Italy, the framework for its structured capital contributions through the Milestone Payments was already in place. Hence, these subsequent Milestone Payments cannot be characterized as distinct investment decisions that were made later in time. These subsequent Milestone Payments were only an implementation of a mechanism that already existed at the time of the original share acquisition.

766. Other than the above structured mechanism of Milestone Payments under the Framework Agreement, Claimants have not presented any evidence to establish that their subsequent equity payments or capital contributions were distinct investment decisions made later in time.

767. During the Hearing, Claimants compared their case to the facts in *Novenergia II v. Spain,* stating that the circumstances surrounding the investments in that case "is exactly – exactly – what happened here".[752] The Tribunal considers the following finding of the tribunal in *Novenergia II v. Spain* to be pertinent, and along the same lines as this Tribunal's findings above:

> The Tribunal is of the view that the timing of the investor's *decision* to invest sets a backstop date for the evaluation of legitimate expectations. In the present case it is evidenced that the Claimant made its investment on 13 September 2007 when it acquired a 100% interest in the PV Plant Solarsaor. As from that date the Claimant had irreversibly committed to investing in the Spanish PV sector, which commitments were subsequently fulfilled as the Claimant expended further funds for the development of the other PV Plants relevant for this arbitration. Consequently, the Tribunal finds that the Claimant made its investment no later than 13 September 2007.[753] (emphasis added)

[752] Hr. Tr. Day 4, p. 179:3.

[753] **CL-119**, *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, Feb. 15, 2018, ¶ 539.

768. In conclusion, the Tribunal finds that, for each of Claimants' power plants, the relevant point in time when Claimants decided to make their investment(s), is the time when Claimants acquired their shares in the SPVs operating and/or developing those plants. That point time would be the date on which the relevant share or quota transfer agreement was concluded. For each of Claimants' nine power plants, that date is reflected in the column titled "Date of Acquisition" in the below table:

S. No.	PV Plant	Regime	Date of Acquisition	Date of GSE Letter	Date of GSE Contract
First Claimant					
1	San Marco	Second *Conto Energia* + Off-Take Regime	30 June 2010	3 March 2011	15 March 2011
2	Santoro	Second *Conto Energia* + Off-Take Regime	30 June 2010	23 December 2010	31 January 2011
3	Lenare	Second *Conto Energia* + Off-Take Regime	30 June 2010	3 March 2011	15 March 2011
4	Campania	Second *Conto Energia*	19 January 2011	--[754]	5 March 2011
5	Monaci	Second *Conto Energia* + Off-Take Regime	15 February 2011	10 May 2011	18 May 2011
6	Rustico	Third *Conto Energia*	31 March 2011	6 November 2011	25 November 2011
7	Milana	Third *Conto Energia*	31 March 2011	23 November 2011	22 March 2012
Second Claimant					
8	Rovigo	Second *Conto Energia*	30 September 2010	11 January 2011	11 February 2011
Third Claimant					
9	Fiumicino	Second *Conto Energia*	22 June 2011	17 June 2011	28 June 2011

754 Claimants stated during the Hearing that they "do not have the tariff recognition letter" for the Campania plant, and later confirmed in their Post-Hearing Brief that this letter was issued by GSE after the date of acquisition of shares (*see* C-PHB, ¶ 54).

(ii) Whether Claimants' Decision to Make their Investment Was in Reliance of Any Legitimate Expectations

769. Having determined the relevant point in time in reference to which Claimants' legitimate expectations, if any, have to be examined, i.e., the date of acquisition of shares in the concerned SPVs, the Tribunal shall next determine whether, and if so, what legitimate expectations existed at this point in time. To this end, the Tribunal shall (i) first delineate the exact contours of Claimants' expectations that existed when they decided to make their investment in Italy; and (ii) whether these expectations satisfy the legal threshold of legitimacy discussed in Section VIII(3)(iii) above.

Expectations That Existed When Claimants Decided to Make Their Investment

770. Claimants have predicated their claims of legitimate expectations on numerous factors. These include (i) Italy's overall regulatory framework in the photovoltaic sector aimed at meeting EU targets for renewable energy, in particular in the EC Directive 2001/77/EC (implemented in Italy by way of Legislative Decree No. 387/2003) and the EC Directive 2009/28/EC (implemented in Italy by way of the Romani Decree); (ii) the five *Conto Energia* Decrees enacted by Italy from 2005 to 2012; (iii) GSE's tariff confirmation letters and the GSE contracts entered into with respect to each photovoltaic plant receiving the incentive tariffs; and (iv) the numerous public statements made by Italian Government officials and Italian Ministerial and other authorities confirming the stability of the incentive tariffs (see ¶ 601 above). Based on these factors, Claimants claim that when they invested in Italy, they legitimately expected the incentive tariff rates made available through the *Conto Energia* Decrees and the GSE's tariff confirmation letters and contracts would be fixed for a 20 year period.

771. Respondent disputes the basis of Claimants' claims of legitimate expectations predicated on the above mentioned four factors. In this regard, Respondent challenges both, the existence of these factors and the creation of any expectations based on them (see ¶¶ 637-641 above).

772. Accordingly, the dispute between the Parties is focussed on (i) which of the four factors listed in ¶ 770 above existed when Claimants decided to invest in their nine power plants in

Italy; and (ii) whether any of the factors that existed when Claimants decided to invest in Italy could create any expectations. The Tribunal shall examine these issues in turn.

773. The Factors that Existed when Claimants Decided to Invest: With respect to the *first* question in ¶ 772 above, the Tribunal notes that since the date of acquisition is different for different power plants (as reflected in the table in ¶ 768 above), the factors that may have existed at the date of acquisition each power plant may differ.

774. In this connection, it is undisputed that the first among the four factors in ¶ 770 above, i.e., the EC Directive 2001/77/EC (implemented in Italy by way of Legislative Decree No. 387/2003) and the EC Directive 2009/28/EC (implemented in Italy by way of the Romani Decree) existed at the time Claimants decided to invest in all of their nine power plants.

775. With respect to the second factor in ¶ 770 above, i.e., the five *Conto Energia* Decrees, it is likewise undisputed that the relevant *Conto Energia* Decree existed at the time Claimants decided to invest in the corresponding power plants. The San Marco, Santoro, Lenare, Campania, Monaci, Rovigo and Fiumicino power plants were covered by the Second *Conto Energia* Decree, which had come into existence in February 2007, i.e., prior to Claimants' acquisition of these seven power plants (see Section IV.B(2) above). Similarly, the Rustico and Milana power plants were covered by the Third *Conto Energia* Decree, which had come into existence in August 2010, i.e., prior to Claimants' acquisition of these two power plants (see Section IV.B(3) above).

776. With respect to the fourth factor in ¶ 770 above, i.e., the numerous public statements made by Italian Government officials and Italian Ministerial and other authorities, the Tribunal notes that some such public statements were indeed made at the relevant points in time when the concerned *Conto Energia* Decree was enacted. For instance, with respect to the Second *Conto Energia*, promotions and clarifications were issued, *inter alia*, by the Government and specifically the Minister of Environment,[755] certain provincial

[755] See, for instance, **CEX-58**, Government, Dossier, "*Vincere la sfida del clima e dare sicurezza energetica al paese*"; **CEX-59**, Government website, excerpt on Conto II, "*Fotovoltaico: incentivi più efficaci*"; **CEX-67**, Statement from Minister for the Environment, Land and Sea, Alfonso Pecoraro Scanio, pamphlet called "*Il Sole In Casa*" ("The Sun At Home"); SoC, ¶¶ 87-90 ; SoRy, ¶ 231; Respondent contests the relevance of **CEX-58** and **CEX-59**, on the ground that they not contain a reference to support schemes, tariffs, rates and duration; see SoD, ¶

authorities,[756] and government organizations,[757] as well as the GSE, which released an e-book[758] and made presentations to different audiences from 2007 until 2010.[759] Like its predecessor, the Third *Conto Energia* also received promotions from the federal Ministries of Economic Development, Foreign Affairs etc.,[760] the provincial and regional authorities,[761] and from GSE.[762]

777. It is with respect to the third among the four factors mentioned in ¶ 770 above, i.e., the GSE tariff confirmation letters and the GSE contracts entered into with the SPVs, that the situation is different for different power plants. As reflected in the table in ¶ 768 above, with respect to all power plants except the Fiumicino power plant, the date of acquisition precedes the dates of the GSE tariff confirmation letter or the date when the GSE contract was executed. In other words, neither the GSE tariff confirmation letter nor the GSE

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468. With respect to **CEX-67**, Respondent stresses on the Italian Minister of Environment's statement that "the *[C]onto [E]nergia* is based on twenty years but the system will pay for itself in ten"; see SoD, ¶ 486.

[756] See, for instance, **CEX-68**, Parma Energy Agency, Summary of second Conto Energia regime; **CEX-69**, Local press of Umbria, Article "Gubbio: il Ministro Pecoraro Scanio interverrà oggi presso la Sirci"; **CEX-70**, Presentation at promotional and informational meeting organized by Municipality of Rimini, "Gli impianti fotovoltaici – il nuovo conto energia"; **CEX-74**, Presentation by CIA, published on website of the Abruzzo Region, "Progetto Enersun – incentive per la produzione di energia dalla fonti rinnovabili"; **CEX-75**, Province of Biella, Promotional pamphlet "Opuscolo per migliorare l'efficienza energetica nelle nostre abitazioni"; *see* SoC, ¶ 91.

[757] **CEX-61**, AEEG, Performance Evaluation of Conto I and Conto II, 2007/2008; **CEX-62**, CNES Preliminary Report on the national photovoltaic framework; **CEX-63**, ENEA and Sicilian Region, Paper "Energia per un future sostenibile e fonti rinnovabili"; **CEX-65**, ENEA, Press Release "Il nuovo decreto sul conto energia 2007"; **CEX-66**, Interview with Minister of Environment Pecoraro Scanio, Excerpt from Verdi Party website; *see* SoC, ¶ 88.

[758] **CEX-76**, GSE e-book "Elementi," Issue No. 11; *see* SoC, ¶ 92.

[759] See, for instance, **CEX-77**, GSE, annual activity report, "The activity of the GSE – 2008 Report"; **CEX-78**, GSE, Report "Incentivazione degli impianti fotovoltaici Relazione delle attività settembre 2008 – agosto 2009"; **CEX-81**, GSE, Guide to Conto II, Issue No. 4; **CEX-83**, GSE Presentation "Le attività del GSE nel 2006", slide 24 ; **CEX-84**, GSE Presentation "Il 'nuovo' conto energia", slide 12; **CEX-90**, GSE Press Release "Il GSE presenta il Rapporto 2007"; **CEX-92**, GSE Presentation "The experience of feed-in tariff in Italy. Results so far and middle term forecasts", slide 7; **CEX-94**, GSE Presentation "Il Conto Energia in Italia", slide 4; **CEX-102**, GSE Presentation "Gli incentive per il Fotovoltaico e il bilancio del Conto Energia", slide 4; **CEX-103**, GSE Presentation "The feed-in premium as a booster of Italian feed PV market. Forecast of installed capacity", slide 5; **CEX-110**, GSE Presentation "Results and forecasts of Italian PV market" slide 11; *see* SoC, ¶ 92.

[760] See, for instance, **CEX-139**, AEEG, Presentation "La regolazione del settore elettrico in Italia"; **CEX-147**, GSE Presentation "Il nuovo quadro italiano per le rinovabili"; **CEX-148**, IlSole24Ore press article, "Il fisco pesa le tariffe del Fotovoltaico"; *see* SoC, ¶ 105.

[761] **CEX-149**, Solarfast Conference, "Conto Energia rinnovato – gli incentive pure"; **CEX-150**, National Confederation of Craft (CNA) and and Camera di Commercio Industria Artigianato e Argicoltura di Bologna, Summary Note "Tariffe incentivati (Terzo Conto Energia)"; *see* SoC, ¶ 105.

[762] See, for instance, **CEX-151**, GSE Presentation "Terzo Conto Energia e mercato", slide 12; **CEX-152**, GSE Presentation "Il Terzo Conto Energia", slide 12; **CEX-153**, GSE Presentation "Il Terzo Conto Energia", slide 3; **CEX-155**, GSE Guide to Conto III, "Il Terzo Conto Energia – Guida alla richiesta degli incentive per gli impianti fotvoltaici D.M. 6 agosto 2010"; *see* SoC, ¶ 105.

contract existed for any of these eight power plants when Claimants decided to invest in them. The situation is different for the Fiumicino power plant, since the GSE tariff confirmation letter was issued five days prior to Claimants' decision to acquire the shareholding in the SPV operating that plant, i.e., SunEdison Apulia 009 S.r.l. The GSE Contract, however, post-dates Claimants' decision to invest in the Fiumicino plant.

778. Accordingly, for eight of Claimants' power plants, i.e., all except the Fiumicino plant, any expectations that Claimants could have had while deciding to invest in them can only be sourced to three of the four factors mentioned in ¶ 770 above, i.e., (i) the overall regulatory framework that existed by virtue of the EC Directive 2001/77/EC (implemented in Italy by way of Legislative Decree No. 387/2003) and the EC Directive 2009/28/EC (implemented in Italy by way of the Romani Decree); (ii) the relevant *Conto Energia* Decree; and (iii) the public statements made by Italian public officials to promote the incentive tariff regime. For these eight power plants, Claimants could not have derived or relied upon any expectations from the GSE letters or contracts that followed Claimants' investment in these plants, because the letters and contracts did not exist when Claimants decided to invest in them.

779. In light of the above considerations, the Tribunal is not persuaded by Claimants' submission that the Tribunal's determinations on legitimate expectations should be common for all of Claimants' photovoltaic plants, regardless of the timing of investment in each of them (see ¶ 604 above). The timing of Claimants' acquisition of shareholding in the concerned SPVs becomes important in the Tribunal's determinations, since the factors that existed when these acquisitions were made by Claimants differed for different plants. In this connection, the Tribunal also notes the following three points with respect to Claimants' other submissions concerning the GSE letters and contracts and the regime that existed in Italy when Claimants' decided to invest.

780. *First,* Claimants submit that the Italian regulatory framework was an "integrated and sequential" one, whereby Italy offered conditions that entailed the performance of subsequent acts. Thus, according to Claimants, the fact that the GSE letters and contracts post-dated the investments does not impede the protection of Claimants' legitimate expectations based on these overall regulatory conditions. This is also because once an

investor applied and satisfied all the requirements under the relevant *Conto Energia* Decree, GSE had no discretion but to issue the tariff confirmation letter. (see ¶ 606 above).

781. Regardless of whether the conditions under the *Conto Energia* Decrees and the other regulatory factors that existed in Italy created expectations that were legitimate, it is important to clarify that this "integrated and sequential" regulatory framework does not ascribe legal or factual significance to the GSE letters and contracts that post-dated Claimants' decision to invest for the Tribunal's legitimate expectations determination. In other words, even though the GSE letters and contracts were issued in accordance with the *Conto Energia* Decrees that existed when Claimants decided to invest, Claimants' legitimate expectations cannot be sourced in these letters and contracts, since they did not exist at the time the decision to invest was made for the first eight of Claimants' nine power plants enlisted in ¶ 768 above.

782. The Tribunal is also not persuaded by Claimants' argument about the lack of discretion on part of GSE while issuing the tariff confirmation letter. The role of GSE under the *Conto Energia* Decrees was that of an "implementing body"[763] that would, in the words of Mr. Daniele Bacchiocchi (Head of Photovoltaic Plants' Investigations and Inspections Unit), *inter alia*, "purchase and resell energy generated by renewable energy plants and to manage the *Conto [Energia]* [D]ecrees in accordance with applicable legislation" (see ¶ 121 above).[764] The fact that GSE, as a state-owned entity, had no discretion while implementing the *Conto Energia* Decrees, even if assumed to be correct, does not imply that GSE's letters and contracts that did not exist when Claimants decided to invest in eight power plants could create any expectations. Further, and in any event, both the Second and the Third *Conto Energia* Decrees required the issuance of the tariff confirmation letters only after GSE verified "compliance with the provisions of this decree".[765] Thus, to the extent GSE had the authority to check compliance with the provisions of the relevant *Conto Energia* Decree, it was not completely devoid of discretion. In this regard, the Tribunal notes the following testimony of Mr. Bacchiocchi during the Hearing:

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[763] See **CEX-30**, Italian Electrical Energy Authority ("**AEEG**") Resolution no. 188/05, 14 September 2005.

[764] First Witness Statement of Mr. Daniele Bacchiocchi, 22 December 2017 ("**First Bacchiocchi Witness Statement**"), ¶ 17.

[765] **CEX-54**, Second *Conto Energia* Decree, article 5(5); **CEX-132**, Third *Conto Energia* Decree, article 4(2).

> GSE was not oblige to execute anything. We were just obliged to issue an administrative act if the plant met all the necessary requirements.
>
> . . . .
>
> But the GSE was not obliged to enter into any contract. We were obliged to grant the incentives if the plants met and complied with all the requirements. This is the only obligation that the law imposed on the GSE.[766] (emphasis added)

783. *Second,* and on a related note, the Tribunal considers that Claimants' allegation that the delay in the issuance of the tariff confirmation letters and/or the execution of the GSE contracts was attributable to "bureaucratic delay" misses the point (see ¶ 606 above). As mentioned above, GSE's role as the implementing body under the *Conto Energia* Decrees and any delays that it may have encountered while performing such role is irrelevant to the factual question of whether the GSE tariff confirmation letters and contracts existed when Claimants decided to invest in the concerned photovoltaic plant.

784. *Third,* the Tribunal also does not consider it relevant that the GSE contracts, once executed with respect to eight of the nine power plants in consideration (all except the Fiumicino plant), defined the "effective date" as the date of entry into operation of the concerned plant.[767] The fact that the GSE contracts backdated the effective date to the date of entry into operation of the plant does not alter the factual conclusion that the said GSE contracts did not exist when Claimants decided to invest. Thus, Claimants could not have relied upon these contracts while making the decision to invest in the concerned power plants.

785. Accordingly, the Tribunal is of the view that while deciding to invest in the first eight of Claimants' nine power plants enlisted in ¶ 768 above, Claimants did and could only have relied upon the three factors mentioned in ¶ 778 above, and not on GSE's tariff confirmation letters and the contracts. Thus, for the purpose of the analysis that will follow to determine Claimants' expectations and the legitimacy thereof, the Tribunal shall not examine the GSE letters and contracts for these eight power plants.

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[766] Hr. Tr. Day 2, pp. 162:3-162:18; *see also* Hr. Tr. Day 2, pp. 157:14-158:2.

[767] See **CEX-293**, Santoro GSE Agreement n. I08F13381307; **CEX-294**, San Marco GSE Agreement n. I08F15697007; **CEX-295**, Lenare GSE Agreement n. I0F15697307; **CEX-306**, Campania plant GSE Agreement n. I08F13988007; **CEX-311**, Monaci GSE Agreement n. I0F17928907; **CEX-329**, Rustico GSE Agreement n. O03M27266207; **CEX-330**, Milana GSE Agreement n. O03M28467707; **CEX-341**, Rovigo GSE Agreement n. T03F13776207.

786. As mentioned in ¶ 777 above, the situation is different for the Fiumicino power plant, since Claimants' acquisition of this plant post-dated GSE's tariff confirmation letter. Accordingly, Claimants could have relied upon this letter while deciding to make their investment. In light of this, the Tribunal's forthcoming analysis with respect to any legitimate expectations that existed for Claimants to invest in the Fiumicino plant will be conducted separately.

787. <u>The Scope of Claimants' Expectations</u>: The Tribunal shall next answer the *second* question in ¶ 772 above, i.e., what expectations, if any, the factors mentioned in ¶ 778 above could create for investors to decide to invest in the Italian photovoltaic market. In this regard, the Tribunal shall first examine the scope of the expectations created by the three factors, which existed while Claimants invested in the first eight power plants enlisted in ¶ 768 above. This shall be followed by the same question being answered with respect to the Fiumicino power plant, for which the GSE tariff confirmation letter also existed as a factor.

788. To recall, the three factors that Claimants did and could have relied on while investing in the first eight plants enlisted in ¶ 768 above were (i) Italy's overall regulatory framework in the photovoltaic sector aimed at meeting EU targets for renewable energy, in particular in the EC Directive 2001/77/EC (implemented in Italy by way of Legislative Decree No. 387/2003) and the EC Directive 2009/28/EC (implemented in Italy by way of the Romani Decree); (ii) the Second and/or the Third *Conto Energia* Decrees as relevant; and (iii) the public statements made by Italian Governmental, Ministerial and other authorities confirming the stability of the incentive tariffs. In order to determine Claimants' claims, the question to be examined is whether these three factors could come together to create an expectation that the incentive tariff rates made available to Claimants' power plants would be fixed for a 20 year period.

789. The Tribunal answers this question in the negative. This is for the following five reasons.

790. *First,* and at the outset, the Tribunal notes that the structure of the *Conto Energia* Decrees reflects that photovoltaic producers' entitlement to incentive tariffs was not automatic, and could therefore not be assumed in the absence the GSE tariff confirmation letters and/or the GSE contracts.

791. In this regard, the Tribunal takes the Second *Conto Energia* as an example. First, within 60 days as of the commencement of operation of the plant (90 days in the case of the Third *Conto Energia*), the plant operator had to send to the GSE its application for the "pertinent incentive tariff, together with final documentation" and "[f]ailure to comply with the deadlines under this paragraph involve[d] inadmissibility to the incentive tariffs under article 6."[768] Second, within 60 days (or 120 days as was the case with the Third *Conto Energia*) of the date of receipt of this application from the plant operator, GSE had to "verify compliance with the provisions of this [D]ecree and in consideration of the provisions of article 6" notify the plant operator of the exact tariff awarded.[769] Third, it is only after these provisions appear in the *Conto Energia* Decree that it discusses the "entitlement period" and in this regard states that the "tariff identified . . . is awarded for a period of twenty years commencing from the date of entry into operation of the plant and shall remain constant in current currency for the entire twenty year period."[770] Thus, the incentive tariff is spoken about in terms of an entitlement that has to be "awarded"; not one that is automatically available upon entry into operation of a power plant.

792. Accordingly, Claimants' characterization of the *Conto Energia* regime, as a conjunctive legislative and contractual mechanism which qualifies as "a single unified act that Italy guaranteed investors under its regulatory regime"[771] is inappropriate. Moreover, Claimants' characterization goes against Claimants' own admission that "the *Conto Energia* [D]ecrees themselves did not automatically convey a specific right on any particular investor", but instead "established the specific regime to which investors would be entitled if the investors met various technical and construction criteria."[772] Thus, Claimants recognize that merely based on the *Conto Energia* Decrees in existence at the time they invested, they could not have expected a feed-in tariff to automatically be available and to last for a period of 20 years.

768 **CEX-54**, Second *Conto Energia* Decree, article 5(4); **CEX-132**, Third *Conto Energia* Decree, article 4(1).
769 **CEX-54**, Second *Conto Energia* Decree, article 5(5); **CEX-132**, Third *Conto Energia* Decree, article 4(2).
770 **CEX-54**, Second *Conto Energia* Decree, article 6(1); **CEX-132**, Third *Conto Energia* Decree, article 8(4).
771 SoRy, ¶ 224.
772 SoRy, ¶ 223.

793. *Second*, it is also important to examine the *Conto Energia* Decrees in the correct hierarchical context. In this regard, the Tribunal is persuaded by Respondent's characterization of the *Conto Energia* Decrees as secondary rules, which should be understood in the context of the hierarchically superordinate rules they implement, i.e., the Legislative Decree 387/2003, which implemented the EC Directive 2001/77/EC and the Romani Decree, which implemented the EC Directive 2009/28/EC (see ¶ 640 above).

794. Claimants also do not deny that the *Conto Energia* Decrees were "well-crafted response to" the objectives laid down in the EC Directives, and "respected the principles" under Legislative Decree 387/2003 and the Romani Decree.[773] Claimants' own expert on Italian law, Prof. Antonio D'Atena, has alluded to this "'hierarchical' position of the relevant sources of law (eg: law, law decree, legislative decree, regulation)", wherein he characterizes the *Conto Energia* Decrees as ministerial decrees that constitution "regulatory measures" that fall below "legislative measures" such as Legislative Decree No. 387/2003.[774]

795. Of particular relevance for the present case is Legislative Decree No. 387/2003, which was implemented by the first three *Conto Energia* Decrees, the Second and Third *Conto Energia* Decrees being directly relevant for Claimants' photovoltaic plants. The text of these *Conto Energia* Decrees clearly evidences their purpose as interdepartmental or ministerial decrees intended to implement the framework regime of the Legislative Decree No. 387/2003. For instance, the Second *Conto Energia* Decree starts with the following statements in its preamble:

> Considering that article 7(1) of [L]egislative [D]ecree no. 387, 29 December 2003, implementing European [D]irective 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market, provides that the Minister for productive activities, in concert with the Minister for the environment and the protection of territory, in agreement with the Joint Conference (*Conferenza Unificata*), shall adopt one or more decrees defining criteria to promote the production of electricity from solar energy sources;

773 SoRy, ¶¶ 218-220.

774 Independent Opinion of Prof. Antonio D'Atena ("**First D'Atena Opinion**"), 26 July 2017, pp. 4, 24-25.

> Considering that article 7(2) sub-paragraph d) of [L]egislative [D]ecree no. 387, 29 December 2003, provides that criteria for the promotion of electricity produced by means of the photovoltaic conversion of solar sources shall include a specific incentive tariff, in a decreasing amount and for a term guaranteeing fair remuneration of investment and operation costs;[775]

796. Thereafter, Article 1 of the Second *Conto Energia* Decree defines the "purpose" of the Decree as defining "the criteria and procedures for the promotion of the production of electricity by photovoltaic plants in implementation of article 7 of [L]egislative [D]ecree no. 387, 29 December 2003."[776] Similar recitals and definitions exist in the First and Third *Conto Energia* Decrees as well.[777]

797. Going a step further, the Legislative Decree No. 387/2003, which followed Law No. 39/2002, was itself enacted in implementation of the EC Directive 2001/77/EC, and should thus be understood in conjunction with these two legal instruments. The EC Directive 2001/77/EC spoke about setting "national indicative targets" for each Member State's consumption of energy through renewable sources, keeping in mind the global target of 12% by 2010,[778] whereunder Italy was ascribed the reference value for a national indicative target of 25%.[779] (see ¶¶ 104-107 above).[780]

798. Law No. 39/2002 and the Legislative Decree No. 387/2003 were enacted as steps towards implementing these objectives, and while they envisaged incentive schemes, these Decrees delegated the specificities of these incentive schemes to various Ministries while noting that the incentives should be cost-efficient and not create greater or new burdens on the State budget (see ¶¶ 107 and 113 above).[781]

799. In this connection, the Tribunal considers it useful to quote Article 7 of Legislative Decree No. 387/2003:

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775 **CEX-54**, Second *Conto Energia* Decree, recitals 1 and 2.

776 **CEX-54**, Second *Conto Energia* Decree, article 1.

777 **CEX-31A**, First *Conto Energia* Decree, recitals; **CEX-132**, Third *Conto Energia* Decree, recitals.

778 **CEX-24**, EC Directive 2001/77/EC, recitals (5), (6) and (7); *see* SoD, ¶ 222.

779 **CEX-24**, EC Directive 2001/77/EC, Annex; *see* SoC, ¶ 55; SoRy ¶ 211.

780 **CEX-24**, EC Directive 2001/77/EC, article 4(2); *see* SoD, ¶ 223.

781 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, articles 1, 7 and 20; *see* SoC, ¶¶ 56, 64-65.

> 1. Within six months from the date of entry into force of this decree, the Minister of Productive Activities, in consultation with the Minister of Environment and Protection of Natural Resources, in consultation with the Joint Conference, shall adopt one or more decrees which define the criteria to encourage the production of electricity from solar sources.
>
> 2. The criteria referred to in paragraph 1, which shall impose no new cost to the state budget and shall be in compliance with Community legislation currently in force, shall:
>
>   a) establish the requirements of the subjects that may benefit from incentives;
>
>   b) establish the minimum technical requirements of the eligible components and systems;
>
>   c) establish the conditions for the accumulation of the new incentives with other incentives;
>
>   d) establish the modalities for determining the scope of incentives. For electricity produced by photovoltaic conversion of solar energy, provide a specific incentive rate, decreasing amount and duration as to ensure fair remuneration of each investment and operating costs;
>
>   e) establish a target for the nominal power to be installed;
>
>   f) agree also with the upper limit of the cumulative electric power of all plants that can receive the incentive;
>
>   g) may include the use of green certificates allocated to the Manager of the grid in Article 11 paragraph 3, second sentence of the legislative decree 16 March 1999 n. 79.[782]

800. The Tribunal considers the hierarchical set-up to be clearly evidenced from the above provision, inasmuch as it (i) delegates the function of defining specific criteria for incentive regimes to the Ministries mentioned in Article 7(1); (ii) states, in Article 7(2), that the criteria shall be in compliance with EC legislation; and (iii) states, in Article 7(2), that the criteria shall not impose any new costs on to the State budget. The above three elements indicate that the criteria for incentives vis-à-vis photovoltaic facilities that would be established by the concerned Ministries would be subject to EC legislation and to the Italian State budget. In other words, these criteria could undergo alterations upon recommendations of the EC, such as the proposals the EC was authorized to make under

[782] **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 7. As mentioned in f.n. 52 above, Respondent's translation of article 7 of the Legislative Decree No. 387/2003 varies from Claimants'. Specifically, Respondent uses the term "fair return" instead of "fair remuneration", which usage is disputed between the Parties. The Tribunal shall resolve this disputed matter in the forthcoming paragraphs of this Section.

EC Directive No. 2001/77/EC (see ¶ 797 above), or upon the incentive scheme imposing any costs on the State budget.

801. *Third,* it is important to note that Legislative Decree No. 387/2003 or Law No. 39/2002, and the EC Directive 2001/77/EC made no mention of a 20 year period during which incentive schemes, such as tariffs were to remain constant. The only thing that Legislative Decree No. 387/2003 mentioned about the "modalities for determining the scope of incentives" was that photovoltaic energy producers that qualify as recipients of such incentives would be entitled to "a specific incentive rate, decreasing amount and duration as to ensure <u>fair remuneration</u> of each investment and operating costs".[783] (emphasis added) The emphasised phrase is disputed between the Parties, both in terms of its translation and its implication.

802. According to Claimants, "[r]eturns can only be assessed in hindsight, after the actual costs and performance of a facility are known. Remuneration, on the other hand, generally is established or agreed *ex ante*, with the returns on any particular project flowing as a function of the remuneration, costs, and performance of the projects."[784] According to Respondent, under Article 7(2) of the Legislative Decree No. 387/2003, "remuneration of the investment, through the grant of incentives, was thus functionally linked . . . to the costs suffered by the investors, thus requiring that such incentives be always parameterized on the progressive reduction of such costs, due to technological development and scale economies."[785]

803. The Tribunal considers that not much turns on the use of the term "remuneration" versus "return".[786] The Tribunal, however, considers that Claimants read more into this stipulation, i.e., "fair remuneration" than warranted. Assuming that the term "remuneration" is a more accurate translation of the Italian original than the term "return", that alone cannot imply that the incentive scheme being discussed in Legislative Decree

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783 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 7(2)(d).

784 SoRy, ¶ 266.

785 R-SoRj, f.n. 139.

786 For the purposes of the Tribunal's determinations in this Award, the Tribunal has used and shall continue to use Claimants' preferred translation, i.e., "fair remuneration", noticing that Respondent has also occasionally used the terms "return" and "remuneration" interchangeably (*see* SoD, ¶ 243; R-PHB, ¶¶ 65-66).

No. 387/2003, and later codified in the *Conto Energia* Decrees, is set in stone such that it cannot be subsequently modified by the Italian Government. In this regard, the Tribunal agrees with Respondent that "[t]he theory of the Claimants that Italy had promised fixed tariffs that could not have been modified by even a cent . . . would read a stabilisation clause into a legislation that in fact says exactly the opposite, because it includes the parameters under which incentives could be remodulated."[787]

804. As mentioned in ¶ 800 above, the Tribunal considers that Article 7(2) of Legislative Decree No. 387/2003 includes elements that indicate that the criteria for the incentive scheme to be established thereunder could undergo modifications. Moreover, the structure of the *Conto Energia* Decrees, discussed in ¶¶ 790-792 above, indicates that the entitlement to any incentive scheme is not automatic, but is subject to compliance with the conditions within these Decrees.

805. In light of the above regulatory and structural framework, the Tribunal considers it important to examine the provisions in the *Conto Energia* Decrees, which provides that the "tariff identified . . . is awarded for a period of twenty years commencing from the date of entry into operation of the plant and shall remain constant in current currency for the entire twenty year period."[788] Apart from the fact that this provision already indicates that the incentive tariffs are not automatically available to photovoltaic plant operators but are "awarded" (see ¶ 790 above), the Tribunal considers that this provision cannot be read as a guarantee that incentive tariffs, once awarded, will remain unchanged for a 20 year period.

806. In this regard, Respondent argues that the provision in the Second and Third *Conto Energia* Decrees stating that the tariffs "shall remain constant in current currency for the entire twenty year period" should be juxtaposed against the contrary stipulation in the First *Conto Energia* Decree, which permitted inflation-related adjustments to tariffs. The Tribunal is persuaded by Respondent's argument.

807. The Tribunal notes that the above quoted stipulations from the Second and Third *Conto Energia* Decrees were not included in the First *Conto Energia*, which provided instead that

787 Hr. Tr. Day 1, pp. 200:25-201:6.

788 **CEX-54**, Second *Conto Energia* Decree, article 6(1); **CEX-132**, Third *Conto Energia* Decree, article 8(4).

"[r]evisions to the incentive tariffs . . . will be carried out for each of the years subsequent to 2006, in accordance with the annual rate of variation, for the previous twelve months, in the consumer price index for blue and white-collar worker families recorded by Istat."[789] Both Parties recognize that this stipulation indicated that the incentive tariff amounts could be adjusted for inflation calculated according to the ISTAT index (see ¶ 120 above).[790]

808. Accordingly, the Tribunal considers that the phrase "constant in current currency for the entire twenty year period" is indicative of the fact that the incentive tariffs awarded pursuant to these Decrees were not subject to modifications based on inflation rates. This understanding is also confirmed by a report of the Italian Federation for Rational Use of Energy.[791] Further, the Tribunal understands the reference to a 20 year period in the *Conto Energia* Decrees to be an indication of the average conventional or useful lifecycle of photovoltaic plants, which is not a disputed proposition between the Parties.[792]

809. Consequently, the phrase "shall remain constant in current currency for the entire twenty year period" should be understood as a confirmation that the incentive tariff rates granted for the average conventional life of photovoltaic plants, once awarded, will not be subject to inflation-related adjustments. However, they may be modified subsequently, as long as the "remuneration" that photovoltaic plant operators receive for the average life of their plant is "fair" in the given circumstances, in accordance with Article 7(2) of the Legislative Decree No. 387/2003.

810. The above reading of the *Conto Energia* Decrees is also in tune with the hierarchical context within which these Decrees should be understood, i.e., as ministerial decrees that implement the broader regulatory framework provided in the Legislative Decree No. 387/2003 (see ¶¶ 793-800 above). Even the Italian Constitutional Court understood the *Conto Energia* Decrees in this light, in the following passages of its Decision No. 16/2017:

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789 **CEX-31**, First *Conto Energia* Decree, articles 5.2(b), 6.2(b), 6.3(b) and 6.6; **CEX-31B**, Ministerial Decree No. 20998 from the Ministry for Productive Activities of 6 February 2006, article 4(1).

790 SoC, ¶ 71; SoD, ¶ 237.

791 **CEX-123**, Publication *"Le tariffe incentivanti per la produzione di energia elettrica da fonte rinnovabile"*; *see* SoD, fn 97.

792 SoD, ¶¶ 254, 464; Hr. Tr. Day 1, pp. 48:17-48:23; *see* **CEX-158**, Romani Decree, article 24(2)(b) read together with **CEX-161**, Fourth *Conto Energia*, articles 12(2), 16(2) and 18(2) and **CEX-188**, Fifth *Conto Energia*, article 5(4).

> Article 7 of Decree 387/2003 – which is entitled " Specific provision for solar energies" – takes into account the production of electricity through photovoltaic conversion of solar energy and entrusts to " one or more decrees" of the Ministers of Productive activities and of Environment, having heard the advice of the State/Regions conference, the determination of the criteria for the incentives in order to "guarantee a fair remuneration of the costs of investment and management" .
>
> The decrees that have been issued on the basis of said article 7 are known as "conti energia" and are progressively numbered in accordance with the various, subsequent, versions which have enacted five different procedures of support.
>
> It must be said that, in the context of such general normative framework, the enforcement of systems of incentives to renewable energies is characterized by long-term stability in order to ensure certainty for investors.
>
> . . . .
>
> However, the guarantee of stability of the incentive for all the due period does not imply, however, as a necessary consequence, that the measure should remain unchanged for 20 years, unchanged and unaffected by the variations which are common to long-term contract.[793]

811. *Fourth*, on a related note, the Parties have also discussed the implications of Article 24 of the Romani Decree, i.e., the Legislative Decree No. 28/2011 (quoted in its relevant part in ¶ 147 above), which implemented the EC Directive 2009/28/EC. The Tribunal notes that the Romani Decree is not directly relevant to the present case, since Claimants' photovoltaic plants were covered by the Second and Third *Conto Energia* Decrees, which were enacted in implementation of the Romani Decree's predecessor, i.e., Legislative Decree No. 387/2003. The Romani Decree was implemented by the Fourth and Fifth *Conto Energia* Decrees (see Sections IV.B(5) and IV.B(6) above).

812. Accordingly, for the purposes of the current analysis, it suffices to state that a number of similar considerations that applied to the Legislative Decree No. 387/2003 also apply to the Romani Decree. These include (i) the hierarchical subordination of the *Conto Energia* Decrees that implemented the Romani Decree by virtue of a delegation to various Ministries contained in the Romani Decree (see ¶ 149 above); (ii) the fact that the Romani Decree was enacted in implementation of European law, namely the EC Directive

[793] **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, ¶ 8.3.

2009/28/EC (see ¶ 147 above); (iii) the stipulation, in Article 24, that incentive schemes would have "the purpose of ensuring a fair remuneration of the investment and operating costs", the translation and implication of which stipulation is likewise disputed between the Parties (see ¶ 149 above);[794] and (iv) the provision that "[n]o further or higher burden on the State budget shall derive from the application of" the Romani Decree.[795]

813. The above factors indicate to the Tribunal that the Romani Decree, like its predecessor, i.e., the Legislative Decree No. 387/2003, contained a scope for re-modulation of the incentive tariff regime, so long as the incentive regime ensured the purpose of a fair remuneration to the investors. Indeed, Italy's National Action Plan, which preceded the Romani Decree, had specifically stated that the incentive tariff scheme "is subject to regular adjustments which take into account the trends in the prices of energy products and components for photovoltaic plants . . ., with the intention of limiting the medium- and long-term costs to the community"[796] (see ¶ 146 above).

814. On a related note, the Tribunal is also persuaded by Respondent's submission that legislations such as the Romani Decree or the prior-in-time *Salva Alcoa* Decree are itself proof that the incentive tariff regime was subject to future modifications.[797] As mentioned in ¶ 130 above, the *Salva Alcoa* Decree, i.e., Legislative Decree No. 3/2010 was enacted on 25 January 2010 and it extended the Second *Conto Energia* tariffs to the plants that were built by 31 December 2010, but connected to the grid later, i.e., until 30 June 2011. Regardless of the motivations behind the *Salva Alcoa* Decree and whether or not the same benefitted Claimants in some manner, which are disputed issues between the Parties, the Tribunal considers the *Salva Alcoa* Decree relevant as an indication of modifications to the regulatory regime regarding incentive tariffs. Similarly, the Romani Decree is also an example of a regulatory modification to the incentive tariff regime, inasmuch as it amended the regime by (i) limiting the deadline for Third *Conto Energia* tariffs to plants that were connected to the grid by 31 May 2011, as opposed to the originally envisaged

794 **CEX-158**, Romani Decree, article 24; see SoD, ¶¶ 233 *et seq.*, 254, 256, 462, 480; *see also* SoRy, ¶¶ 306 *et seq.*

795 **CEX-158**, Romani Decree, article 23(4).

796 **CEX-130**, National Action Plan for Renewables of Italy, p. 102.

797 R-SoRj, ¶ 284; SoD, ¶¶ 522-525.

deadline of 31 December 2013; and added further conditions to the eligibility of plants that received incentive tariffs (see ¶ 150 above).[798]

815. The Tribunal is not convinced by Claimants' argument that the Romani Decree and the *Salva Alcoa* Decree are not comparable to the *Spalma-incentivi* Decree, since the latter was an impermissible retroactive modification whereas the former two decrees applied prospectively.[799] There was no indication in either the Legislative Decree No. 387/2003 or the Romani Decree, or the *Conto Energia* Decrees enacted in implementation thereof, that any modifications to the regulatory regime concerning incentive tariffs cannot apply to plants already in operation. Moreover, the fact that the modifications applied to plants in existence does not render them retroactive in application, since such modifications fell within Italy's regulatory regime.

816. *Fifth*, with respect to the various public statements made by Italian Government officials and Italian Ministerial and other authorities, which is the last factor that Claimants rely on for their legitimate expectations claim (see ¶ 776 above), the Tribunal is persuaded by Respondent's submission. Respondent rightly submits that such public statements were only intended to reiterate the regime that existed by virtue of the legislative and the *Conto Energia* Decrees (see ¶ 641 above). Given that the overall regulatory regime in Italy, including the *Conto Energia* Decrees, did not create expectations of the incentive tariffs being fixed in time for 20 years, the public statements corresponding to this regulatory regime could also not have created such an expectation.

817. While that general statements can create legitimate expectations in theory (see ¶¶ 699-703 above), the general statements made to the public in order to advertise a particular regulatory regime can only create expectations, if any, that are in line with the regulatory regime itself. These public statements cannot bind the State to commitments above and beyond the legal regime in existence.

818. In any event, the Tribunal is also persuaded by Respondent's argument that a perusal of these public statements shows that many of them did not specifically contain any evident

798 **CEX-158**, Romani Decree, article 24, article 25.9; *see* SoC, ¶ 109.

799 SoRy, ¶¶ 435-437.

promise of the exact incentive tariff amounts being fixed for 20 years. For instance, the most discussed public statement, i.e., of the Minister of Environment, spoke about the State recognizing "an incentive that balances widely initial investment", or the "system" guaranteeing a "sure income for 20 years" for photovoltaic producers.[800] These articulations are synonymous with the regulatory prescription of a "fair remuneration" in the Legislative Decree No. 387/2003 and the subsequent Romani Decree.[801] Similarly, the statements by provincial government authorities that did mention the *Conto Energia* regime, while discussing the tariffs being constant for 20 years, specifically clarified the meaning of "constant" as referring to "no integration . . . at the rate of inflation".[802] Even GSE's presentations, reports or publications spoke about the tariffs being "constant" in terms of "current currency", i.e., "not subject to updates ISTAT",[803] and/or clarified GSE's role in the multi-step process of receiving incentive tariffs.[804]

819. Consequently, in light of the above considerations, the Tribunal considers that none of the three factors relied upon by Claimants (see ¶ 778 above) for the first eight of their nine photovoltaic plants enlisted in ¶ 768 above, created an expectation that the incentive tariff rates made available through the *Conto Energia* Decrees and the GSE's tariff confirmation letters and contracts would be fixed for a 20 year period. The only expectation that Claimants could have had while acquiring the shareholding of the concerned SPVs was that their power plants, once they were declared to qualify for the incentive scheme within

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800 **CEX-67**, Statement from Minister for the Environment, Land and Sea, Alfonso Pecoraro Scanio, pamphlet called "*Il Sole In Casa*" ("The Sun At Home").

801 **CEX-62**, CNES Preliminary Report on the national photovoltaic framework.

802 **CEX-61**, AEEG, Performance Evaluation of Conto I and Conto II, 2007/2008; **CEX-68**, Parma Energy Agency, Summary of second Conto Energia regime; **CEX-71**, Memo issued by Tuscany Region, "Fotovoltaico – promemoria per l'accesso al Conto Energia".

803 **CEX-78**, GSE, Report "Incentivazione degli impianti fotovoltaici Relazione delle attività settembre 2008 – agosto 2009"; **CEX-81**, GSE, Guide to *Conto II*, Issue no. 4; **CEX-82**, GSE Presentation "L'incentivazione del Fotovoltaico e il ruolo del GSE"; **CEX-84**, GSE Presentation "Il 'nuovo' conto energia"; **CEX-87**, GSE Guide to Conto II, "Il nuovo conto energia – Decreto 19 febbraio 2007. La richiesta dell'incentivazione per gli impianti fotovoltaici"; **CEX-98**, GSE Guide to Conto II, "Guida al Conto Energia – Decreto 19 febbraio 2007, La richiesta degli incentivi per gli impianti fotovoltaici," No. 3; **CEX-100**, GSE website (excerpt – FAQ Section) "Il meccanismo d'incentivazione del nuovo Conto Energia (DM 19/02/07)"; **CEX-141**, Center for Applied International Finance and Development (CAIFD) – University of Applied Sciences (Nuremberg), Seminar Paper 3/2011 "Photovoltaic in Italy – An economic, legal, institutional and financial perspective".

804 **CEX-82**, GSE Presentation "L'incentivazione del Fotovoltaico e il ruolo del GSE"; **CEX-86**, GSE Presentation "La situazione del conto energia in Italia"; **CEX-110**, GSE Presentation "Results and forecasts of Italian PV market".

the Second and/or Third *Conto Energia* regime, would be ensured a "fair remuneration" for the average conventional life of photovoltaic plants (20 years), in accordance with the Legislative Decree No. 387/2003.

820. With respect to Claimants' ninth power plant, i.e., the Fiumicino power plant, as mentioned in ¶¶ 777 and 786 above, the situation was slightly different than for the remaining eight power plants. This is because Claimants' acquisition of the Fiumicino plant post-dated GSE's tariff confirmation letter awarding the incentive tariff to the SPV operating the plant. Thus, Claimants could not only have relied on the three factors mentioned in ¶ 778 above while deciding to invest in the Fiumicino plant, but could also have relied on a fourth factor, namely the GSE tariff confirmation letter. With respect to the three factors mentioned in ¶ 778 above, the Tribunal's determination in ¶ 818 above applies equally to the Fiumicino plant. However, only for the purposes of the Fiumicino power plant, the Tribunal is required to additionally determine the value of the GSE tariff confirmation letter, in order to decide whether it could have created any legitimate expectations of the incentive tariff rate being fixed for a 20 year period.

821. The Tribunal is of the view that even for the Fiumicino power plant, despite the GSE tariff confirmation letter, Claimants' expectations could not go beyond being entitled to a fair remuneration, in accordance with the stipulation in the Legislative Decree No. 387/2003. In this connection, the Tribunal is persuaded by Respondent's submission that the instruments created by GSE, i.e., the GSE tariff confirmation letters and the contracts, were of an "accessory" nature (see ¶ 638 above).

822. The term "accessory" denotes that these instruments were issued by GSE as accessories to public acts, as distinct from instruments that could create binding contractual obligations. The concept of accessory contracts was explained by Claimants' expert, Prof. D'Atena, during the hearing:

> THE CHAIRMAN: What's an "accessory contract"? Is that an administrative law motion or a civil law notion? For me it's new, I admit it.
>
> A. Administrative law, an accessory contract which is accessory to an administrative concession.

> THE CHAIRMAN: In what respect does it differ from an ordinary private law contract, an accessory contract under administrative law?
>
> A. This is a kind of scientific concept which was explored in Italy in the past. According to this interpretation there are certain contracts that, despite the fact that they have a private law form, they are subject to the logic of administrative law because they are ancillary to an administrative concession.[805]

823. Further, the Tribunal is also convinced by Respondent's Italian law expert, Prof. Anna Romano's emphasis on a characteristic feature of such accessory contracts, i.e., "the close interdependence between the administrative measure and the [accessory instrument]", such that the "the primary source" of the obligation is the administrative measure, whereas the accessory instrument is a secondary regulatory tool.[806] In the Tribunal's view, this characteristic feature implies that the accessory instruments, i.e., the GSE letters and/or contracts in the present case, cannot create any commitments or expectations above and beyond the administrative or public acts that they are sourced in, i.e., the Legislative Decree No. 387/2003 and the Second and Third *Conto Energia* Decrees in the present case.

824. The Tribunal considers instruments issued by GSE to qualify as such accessory instruments under Italian law, on the basis of two related factors that provide the appropriate context in which to consider these letters.

825. Firstly, the nature and role of GSE as an "implementing body" under the *Conto Energia* regime implies that GSE acts in a purely executory role in this regime. GSE is a state-owned company, whose sole shareholder is the Ministry for Economy and Finance, and it is the successor of GRTN, which was established under the Legislative Decree No. 79/1999 (see ¶ 102 above). It was defined as the "implementing body" by Italian Electrical Energy Authority's Resolution No. 188/05 (see ¶ 121 above).[807] In this regard, the Tribunal also considers it appropriate to rely on Respondent's witness, Mr. Daniele Bacchiocchi's description of GSE's role, since he is the Head of Photovoltaic Investigations and Inspections Unit at GSE. According to his testimony, "GSE's main role is to promote and

[805] Hr. Tr. Day 3, pp. 92:24-93:12 (D'Atena Testimony).

[806] Rejoinder Expert Opinion of Anna Romano, p. 15.

[807] **CEX-30**, Italian Electrical Energy Authority ("**AEEG**") Resolution no. 188/05, 14 September 2005; *see* SoC, ¶ 68.

support the production of electricity from renewable energy sources, to purchase and resell energy generated by renewable energy plants and to manage the *Conto [Energia]* [D]ecrees in accordance with applicable legislation" (see ¶ 782 above).[808]

826. The *Conto Energia* Decrees also recognize GSE's role as an implementing body, and assign responsibilities to GSE in order to implement the *Conto Energia* Decrees.[809] In this connection, too, the testimony of Mr. Bacchiocchi is relevant:

> Q. When the Conto Energia decree says that the GSE is an implementing body, what is your understanding -- if you have one -- of what that means?
>
> A. As I said at the beginning, the implementing body is the body that has been identified by the decree in order to implement everything that is necessary so that the decree can be implemented, made effective.
>
> So the GSE, for example, as I said before, dealt with the validation of the applications, inspections; it made available the remote platform to send the incentive applications; it deals with payments. So it completely manages this mechanism on the basis of what is written in the decree and in the general rules of this mechanism.[810]

827. Secondly, the Tribunal is persuaded by Respondent's reliance on the Italian Constitutional Court Decision No. 16/2017 (see Section IV.G(2) above), which characterized the agreements entered into by GSE as "accessory to the provisions granting the incentives" as opposed to "private law contracts".[811] This opinion of the Constitutional Court Decision No. 16/2017 has also received endorsement of investment arbitration tribunals, in particular, the tribunals in *CEF v. Italy* and *Belenergia v. Italy*. The tribunal in *CEF v. Italy* found, while relying on the above findings of the Italian Constitutional Court, that due to the peculiar nature of the GSE contracts, they were "as a matter of Italian law subject to unilateral modification".[812] Similarly, the tribunal in *Belenergia v. Italy* stated in this regard that "the GSE as part of Public Administration has acted in a position of supremacy exercising public powers when concluding and modifying the GSE Conventions in light of

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808 First Bacchiocchi Witness Statement, 22 December 2017, ¶ 17.

809 **CEX-54**, Second *Conto Energia* Decree, articles 2, 5 and 6; **CEX-132**, Third *Conto Energia* Decree, articles 2, 4 and 8.

810 Hr. Tr. Day 2, pp. 151:5-151:18 (Bacchiocchi Testimony).

811 **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, ¶ 11.

812 **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶¶ 254-255.

Italian regulatory and legislative framework, leading to jurisdiction of Italian administrative courts to discuss this. Hence, the Tribunal cannot agree . . . that the GSE Conventions could have contained specific commitments addressed specifically to Belenergia."[813]

828. While the above findings were rendered in the context of the contracts that GSE executed with photovoltaic plant operators, the Tribunal considers that these findings apply equally to the GSE tariff confirmation letters. If the GSE contracts are characterized as acts accessory to administrative acts, there is no reason to not qualify GSE's tariff confirmation letters similarly.

829. In this connection, the Tribunal is not persuaded by Claimants' and Claimants' expert, Prof. D'Atena's criticisms of the Italian Constitutional Court Decision No. 16/2017 and of Italy's position in this arbitration proceedings. The Tribunal notes the following points in this connection.

(i) Claimants' and Prof. D'Atena's reliance on the Romani Decree's description of the GSE contracts as "private law agreements" does not persuade this Tribunal.[814] In this regard, the Tribunal is convinced by Respondent's Italian law expert, Prof. Anna Romano's opinion that the Romani Decree's use of the phrase "private law agreements" is not directly relevant to the present case, since Claimants' photovoltaic plants were covered by the Second and Third *Conto Energia* Decrees, which were enacted to implement Romani Decree's predecessor, i.e., the Legislative Decree No. 387/2003.[815] Moreover, the Italian Constitutional Court Decision No. 16/2017 took this provision in the Romani Decree into account, and still characterized the GSE contracts as "accessory" to administrative or public acts, in light of the public or social interests involved.[816]

(ii) Further, Prof. D'Atena, during the Hearing, described accessory contracts as being subject to the logic of administrative law, "despite the fact that they have a private

813 **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 579-580.

814 SoRy, ¶ 402; First D'Atena Opinion, p. 49.

815 First Romano Opinion, p. 65.

816 **REX-032**, Italian Constitutional Court Decision No. 16/2017, 7 December 2016, ¶¶ 8.2, 11.

law form" (see ¶ 822 above). Thus, the form of the instrument in question is not as important as the logic or context behind the same. In this connection, the Tribunal is persuaded by Prof. Romano's opinion that the "interdependence between the administrative measure and the ancillary [GSE] agreement" and the fact that "the content of the agreement is totally predetermined by law", evidence the accessory nature of GSE letters and contracts.[817] In the face of these contextual features, the form of the GSE letters and contracts, which Claimants emphasise,[818] is not a material feature in consideration.

(iii) Similarly, the fact that the Italian Procurer General, in his brief to the Constitutional Court, described GSE contracts as private law contracts,[819] also does not convince this Tribunal. The Tribunal, instead, considers the Italian Constitutional Court's understanding of Italian law to prevail over the Italian Procurer General's submission before the Court.

(iv) Lastly, the Tribunal does not consider the Italian Constitutional Court's findings, quoted in ¶ 827 above, to be unclear.[820] The Tribunal considers the Constitutional Court's findings to be sufficiently clear, and this clarity is evidenced by its endorsement in investment arbitration jurisprudence. In the face of the clear findings of the Constitutional Court, the Tribunal does not consider Prof. D'Atena's criticisms of the Constitutional Court based on the Italian principle of horizontal subsidiarity to warrant a different conclusion.[821]

830. In light of the above considerations, the Tribunal considers that the GSE tariff confirmation letter that was issued to the Fiumicino power plant prior to Claimants' investment therein was merely an accessory instrument that could not have created any expectations beyond what the overall regulatory regime had created. These expectations have already been delineated by the Tribunal in ¶ 818 above. To recall, the only expectation that Claimants had, and could have relied upon, while deciding to invest in Italy was that their power

817 Rejoinder Expert Opinion of Anna Romano, p. 15.
818 SoRy, ¶ 405.
819 SoRy, ¶ 403.
820 SoRy, ¶ 404.
821 First D'Atena Opinion, pp. 49-50; Second D'Atena Opinion, p. 12.

plants, once they were declared to qualify for the incentive scheme within the Second and/or Third *Conto Energia* regime, would be ensured a "fair remuneration" for the average conventional life of photovoltaic plants (20 years), in accordance with the Legislative Decree No. 387/2003. The GSE tariff confirmation letter issued to the Fiumicino plant, while being a manifestation of the power plant having qualified for the incentive scheme within the Second *Conto Energia* Decree, does not have any implications on the scope of the expectations of a "fair remuneration".

831. As an incidental matter, the Tribunal notes that Respondent does not specifically dispute that Claimants did, in fact, place reliance upon the regulatory regime in existence while deciding to invest in Italy. In this connection, although Respondent challenges the adequacy of Claimants' due diligence prior to deciding to invest in Italy (see ¶ 655 above), the Tribunal is not convinced by Respondent's allegations. In particular, the Tribunal does not agree with Respondent's assertion that, based on a statement in a due diligence report prepared by the law firm, Gianni, Orrigoni, Grippo & Partners, which provided that "the photovoltaic energy industry is highly regulated",[822] Claimants should have conducted further investigations.[823] There is ample evidence of due diligence reports that Claimants had obtained from various reputed law firms with respect to each of their photovoltaic power plant, which convinces the Tribunal that the threshold of reasonable due diligence was satisfied (see ¶¶ 192, 196, 198, 201 and 204 above).[824]

832. Accordingly, the Tribunal considers that Claimants could have, and did rely upon, the expectation that their power plants, once they were declared to qualify for the incentive scheme within the Second and/or Third *Conto Energia* regime, would be ensured a "fair

[822] **CEX-322**, Gianni, Orrigoni, Grippo & Partners law firm report "Legal Due Diligence Report on Photovoltaic Projects in the Sicily Region Project Milana - Project Rustico", p. 2.

[823] Hr. Tr. Day 4, pp. 236:21-237:4.

[824] **CEX-214**, Ashurst due diligence report "Legal Due Diligence Report in relation to the following photovoltaic plants: San Marco, Santoro, Lenare"; **CEX-301**, Gianni, Orrigoni, Grippo & Partners, Legal Due Diligence Report for the Photovoltaic Project in Campania; **CEX-307**, Ashurst due diligence report "Legal Due Diligence Report in relation to the following photovoltaic plants: Monaci and Fiumicino"; **CEX-322**, Gianni, Orrigoni, Grippo & Partners law firm report "Legal Due Diligence Report on Photovoltaic Projects in the Sicily Region Project Milana - Project Rustico"; **CEX-334**, Ashurst, Legal Due Diligence Report in relation to the Rovigo Photovoltaic Plant.

remuneration" for the average conventional life of photovoltaic plants (20 years), in accordance with the Legislative Decree No. 387/2003.

Whether Claimants' Expectations Satisfy the Threshold of Legitimacy

833. Having determined the scope of Claimants' expectations that existed when they decided to invest in Italy, the Tribunal next examines whether these expectations satisfy the threshold of legitimacy.

834. In this connection, at the outset, the Tribunal notes that the Parties, through their experts on Italian law, have advanced propositions relating to the threshold of legitimate expectations under Italian and European laws, in particular while criticizing the Italian Constitutional Court Decision No. 16/2017.[825] However, the Tribunal considers it important to clarify that the standard of legitimate expectations that it is required to, and consequently will, apply is the standard in international law. The applicable law to this issue of frustration of legitimate expectations, and whether or not the same amounts to a breach of the FET standard under Article 10(1) ECT, is international law, pursuant to Article 26(6) ECT. Accordingly, the standard against which the legitimacy of Claimants' expectations and propriety of Italy's conduct shall be examined is the one that emanates from international law.

835. With respect to the standard of legitimacy of an investor's expectations, the Tribunal has already discerned the same above (see ¶¶ 697-714 above). In particular, the question to be examined is whether Claimants' expectations of ensured a "fair remuneration" in respect of their photovoltaic power plants (see ¶ 830 above) rise to the requisite level of legitimacy and reasonableness in light of the circumstances (see ¶ 697 above). This requires looking into whether Claimants' alleged expectations were in the form of mere subjective hopes or beliefs, or were objectively knowable and certain (see ¶ 710 above). Only in the latter situation will the expectations be considered legitimate.

836. The Tribunal considers that Claimants' expectations of a fair remuneration for the average conventional life of photovoltaic plants (20 years) do not satisfy the threshold of objective

[825] See First D'Atena Opinion, Sections 6, 8 and 13; Second D'Atena Opinion, Section 2.3; First Romano Opinion, Parts II and III; Rejoinder Expert Opinion of Anna Romano, Parts II.4, II.5 and II.6.

certainty for the first eight of Claimants' nine power plants enlisted in ¶ 768 above. In this regard, the Tribunal recalls that it is accepted in investment arbitration jurisprudence that for any expectations to be protected, such expectations should be "based on more than subjective beliefs",[826] and the assessment of whether they are must be based on information that was, or should have been, known at the time the decision to invest was made. This is an objective standard for assessing the legitimacy of expectations, to ensure that merely subjective hopes and beliefs are not protected (see ¶¶ 708-710 above).[827]

837. For the first eight of Claimants' nine power plants enlisted in ¶ 768 above, as already determined above, Claimants' SPVs had not received the GSE tariff confirmation letters, nor was there any contract in existence between GSE and the concerned SPVs (see ¶¶ 777-778 above). The absence of these documents, in particular the GSE tariff confirmation letters, necessarily implies that Claimants had no way of being objectively certain that they would qualify so as to be awarded the incentive tariffs under the incentive regime in the *Conto Energia* Decrees.

838. Further, as determined in ¶¶ 790-792 above, the entitlement to the incentive scheme in the *Conto Energia* regime was not automatic, in the sense that an application had to be made to GSE with requisite documentation, and only upon verification of the documentation being complete and the criteria in the *Conto Energia* Decree being complied with, would GSE award a particular incentive tariff to the power plant operator. Even the entitlement to a "fair remuneration" under Article 7(2) of the Legislative Decree No. 387/2003 was available only to such photovoltaic plants that would fall within the "criteria" established by the Ministries that were responsible for codifying such criteria under Article 7(1) of the Legislative Decree No. 387/2003 (see ¶¶ 799-809 above). In other words, the protection of the Legislative Decree No. 387/2003 was also only available after the candidacy of the

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826 **CL-9**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Award, ¶ 7.76.

827 **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶ 130; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 304; **CL-4**, *Charanne BV and Construction Investments v. Spain*, SCC Case No. 062/2012, ¶ 495; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶ 583; **CL-171**, *Antaris GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, May 2, 2018, ¶ 360(2);

photovoltaic plant in question had been approved as per the applicable *Conto Energia* Decree.

839. Since the first eight of Claimants' nine power plants enlisted in ¶ 768 above did not have GSE's tariff confirmation letters before Claimants decided to invest in them, Claimants' expectations of a fair remuneration vis-à-vis these power plants do not meet the requisite threshold of objective certainty, and in turn, do not meet the standard of legitimacy in order to be protected under Article 10(1) ECT. Accordingly, Claimants' claims for a frustration of their legitimate expectations under Article 10(1) ECT is rejected with respect to these eight power plants.

840. With respect to the Fiumicino power plant, as mentioned above (see ¶¶ 777-779 above), Claimants acquisition of the operating SPV, SunEdison Apulia 009 S.r.l., was dated 22 June 2011,[828] at a point in time when the power plant had already been issued a tariff confirmation letter by GSE on 17 June 2011.[829] By way of this tariff confirmation letter, GSE "hereby communicate[d] the admission to the incentive tariff under [the Second *Conto Energia* Decree]".[830] Accordingly, Claimants did objectively know and were certain that they were admitted into the incentive regime of the Second *Conto Energia* Decree. Since this admission into the incentive regime pre-dated Claimants' decision to invest in the Fiumicino power plant, Claimants' expectation of a fair remuneration for the average conventional life of photovoltaic plants (20 years) satisfies the threshold of objective knowledge and certainty. Accordingly, Claimants' expectation of a fair remuneration with respect to the Fiumicino power plant satisfies the threshold of legitimacy.

(iii) Whether Italy's Enactment of the *Spalma-incentivi* Decree Frustrated Claimants' Legitimate Expectations of a "Fair Remuneration"

841. The implications of the enactment of the *Spalma-incentivi* Decree enacted on 11 August 2014 are disputed between the Parties. In general, Respondent views the *Spalma-incentivi*

828 **CEX-300**, SunEdison Apulia 009 S.r.l. Quota Transfer Deed; **CEX-305**, Facility Agreement by and between SunEdison Apulia 009 S.r.l. and Natixis SA, article 3.1; **CEX-332**, SunEdison Apulia 009 S.r.l. Shareholder Loan article 2.

829 **CEX-400**, Fiumicino GSE Incentive Tariff Letter.

830 **CEX-400**, Fiumicino GSE Incentive Tariff Letter.

Decree as a "remodulation" of the existing regulatory regime in Italy (see ¶ 258 above), whereas Claimants contend that the *Spalma-incentivi* Decree had a "dramatic impact" on their investments (see ¶ 275 above).

842. The changes brought about by the *Spalma-incentivi* Decree in the incentive tariff regime, and in particular the three options that it offered the photovoltaic plant operators, are discussed in detail in Section IV.G(1) above. Additional aspects of the *Spalma-incentivi* Decree, pertaining to alterations in the payment modalities, the Administrative Management Fee and options granted to photovoltaic plant operators to, *inter alia,* obtain loans, are also discussed in Section IV.G(1) above. Although Claimants did not make a choice amongst the three options that the *Spalma-incentivi* Decree, they claim that the default option assigned to them, i.e., the third option (see ¶ 261 above) taken together with the change in payment modalities, frustrated their legitimate expectations.

843. The Tribunal has delineated the scope of Claimants' legitimate expectations in the previous Section, and found that Claimants could only have relied upon any legitimate expectations with respect to one of their plants, i.e., the Fiumicino power plant. Accordingly, the only question that is left for the Tribunal to answer is whether the enactment of the *Splama-incentivi* Decree frustrated Claimants' legitimate expectation of a "fair remuneration" vis-à-vis the Fiumicino power plant. In this connection, although the Tribunal has already rejected Claimants' claims of legitimate expectations with respect to Claimants' remaining eight power plants (see ¶ 839 above), the Tribunal shall nonetheless also answer this question for these power plants as well, in the interest of completeness. Accordingly, unless specified otherwise, the Tribunal's forthcoming findings shall take into account all nine of Claimants power plants cumulatively.

844. In order to determine whether the Claimants' legitimate expectations of a "fair remuneration" were frustrated by the *Spalma-incentivi* Decree, it is important to examine, as a preliminary matter, what constitutes a "fair remuneration". In this connection, both, Claimants and Respondent, agree that there was no precise numerical indication of a fair remuneration provided in the Italian regulatory regime. In Respondent's view, a fair remuneration, for the purposes of Article 7(2) of the Legislative Decree No. 387/2003,

would fall between 5.3-6.6%.[831] While Claimants have not countered this with a particular figure or range, they contend that the range of 5.3-6.6% does not represent an appropriately fair remuneration for their plants.[832] Further, there is also a discussion between the Parties about whether the returns Claimants' plants were earning, prior to the *Spalma-incentivi* Decree, were excessive. Respondent calculates Claimants' plants rates of return at 13-16% and characterizes the returns as being excessive,[833] whereas Claimants' calculation of the weighted average rate of return for their plants (pre-tax) is 10.5% and (post-tax) is 7.7%.[834]

845. The Tribunal does not consider it appropriate or necessary to determine the precise percentage or range that satisfied the "fair remuneration" criteria, especially in the absence of such a numerical benchmark having been set by Italy while regulating the photovoltaic energy market. At this juncture, the Tribunal also does not consider it necessary to determine the propriety of the Parties' mathematical calculations concerning the returns being received by Claimants' plants. For the purposes of determining Italy's liability under Article 10(1) ECT, the Tribunal considers it sufficient to understand "fair remuneration" qualitatively, as opposed to quantitatively.

846. To this end, the Tribunal recalls certain important tenets of its findings relating to the legal standard of the FET obligation under Article 10(1) ECT, namely (i) in order to determine whether an action is fair or unfair, all relevant circumstances are required to be considered, including Italy's right to regulate the photovoltaic energy market as a sovereign State; and (ii) it must be borne in mind that not every shortcoming in Italy's action will render the action unfair, since the overall legal standard for an action to qualify as unfair treatment is high, in particular because this determination is a balancing exercise between the investors' expectations and the host State's regulatory authority (see ¶¶ 685-693 above).

847. In other words, to determine whether Claimants' legitimate expectations were frustrated, the Tribunal shall resort to the overall legal standard for a breach of the FET obligation

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831 SoD, ¶ 482.

832 Second FTI Regulatory Report, ¶ 3.72.

833 SoD, ¶ 483; First Bacchiocchi Witness Statement, 22 December 2017, ¶ 28; Second Witness Statement of Luca Miraglia, 3 July 2018 ("**Second Miraglia Witness Statement**"), ¶¶ 23-29.

834 Second FTI Quantum Report, Appendix 5-3; Dr. Boaz Moselle and Dr. Dora Grunwald (FTI) Slides, slide 34.

(see ¶¶ 726-728 above). Moreover, and on a related note, the Tribunal is persuaded by Mr. Miraglia's testimony during the Hearing, wherein he stated that the concept of fair remuneration should be understood keeping in mind the requirement of sustainability of the entire incentive tariff mechanism:

> Q. Where in this law is a reference made to a need to cut the incentive tariffs in order to ensure a fair return to PV investors?
>
> A. The fair return is a main aspect of the sustainability of a policy, and this is stated in also the EU guidelines on incentives. So the concept of sustainability of a mechanism is of course related, the sustainability, to the fair return for an investment, because a policymaker had to ensure that the investment will be sustainable, but also to provide a fair remuneration.
>
> So the reference to the sustainability is clearly a large concept, but an aspect -- a priority aspect of sustainability is the economical sustainability, and a fair return. This is one of the main criteria that is also stated by the EU guidelines.[835]

848. The Tribunal also considers it important to clarify that the understanding of "fair remuneration" cannot be influenced by the investors' subjective aspirations while investing in the Italian market, since as mentioned above Italy had not invited investments based on any indicative numerical benchmark of a "fair remuneration" in their regulatory documents (see ¶ 844 above). Thus, what qualifies as "fair remuneration" for Claimants' power plants cannot be assessed based on what Claimants targeted while deciding to invest in Italy. The Tribunal notes that, as per the testimony of Mr. Florian and Mr. Shockley, Claimants had targeted a (post-levered) rate of return amounting to 14% while investing in Italy.[836] The Tribunal does not consider this aspirational figure to have any impact on its determination of what qualifies as a "fair remuneration" for Claimants' plants.

849. Having delineated the qualitative ingredients of a "fair remuneration", the Tribunal shall examine whether the *Spalma-incentivi* Decree interfered with the obtainment of such remuneration for Claimants' plants. In the given facts and circumstances, the Tribunal does not consider the *Spalma-incentivi* Decree to interfere with or frustrate Claimants' expectations for a "fair remuneration". This is for the following five reasons.

[835] Hr. Tr. Day 3, pp. 44:19-45:4 (Miraglia's Testimony).

[836] Florian First Witness Statement, ¶ 16; Shockley Witness Statement, ¶ 11.

850. *First*, as mentioned in ¶¶ 263 and 842 above, all of Claimants' plants were assigned the third option under the *Spalma-incentivi* Decree, which was the default option available in the absence of a choice made by a plant operator. As a result of this third option (see ¶ 261 above), the incentive tariffs would reduce progressively for the remaining incentive period (out of the total 20 year incentive period, which was retained). This progressive reduction was (a) 6% for photovoltaic plants having a capacity between 200 and 500 kW; (b) 7% for photovoltaic plants having a capacity between 500 and 900 kW; and (c) 8% for photovoltaic plants having a capacity higher than 900 kW.[837] Since all of Claimants' plants were beyond 900 kW in capacity, it is not disputed that the incentive tariffs for each of them was impacted by an 8% progressive reduction.

851. This reduced incentive tariff for each of Claimants' photovoltaic plants is appropriately represented in the following Table 5-1 of FTI's Mr. Edwards' first expert report on quantum related issues:

Table 5-1: Incentive Tariffs assigned to the Italian Plants prior to and following the IT Decrease (EUR per MWh)

Plant	Incentive Tariff [A]	Reduction due to IT Decrease (Option C) [B]	Incentive Tariff after IT Decrease [C]=[A]x(1-[B])
Rovigo	346	8%	318
Campania	346	8%	318
Fiumicino	443	8%	408
Rustico	313	8%	288
Milana	313	8%	288
San Marco	346	8%	318
Santoro	346	8%	318
Lenare	346	8%	318
Monaci	346	8%	318

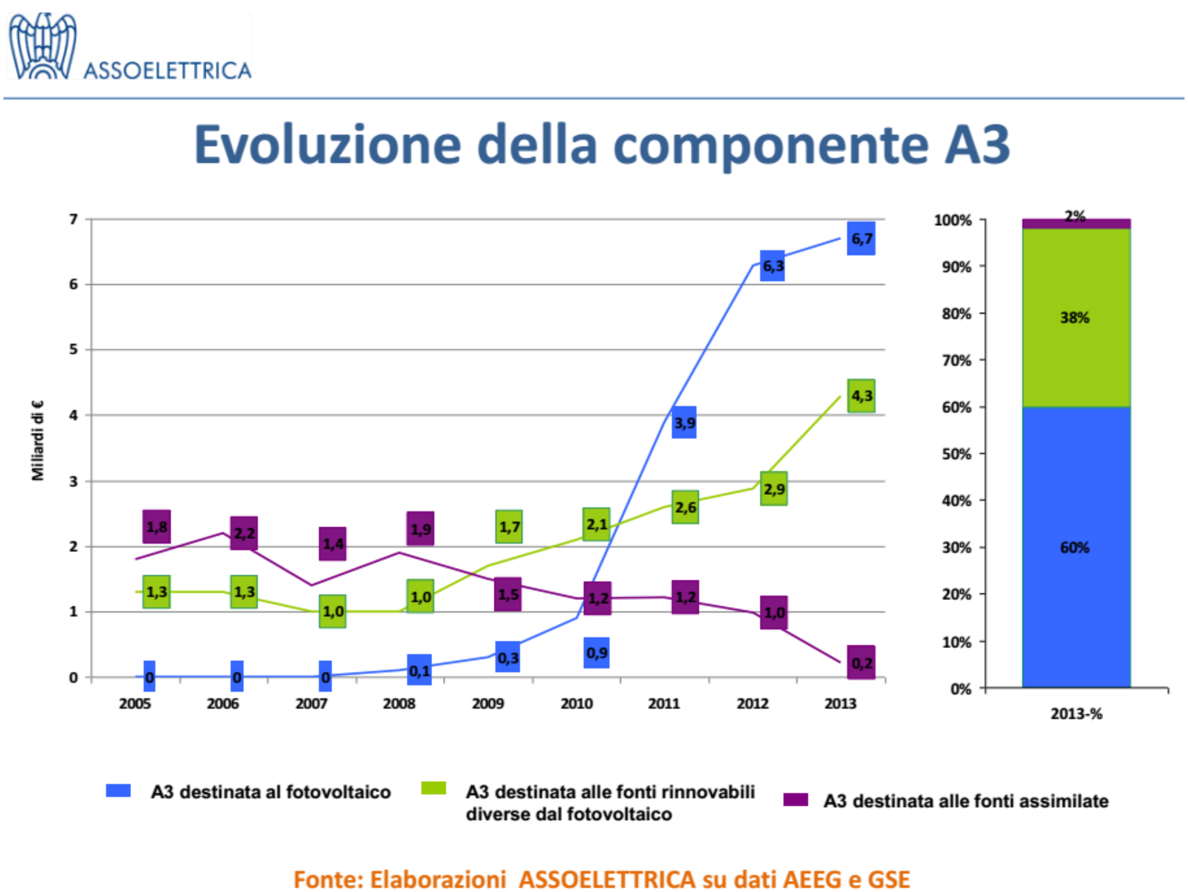
Sources: Exhibit RE-11 to Exhibit RE-19: Conto Agreements for the Italian Plants; and RfA: 49 and 50.

852. The Tribunal does not consider an 8% reduction in incentive tariffs to result in an unfair remuneration for any of Claimants' power plants. This is especially when this reduction is

837 **CEX-266**, Law Decree No. 91/2014, 24 June 2014, article 26(3)(c); *see* SoC, ¶ 230; *see also* SoD, ¶ 314.

balanced against other factors to be considered in respect of the sustainability of the overall incentive mechanism for photovoltaic energy, in particular the exponential rise in the A3 component of the electricity bills being paid by the end consumers (see ¶¶ 164-854 above).

853. Claimants[838] and Respondent[839] agree that the incentive tariffs being paid by GSE were being funded, in turn, by the end consumers and were in turn included in the A3 component of their electricity bills. Further, Claimants and Respondent also agree with the fact that this A3 component had undergone a significant increase since 2005 onwards, which is represented in the chart in ¶ 164 above, reproduced herein below for ease of reference:[840]



838 First FTI Regulatory Report, ¶¶ 5.36-5.38.

839 Hr. Tr. Day 4, pp. 157:11-157:17 (Prof. Monarca Testimony).

840 **REX-026**, Assoelettrica, Presentation at the 10th hearing of the Senate Industry Commission, 25 September 2013, slide 11.

854. Respondent contends, relying on an Italian Electrical Energy Authority's report of April 2012, that A3 was the largest component of the consumers' general charges, constituting approximately 83% of the share of these charges. The general electricity charges, in turn, constituted, 23% of the overall cost for electricity borne by consumers.[841] While Claimants do not deny this increase in charges, they submit that such an increase was foreseeable and was a direct consequence of the level of support that Italy had chosen to offer to photovoltaic energy, and Italy's larger policy decision to socialize these incentive tariffs passing the burden on to consumers. Further, Claimants submit that the A3 component ultimately constituted only 10% of the total electricity costs/bills borne by consumers from 2009 up until 2013.[842]

855. The Tribunal is not persuaded by Claimants' submission that since the rise in the A3 component was a foreseeable consequence of socializing the incentive tariffs, the same cannot qualify as a justifiable motivation behind Italy's decision to remodulate the incentive tariff regime. Regardless of the exact proportion of the total electricity costs/bills constituted by the A3 component, it is not disputed that this component went through a significant rise attributable to the incentive tariff regime. Claimants' regulatory experts calculate this rise to range from 4.8% in 2008 to 21.4% in 2016.[843] Accordingly, the Tribunal is convinced by Respondent's submission that the remodulation of the incentive tariff regime was motivated in the public interest of easing the burden on the end consumers (see ¶ 653 above).

856. *Second*, the Tribunal also observes that another agreed aspect regarding the photovoltaic energy market between the Parties is that the operating costs for photovoltaic plants were reducing over time. According to Respondent, due to this reduction in the operating costs for photovoltaic plants, any impact of the reduction in incentive tariffs was appropriately insulated. The Italian Electrical Energy Authority had commission the *Politecnico di Milano* ("**Politecnico**"), a Milan-based university, to assess the average operating costs of photovoltaic energy in 2013, which assessed various categories of these operating costs

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841 SoD, ¶¶ 277-280; R-SoRj, ¶¶ 328-333; **REX-062**, AEEG Report presented to the Senate in April 2012 (146-2012-I-eel), Consultation on the national energy strategy.

842 SoRy, ¶¶ 283-290, 301; *see* **CEX-374**, AEEG Resolution 451/2015/R/com.

843 First FTI Regulatory Report, Table 5-2.

and calculated an overall reduction in the price.[844] As per Mr. Miraglia from the GSE, this reduction in the operating costs was attributable primarily to the reduction in the operations and maintenance costs ("**O&M Costs**"), which constituted one facet of the overall operating costs.[845]

857. Claimants' witnesses, Mr. Hanna and Mr. Florian, also admit that the O&M Costs for photovoltaic plants had undergone a reduction over time.[846] However, Claimants disagree that this reduction in the O&M costs could offset the reduction in the incentive tariffs brought about by the *Spalma-incentivi* Decree, since the O&M costs only constituted a part of the overall operating costs for the photovoltaic plants, and in any event, the categories of operating costs calculated by Politecnico were not exhaustive and thus not reliable.[847]

858. In this connection, the Tribunal notes that Claimants had renegotiated their O&M contracts with respect to all of their plants in 2014, which renegotiation resulted in a reduction in the O&M Costs.[848] According to Vector Cuatro's due diligence report that conducted a full technical review of Claimants' solar photovoltaic portfolio and is relied upon by Claimants' quantum expert, Mr. Richard Edwards, this reduction in O&M Costs amounted to "8% on the O&M prices of all PV Plants" in the 1st quarter 2015, followed by "[a] reduction of 35% of all Plants from the 2nd quarter 2015, with an exception of Campania with a reduction of 30%".[849] According to both Mr. Edwards and Claimants' witness, Mr. Hanna, this reduction of O&M Costs "brought the O&M costs for all of the plants down to then-current market levels", and this reduction would anyway have happened "in the

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844 **Exh. RE-208**, Politecnico 2013 Report.

845 Hr. Tr. Day 3, pp. 34:23-35:8 (Miraglia Testimony).

846 Hr. Tr. Day 2, pp. 37:23-38:2 (Florian Testimony); Hr. Tr. Day 2, pp. 126:17-126:24 (Hanna Testimony).

847 Second FTI Quantum Report, ¶¶ 4.8-4.10 and Appendix A-5.

848 First FTI Quantum Report, ¶¶ 6.13-6.15; *see* **Exh. RE-155**, Rovigo First O&M amendment; **Exh. RE-156**, Rovigo Second O&M amendment; **Exh. RE-157**, Rovigo Third O&M amendment; **Exh. RE-159**, Campania First Amendment O&M Agreement; **Exh. RE-162**, Rustico O&M Agreement Amendment; **Exh. RE-163**, Milana O&M Agreement Amendment; **Exh. RE-165**, San Marco Amended O&M Agreement; **Exh. RE-167**, Santoro Amended O&M Agreement; **Exh. RE-169**, Lenare Amended O&M Agreement; Exh. **RE-171**, Monaci Amended O&M Agreement.

849 **Exh. RE-152**, Technical Due Diligence Report, p. 148.

counterfactual scenario", i.e., if not for the *Spalma-incentivi* Decree, albeit one year later.[850]

859. Accordingly, in light of the above, it becomes evident that a reduction in O&M Costs is an admitted phenomenon between the Parties. While Respondent calculates such reduction to amount to 50% by 2014,[851] the due diligence report relied upon by Claimants calculates such reduction at 35% for all of Claimants' power plants, except Campagnia where the reduction was 30% (see ¶ 858 above).

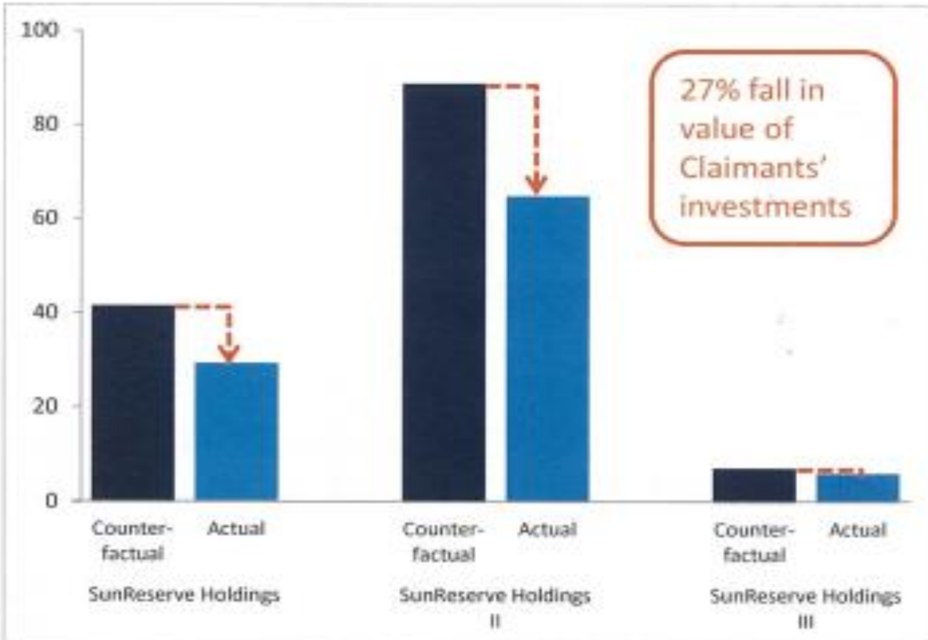
860. As mentioned in ¶ 845 above, the Tribunal does not consider it appropriate or necessary, at this juncture of liability assessment, to comment on the disagreement between the Parties' mathematical calculations, since it is not yet calculating the quantum of damages, if any. In any event, the Tribunal does not consider Respondent's estimate of a 50% reduction to be too distant from Claimants' estimated 30-35%. Thus, regardless of the propriety of the Parties' respective calculations of the O&M Costs, the Tribunal is convinced that the reduction in O&M Costs could not only create an appropriate qualitative justification for the remodulation of the incentive tariffs, but could also quantitatively insulate Claimants from the impact of such remodulation to some extent. Accordingly, in this connection too, the Tribunal is persuaded by Respondent's submission that the *Splama-incentivi* Decree did not cause Claimants' remunerations to become unfair (see ¶ 653 above).

861. *Third*, in their quantum calculations, Claimants have also emphasised the reduction in Claimants' investment value, as on the date of assessment (1 January 2015), from EUR 138.3 million in the counter-factual position, to EUR 101 million in the actual position, thereby amounting to a 27% reduction, of which 19% is attributable to the reduction in incentive tariffs.[852] This reduction in the value of Claimants' investments is represented in the following graphical representation from Claimants' quantum expert, Mr. Edwards' presentation during the Hearing:

850 Witness Statement of Mr. Hanna, ¶ 9; First FTI Quantum Report, ¶ 6.15.

851 Hr. Tr. Day 3, pp. 34:23-35:8 (Miraglia Testimony).

852 Second Florian Witness Statement, ¶ 16; First FTI Quantum Report, ¶ 2.21; Second FTI Quantum Report, ¶ 1.10.



862. Further, Claimants' quantum expert, Mr. Edwards, has also calculated the enterprise value of the companies owning Claimants' photovoltaic plants as of the date of assessment in the actual and counter-factual position, which evidences a difference of 7% according to him as a result of the value allegedly dropping from EUR 450.8 million[853] to EUR 419.5 million.[854]

863. Assuming Mr. Edwards' calculations to be accurate, the Tribunal does not consider a reduction of 7% in the enterprise value of Claimants' subsidiary companies and a resultant reduction of 19% in the value of Claimants' investment to rid Claimants' photovoltaic plants of any fair remuneration. Claimants have not demonstrated how the enactment of the *Spalma-incentivi* Decree interfered with any legitimate expectations they had towards obtaining a fair remuneration in respect of their investments. Moreover, in August 2016, Claimants managed to sell their entire investment portfolio in photovoltaic plants in Italy, while retaining their ownership over the present ECT claim against Italy (see ¶¶ 276-277 above).[855]

853 First FTI Quantum Report, Table 6-8.

854 First FTI Quantum Report, Table 5-7.

855 **RE-128**, Share Purchase Agreement with Tages Capital SGR S.p.A., 5 August 2016.

864. As per Mr. Florian's testimony, "the sale price reflected substantial lost value from the changes in the Italian incentives regime" and "[t]he investment returns on this investment, realized as a result of this sale, we dramatically lower than our expectation".[856] The Tribunal is not persuaded by Mr. Florian's testimony in this connection.

865. The sale price for Claimants' entire investment portfolio in the 2016 transaction was approximately EUR 104 million.[857] According to Respondent, this sale price is itself indicative of the fact that the "the plants were fully profitable and functioning".[858] The Tribunal does not consider it appropriate or necessary to comment on whether the sale price is reflective of the profitability of Claimants' photovoltaic power plants. However, this sale price of approximately EUR 104 million does indicate that the enterprise value of Claimants' subsidiary companies, and in turn, the value of Claimants' investments were not impacted in such a manner that their photovoltaic plants were rid of any fair remuneration. If that were the case, the sale price of Claimants' entire investment portfolio, which, as per Claimants' quantum expert was a "strong indicator of market value",[859] would have been more severely impacted.

866. *Fourth*, the Tribunal also considers a comparison with the incentive tariff (or incentive premium) regimes in other European countries to also be a reflection of what constitutes a fair remuneration in terms of tariff related benefits. In this regard, the Tribunal reproduces the following tabulated representation advanced by Claimants' regulatory experts from FTI:[860]

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856 First Florian Witness Statement, ¶¶ 27-28.

857 **RE-128**, Share Purchase Agreement with Tages Capital SGR S.p.A., 5 August 2016; First FTI Quantum Report, Table 5-8; Hr. Tr. Day 2, pp. 58:15-58:17 (Florian Testimony).

858 Hr. Tr. Day 1, pp. 248:14-248:20.

859 First FTI Quantum Report, ¶ 5.48.

860 Second FTI Regulatory Report, ¶ 3.5, Table 3-8 and Appendix 3-3.

Table 3-8: Tariffs for 999 kW PV plants across the EU, 2010

Country	FiT/FiP	Tariff, €/MWh	Duration, years	Tariff indexation
Czech Republic	FiT	485	20	2% annual increase
Slovakia	FiT	425	15	No
Greece	FiT	397	25	25% of CPI
United Kingdom	FiT	376	20	RPI
Italy	FiP	346 + P(1)	20	No
Austria	FiT	330	13	No
France	FiT	301	20	20% of CPI
Spain	FiT	270	25	CPI - 0.25% (0.5%)
Germany	FiT	265	20	No

*Notes: (1) P stands for the market price of electricity (in 2010, Italy had an average wholesale electricity price (“**PUN**”), of 64 €/MWh (Exhibit BMDG-122) and provided an MGP of 75 €/MWh (Exhibit BMDG-119)). “**CPI**” stands for Consumer Price Index.*
Source: Appendix 3-3.

867. From a comparison of the above tabulated representation (which reflects the pre-*Spalma-incentivi* incentive tariff values) with the table in ¶ 851 above (which reflects the post-*Spalma-incentivi* incentive tariff values), it appears that the incentive tariffs in Italy, even after remodulation, align with, and are often greater than, the values of such comparable tariff related benefits in other European countries. This comparison also convinces this Tribunal to find that the remodulation of the incentive tariff regime by the *Spalma-incentivi* Decree did not impede the prospects of fair remuneration for photovoltaic plants.

868. *Fifth*, and last, the Tribunal considers it important to specify that the above discussed five reasons apply with greater effect to Claimants’ Fiumicino power plant, which, to recall, was the only plant that survived the legitimacy test, insofar as Claimants’ expectations from the Italian regime were concerned (see ¶ 840 above). This is because the decrease in the enterprise value with respect to Claimants’ subsidiary that operated the Fiumicino plant, SunEdison Apulia 009 S.r.l., and in turn the reduction in the Third Claimant’s investment value was much less pronounced than for the other Claimants that owned the other power plants. From Claimants’ quantum expert, Mr. Edwards’ calculation, the fall in

the enterprise value was only EUR 1.1 million as on the assessment date, and the fall in the investment value was 15%, i.e., much lesser than the average of 27% for the other plants (see chart in ¶ 861 above).[861]

869. Moreover, the Fiumicino power plant was already earning returns at a much higher internal rate than Claimants' other power plants. While the weighted average rate of return for Claimants' plants, prior to the *Spalma-incentivi* Decree, was calculated by them to be 10.5% (pre-tax) and 7.7% (post-tax), the rate of return for the Fiumicino plant was 14.3% (pre-tax) and 10.8% (post-tax),[862] i.e., much higher than the average for Claimants' other plants. Furthermore, the original indication of the operating costs for Fiumicino submitted by Claimants to GSE was higher than the actual operating costs being incurred, which was also an anomaly compared to Claimants' other power plants.[863]

870. Thus, with the plant already operating at lower costs than the average for Claimants' plants, and making higher than average returns, the impact of the *Spalma-incentivi* Decree was much lower for the Fiumucino power plant than for the others. This is reflective in Claimants' quantum expert's calculation of the impact on the enterprise and investment value relating to the Fiumicino plant (see ¶ 868 above).

871. In light of the above reasons, the Tribunal considers that the remodulation in the incentive tariff regime brought about by the *Spalma-incentivi* Decree to have not frustrated Claimants' legitimate expectations of a fair remuneration with respect to the Fiumicino power plant. Even if Claimants are assumed to have had similar legitimate expectations vis-à-vis their other power plants, these expectations were similarly not frustrated by the remodulation of the incentive tariffs. Further, given that the substantive remodulation of the incentive tariffs itself does not qualify as a frustration of Claimants' legitimate expectations, the Tribunal does not consider the alterations in the payment modalities effected by the *Spalma-incentivi* Decree (see ¶ 842 above) to alone have such impact.

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861 First FTI Quantum Report, Tables 6-8 and 5-7; Mr. Richard Edwards (FTI) Slides, slide 9.

862 Second FTI Quantum Report, Appendix 5-3; Dr. Boaz Moselle and Dr. Dora Grunwald (FTI) Slides, slide 34.

863 Second FTI Quantum Report, Appendix 5-3, ¶¶ A5-3.2-A5-3.3.

Accordingly, the Tribunal rejects Claimants' claim that the enactment of the *Spalma-incentivi* Decree amounted to a breach of Italy's FET obligation under Article 10(1) ECT.

c. Whether Italy Frustrated any of Claimants' Legitimate Expectations by Any Other Measures

872. In addition to their claims relating to the remodulation of the incentive tariff regime by the *Spalma-incentivi* Decree, Claimants have made further claims relating to a breach of their legitimate expectations that pertain to (i) the imposition of the Administrative Management Fee and the imbalance costs, on the ground that these costs, in essence, altered the promise of the fixed incentive tariffs for twenty years; and (ii) the revision of the minimum guaranteed price effected by the Italian Electrical Energy Authority's Resolution 618/2013, which allegedly impacted Claimants' smaller plants, i.e., the ones with the capacity under 1 MW. The Tribunal shall deal with these residual claims in turn.

(i) Administrative Management Fee and Imbalance Costs

873. Claimants' contentions are common with respect to the imposition of Administrative Management Fee and imbalance costs, i.e., that these costs were not imposed at the commencement of the incentive tariff regime when the investors would decide to invest in Italy, but were imposed later in the process, thereby interfering with Claimants' alleged legitimate expectations of fixed incentive tariffs (see ¶ 618 above). Respondent denies Claimants' claims to this end, arguing that the rationale behind the imposed costs was unrelated to Claimants' alleged expectations regarding the payment of *Conto Energia* tariffs, and in any event their impact was very limited, such that it would not impede the receipt of a fair remuneration (see ¶¶ 645-650 above).

874. The Tribunal is persuaded by Respondent's arguments. The Tribunal does not consider Claimants to have any legitimate expectations that such costs should not have been imposed, nor does the Tribunal consider that the imposition of such costs frustrated Claimants' legitimate expectations, if any. This is for the following three reasons.

875. *First,* the Tribunal notes that Claimants' claims with respect to the Administrative Management Fee and imbalance costs are predicated on the same alleged legitimate expectations that the claims against the *Spalma-incentivi* Decree were based on, i.e.,

expectations of a fixed incentive tariff for a period of 20 years since the entry into operation of the plants. In the previous Sections, the Tribunal has already found that Claimants did not have, and could not have relied upon, any legitimate expectation that the incentive tariff rates made available through the *Conto Energia* Decrees would remain fixed for a 20 year period. Instead, the only expectation that Claimants could have had while acquiring the shareholding of the concerned SPVs was that their power plants, once they were declared to qualify for the incentive scheme within the Second and/or Third *Conto Energia* regime, would be ensured a "fair remuneration" for the average conventional life of photovoltaic plants (20 years), in accordance with the Legislative Decree No. 387/2003 (see ¶¶ 819 and 830 above).

876. Accordingly, the alleged legitimate expectations, upon which Claimants' claims with respect to the Administrative Management Fee and imbalance costs are premised, do not exist. Therefore, Claimants' claims in this regard cannot succeed for the same reasons that their claims against the *Spalma-incentivi* Decree failed.

877. *Second*, and in any event, the Tribunal is also persuaded by Respondent's argument that Claimants' alleged legitimate expectations of a fixed incentive tariff, even if assumed to exist, cannot be frustrated by the imposition of costs that are totally unrelated to the incentive tariffs.

878. In this connection, the Tribunal recalls that the Administrative Management Fee was first imposed by the Fifth *Conto Energia* Decree in 2013, requiring photovoltaic energy producers to pay an annual fee of EUR 0.0005/kWh of incentivized energy. As per Article 10.4 of the Fifth *Conto Energia* Decree, the intention behind the imposition of the Administrative Management Fee was "[t]o cover GSE management costs, and the cost of checks and controls by GSE" (see ¶¶ 214-217 above).[864]

879. Similarly, the imbalance costs were first imposed in 2012 by Resolutions 281 and 493 of the Italian Electrical Energy Authority. However, after the *Consiglio di Stato,* Italy's highest administrative court, found Resolution 281 to be unlawful for being

[864] **CEX-188**, Fifth *Conto Energia* Decree, article 10.4.

discriminatory,[865] the Energy Authority passed another Resolution 522 in 2014, which also pertained to regulating imbalance costs in respect of non-programmable renewable energy producers, albeit by creating distinct bands for different sources of renewable energy with the option of commercial aggregation (see ¶¶ 229-238 above). The intention behind the imposition of the imbalance costs, as per Resolution 281, was "to promote greater accountability of dispatching users of plants fuelled by non-programmable renewable sources so that to guarantee an efficient forecast of electricity fed into the grid, and, in particular, an equitable sharing of costs generated by the electrical system that can no longer fall solely on electricity consumers."[866] Along the same lines, Resolution 522 provided that "the burdens deriving from the imbalances imputable to nonprogrammable renewable sources must not be socialized in order to avoid unjustifiable discrimination, and in order not to continue to allocate burdens on the community . . . it is appropriate to review the guidelines on imbalances for non-programmable renewable sources".[867]

880. From the above, it is apparent to the Tribunal that the motivations behind the imposition of the Administrative Management Fee and the imbalance costs were unrelated to the incentive tariffs offered by the *Conto Energia* Decrees. While the Administrative Management Fee was intended to cover the GSE's costs, the imbalance costs were intended to cover the imbalances in the grid created as a result of non-programmable sources of energy, i.e., those sources of energy for which it "is not objectively impossible to predict the [amount of] energy produced and fed into the grid".[868] Even if one were to assume that Italy was under an obligation to maintain the incentive tariffs for a period of 20 years since the entry into operation of plants (which it was not), this obligation cannot translate to a prohibition against imposition of any reasonable additional costs on the beneficiaries of the incentive tariffs.

881. As Claimants themselves admit with respect to the imbalance costs, such costs are known in any electricity system and "[p]olicymakers have the choice either of charging imbalance

865 **CEX-229**, Decision *Consiglio di Stato, Sez.* VI, ruling no. 2936.

866 **CEX-227**, AEEG Resolution 281/2012/R/EFR.

867 **CEX-230**, AEEG Resolution 522/2014/R/EEL.

868 **CEX-229**, Decision *Consiglio di Stato, Sez.* VI, ruling no. 2936.

costs to renewable producers or passing them on to consumers".[869] In other words, Italian authorities have the discretion to either socialize such costs or impose them on the producers. This discretion exists regardless of the incentive tariffs that are being offered separately by Italy to the producers. This discretion also exists after such tariffs have been offered by Italy, i.e., Italy has the regulatory power to subsequently impose certain costs on producers that were earlier being socially borne by the people.

882. In this connection, the Tribunal also notes that the *Consiglio di Stato,* while invalidating the Resolution 281, had recognized the Italian authorities' discretion to allocate imbalance costs between consumers and/or producers. In this regard, it had clarified that its findings on discrimination between different sources of energies should not be construed to "mean that the imbalance costs caused by these production units should, as it was the case in the previous regime, be socialized. This mechanism would lend itself to . . . criticisms."[870] Although the question of whether Resolution 522 is in violation of the *Consiglio di Stato's* ruling is disputed between the Parties,[871] the Tribunal does not consider it appropriate or necessary to resolve this disputed matter in the present proceedings. For the purposes of Italy's FET obligations under Article 10(1) ECT, it suffices for the Tribunal to find that the imposition of imbalance costs, as well as the Administrative Management Fee, were unrelated to the incentive tariff regime and were a reasonable exercise of the State's regulatory powers.

883. Along the same lines, the Tribunal also endorses the following findings of the *Greentech v. Italy* tribunal:

> Further, as to the impact of these measures, Claimants asserted that the administrative fee and imbalance costs did not directly change the incentive tariff rates granted to PV facilities but instead altered the "general economic framework".
>
> The foreseeability of the administrative fees and imbalance costs raises the question not only whether Respondent undertook the measures in a transparent, good faith manner, but also whether Claimants' assertions of legitimate expectations are justified. Upon consideration of the Parties' arguments, the

869 SoC, ¶ 198; SoRy, ¶¶ 509-511.

870 **CEX-229**, Decision *Consiglio di Stato, Sez.* VI, ruling no. 2936.

871 SoC, ¶¶ 202-204; SoD, ¶¶ 394-398.

> Tribunal finds that the foreseeability of the costs, the silence regarding those costs in the *Conto Energia* decrees and GSE Agreements, and absence of a direct effect of those costs on the Conto tariffs collectively weigh against the conclusion that Claimants had a legitimate expectation that such costs would not be imposed on PV producers.[872]

884. *Third*, with respect to the reasonableness of these measures, the Tribunal is also persuaded by Respondent's submission that these measures did not have a significant impact on Claimants' plants, and did not frustrate their legitimate entitlement to a fair remuneration. As per a GSE report to the Ministry for Economic Development, relied upon by Respondent and not disputed by Claimants, the Administrative Management Fee imposed at EUR 0.0005/kWh of incentivized energy, constituted 0.17% of the incentives received by the beneficiaries under the Fifth *Conto Energia*.[873] Even as per Claimants' quantum expert Mr. Edwards' calculation of the operating costs of photovoltaic plants (for the year 2015), both the Administrative Management Fee and the imbalance costs constituted only 2% each of the entire costs.[874]

885. The Tribunal does not consider such a minimal impact on operating costs to constitute a frustration of Claimants' legitimate expectations of obtaining a fair remuneration under Legislative Decree 387/2003. In this connection, the Tribunal refers to its previous findings with respect to what constitutes a "fair remuneration" (see in general Section VIII.B(3) b(iii) above). These findings are equally relevant for the present Section and should be considered incorporated by reference herein.

886. In light of the above, the Tribunal rejects Claimants' claim that the imposition of the Administrative Management Fee or the imbalance costs amounted to a breach of Italy's FET obligation under Article 10(1) ECT, for frustrating Claimants' legitimate expectations.

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[872] **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, Dec. 23, 2018, ¶¶ 535-536.

[873] **REX-45**, GSE Technical Report, *"Modalità di copertura di oneri sostenuti dal gestore dei servizi energetici GSE SpA per il triennio 2015-2017, ai sensi del Decreto Legge 24 giugno 2014, n. 91, articolo 25"*; *see* SoD, ¶¶ 411-412.

[874] Secon FTI Quantum Report, Table 4-1.

(ii) Minimum Guaranteed Price

887. With respect to the off-take regime, created through the Legislative Decree No. 387/2003,[875] Claimants claim that the Italian Electrical Energy Authority's Resolution 618, which decreased the minimum guaranteed price for 2014 to EUR 38.9/MWh, frustrated Claimants' legitimate expectations of the availability of minimum guaranteed prices that were above a certain competitive threshold. Claimants have also challenged the limitation of the off-take regime to photovoltaic plants with capacity under 100 kW, as opposed to the original limiting capacity denominator of 1 MW. Claimants base their legitimate expectations in this connection, *inter alia,* on Resolution 280/2007 of the Italian Electrical Energy Authority, and the trend of the minimum guaranteed price set by the Italian Electrical Energy Authority since 2008 until 2013. The minimum guaranteed prices affected four of Claimants' smallest plants, i.e., Santoro, San Marco, Lenare and Monaci (see items 1, 2, 3 and 5 of ¶ 768 above).[876]

888. Respondent disputes the existence of Claimants' alleged legitimate expectations for a level of minimum guaranteed price, since the provision of minimum guaranteed prices by the Italian Electrical Energy Authority was only a regulatory implementation of the off-take regime prescribed under the primary legislations, i.e., Article 13 of Legislative Decree No. 387/03 and Article 1(41) of Law No. 39/2004. Further, Respondent has contested the scope of any legitimate expectations relating to minimum guaranteed prices based on the motivations behind such a regime, i.e., to ensure economic survival of smaller plants, but not to ensure profitability. Moreover, Respondent argues that the rise in operating costs, in particular vis-à-vis the smaller photovoltaic plants, reported in Politecnico's 2013 report (see ¶ 856 above), justified the alterations in the minimum guaranteed prices, both with respect to the reduction in amount and the limitations in the eligibility criteria (see ¶¶ 656-661 above).

889. The Tribunal is persuaded by Respondent's arguments. The Tribunal does not consider that Claimants could have had any legitimate expectations of the minimum guaranteed prices

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[875] **CEX-210**, AEEG Consultation for consultation proposing a regime for the "ritiro", § 1, ¶ 1.1; *see* **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003; *see also* **CEX-211/REX-033**, Law No. 239/2004, 20 October 2004, article 1(41); SoD, ¶ 342.

[876] First FTI Quantum Report, ¶ 7.5, Table 7-2.

remaining consistent in terms of range or eligibility criteria, and in any event, the reduction in the minimum guaranteed price and the alterations to the eligibility criteria are justified. This is for the following four reasons.

890. *First,* the Tribunal agrees with Respondent that neither the Italian Electrical Energy Authority's Resolution 280/2007 nor the apparent trend of the minimum guaranteed price set by the Italian Electrical Energy Authority since 2008 until 2013 could source any legitimate expectations for Claimants. The minimum guaranteed price regime was established only to implement the off-take regime, which was created by the Legislative Decree No. 387/2003. This off-take regime, pursuant to Article 13(3) of the Legislative Decree No. 387/2003, required the grid operator to purchase all electricity injected into the grid by renewable energy producers, if the producers so requested.[877] Under this provision of the Legislative Decree No. 387/2003, the Italian Electrical Energy Authority was tasked with establishing the modalities of this off-take regime,[878] and it was further to this delegation that it laid down these modalities primarily in Resolutions No. 34/2005 and 280/2007 (see ¶ 167-173 above).[879]

891. Both these Resolutions No. 34/2005 and 280/2007 also clearly mention that they were issued pursuant to the underlying primary legislative instruments, i.e., Articles 13(3) and 13(4) of Legislative Decree No. 387/2003 and paragraph 41 of Law No. 239/2004. For instance, Article 2 of Resolution No. 280/2007 provided:

> This document set forth the terms and conditions for the purchase of the electricity generated by plants pursuant to article 13, para 3 and 4 of legislative decree 29 December 2003, no. 387, and para 41 of law 23 august 2004, no. 239.[880]

892. In light of the above factors, the Tribunal considers Resolution 280/2007, from which Claimants source their legitimate expectations, to be hierarchically subordinate to the Legislative Decree No. 387/2003. In this connection, the Tribunal considers that its

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877 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, article 13(3); *see also* **CEX-211/REX-033**, Law No. 239/2004, 20 October 2004, article 1(41); SoD, ¶ 342.

878 **CEX-27**, Legislative Decree No. 387/2003, 29 December 2003, articles 13(3) and 13(4).

879 **CEX-212/REX-035**, AEEG Resolution No. 34/2005; **CEX-213/REX-034**, AEEG Resolution No. 280/2007.

880 **CEX-213/REX-034**, AEEG Resolution No. 280/2007, article 2.

previous findings relating to the hierarchical subordination of the *Conto Energia* Decrees also apply with equal effect to the Italian Electrical Energy Authority's Resolutions (see ¶¶ 793-800 above). Given that due to, *inter alia*, their hierarchical subordination, the Tribunal did not source any legitimate expectations from the (ministerial) *Conto Energia* Decrees, the Tribunal similarly considers that the Italian Electrical Energy Authority's Resolution 280/2007 cannot source any legitimate expectations of minimum guaranteed prices.

893. Instead, the Tribunal recognizes that Resolution 280/2007 operated within the broader regulatory framework of Article 13(3) of the Legislative Decree No. 387/2003, which only stated that "[t]he [Italian Electrical Energy Authority] provides for the modalities of the off-take regime of the electricity hereunder by referring to economic market conditions." This Legislative Decree did not prescribe the grant or consistent availability of minimum guaranteed prices.

894. Further, the Tribunal notes that the text of Resolution 280/2007 did not contain any provision that guaranteed the maintenance of minimum guaranteed prices at a particular level or range. To the contrary, both Parties agree that Resolution 280/2007 authorized the Italian Electrical Energy Authority to revise the minimum guaranteed price each year from 2008 onwards.[881] Moreover, the agreements entered into between Claimants' SPVs and the GSE, pursuant to this Resolution 280/2007 (see ¶ 175 above) with respect to this minimum guaranteed prices, also did not contain a provision guaranteeing a consistent range for these prices.[882] In fact, these off-take agreements authorized the GSE to unilaterally terminate[883] or modify the agreements "consistently with any modifications and integrations made to . . . [R]esolution 280/07".[884]

895. In addition, the Tribunal finds that the Italian Electrical Energy Authority's practice between 2008 to 2013 to set minimum guaranteed prices at a certain level, i.e., allegedly

[881] SoC, ¶ 137; SoD, ¶ 350.

[882] **CEX-296**, Santoro Off-take Regime Agreement, articles 1 and 4; **CEX-297**, Lenare Off-take Regime Agreement, articles 1 and 4; **CEX-298**, San Marco Off-take Regime Agreement, articles 1 and 4; **CEX-321**, Monaci Off-take Regime Agreement, articles 1 and 4.

[883] **CEX-296**, Santoro Off-take Regime Agreement, article 15.

[884] **CEX-297**, Lenare Off-take Regime Agreement, article 16; **CEX-298**, San Marco Off-take Regime Agreement, article 16; **CEX-321**, Monaci Off-take Regime Agreement, article 16.

between EUR 72.2/MWh to EUR 105.8 EUR/MWh,[885] could also not be relied upon as a source of legitimate expectations. As mentioned already, Resolution 280/2007 itself authorized the Italian Electrical Energy Authority to annually modify the minimum guaranteed prices. It was further to this authorization that the Energy Authority revised these minimum guaranteed prices on a yearly basis by way of further Resolutions and/or press-releases (see ¶¶ 176-177 above).[886] If Resolution 280/2007 could not source any legitimate expectations for a constant minimum guaranteed price, a trend established by the Italian Electrical Energy Authority pursuant to this Resolution also could not create such legitimate expectations.

896. *Second*, the Tribunal also agrees with Respondent that Claimants could not have legitimately expected that their smaller power plants would consistently remain profitable pursuant to the off-take regime. As mentioned in Resolution 280/2007 itself, the motivation behind the minimum guaranteed price regime was "to ensure the <u>economic survival</u> of the smaller plants . . . even if market prices were to fall significantly", and to "provide dedicated simplifications" of the market by virtue of the minimum guaranteed prices (emphasis added).[887] Both, Claimants[888] and Respondent,[889] agree that the motivation behind the minimum guaranteed prices was to ensure "economic survival" of the smaller plants. In this regard, Claimants argued the following during the Hearing:

> <u>There was not a specific expectation that the minimum guaranteed prices would be an absolutely specific euro cents per kilowatt hour</u>, like the incentive tariffs, because the minimum guaranteed prices could change a bit from year to year. But our clients' expectation regarding minimum guaranteed prices was that <u>minimum guaranteed prices would be paid in a meaningful amount in order to safeguard those four smaller plants</u>.[890] (emphasis added)

[885] SoC, ¶ 188; *see* **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices for years 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016.

[886] For the minimum guaranteed prices for photovoltaic plants from 2008 to 2013, *see* **CEX-219**, AEEG, Press Releases on the minimum guaranteed prices for years 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016.

[887] **CEX-213/REX-034**, AEEG Resolution No. 280/2007, article 7.

[888] SoRy, ¶ 447.

[889] SoD, ¶ 349, fn 138.

[890] Hr. Tr. Day 1, pp. 87:17-87:25.

897. In the above quoted passage, Claimants admit that the objective of safeguarding the economic survival of smaller plants does not imply that the minimum guaranteed prices would always be fixed at a particular amount or in a particular range. In other words, ensuring economic survival does not guarantee that the minimum prices would always be equal to or greater than the market prices of electricity. The only requirement under Article 13(3) of Legislative Decree No. 387/2003 was that the modalities of the off-take regime had to be laid down by "referring to economic market conditions" (see ¶ 893 above). This requirement does not serve to equate the minimum guaranteed prices to the market prices, nor does it elevate them above the market prices.

898. *Third,* the Tribunal considers that this requirement of "referring to economic market conditions" was satisfied by Politecnico's 2013 report, which was prepared upon the Italian Electrical Energy Authority's invitation. This report, *inter alia,* contained an analysis of average electricity production costs from different sources of renewable energy, depending on data from power plants with a capacity up to 1 MW. It concluded that operating costs were generally reducing over time in comparison to the market electricity prices, except in the case of very small scale power plants under 3 kW (see ¶¶ 220-220 above).

899. As discussed in ¶¶ 856-860 above, Claimants have contested the authenticity of the data considered by Politecnico, and have also contested the accuracy and completeness of their findings. However, the Tribunal has already found that the phenomenon of reduction of operating costs, and in particular O&M Costs, was not contested by Claimants. In fact, to recall, Vector Cuatro's due diligence report, which conducted a review of Claimants' photovoltaic portfolio and is extensively relied upon by Claimants' quantum expert, Mr. Edwards, specifically stated that the reduction in O&M Costs amounted to "8% on the O&M prices of all PV Plants" in the 1st quarter 2015, followed by "[a] reduction of 35% of all Plants from the 2nd quarter 2015".[891] This reduction in the O&M costs being discussed in this due diligence report, pertains to both the big and small power plants operated by Claimants' SPVs, including four of the smallest plants relevant for this Section, i.e., Santoro, San Marco, Lenare and Monaci.

891 **Exh. RE-152**, Technical Due Diligence Report, p. 148.

900. Thus, notwithstanding the mathematical divergences in the Parties' calculations and the propriety of the Politecnico report, the Tribunal considers Claimants' admission regarding reduction of the O&M Costs to apply equally to its smaller plants. This suffices for the Tribunal to endorse Respondent's justification behind reducing the minimum guaranteed prices as a result of the corresponding reduction in operating costs. As mentioned in ¶ 860 above, the exact amount of reduction is not necessary to determine at this stage, while assessing Italy's liability under Article 10(1) ECT.

901. *Fourth*, and lastly, the Tribunal notes that the Italian Electrical Energy Authority's Resolution 618, which decreased the minimum guaranteed price for 2014 to EUR 38.9/MWh, was followed by the *Destinazione Italia*, i.e., Legislative Decree No. 145/2013. This Legislative Decree, *inter alia*, provided that the minimum guaranteed price for all photovoltaic plants benefiting from the *Conto Energia* Decrees would be equal to the hourly zonal price, with the exception for photovoltaic plants with a capacity below 100 kW (see ¶¶ 225-228 above).[892]

902. In effect, as mentioned in the speech by the President of the Italian Electrical Energy Authority, Mr. Guido Bortoni, the *Destinazione Italia* Decree ended up equating the minimum guaranteed process with the market prices for electricity for all photovoltaic plants with a capacity above 100 kW.[893] The specific minimum guaranteed prices, distinct from the market prices, were limited to plants with a capacity under 100 kW.

903. With respect to this limitation in the eligibility criteria, the Tribunal is persuaded by Respondent's contention that there was never any rule, either in the Legislative Decree No. 387/2003 or in Resolution 280/2007, that minimum guaranteed prices would always be available for photovoltaic plants with a capacity under 1 MW. Indeed, if the values of the minimum guaranteed prices could fluctuate as a consequence of the Italian Electrical Energy Authority's power to regulate these prices based on market conditions, the same oscillations in the market conditions could also trigger changes in the eligibility criteria for minimum guaranteed prices.

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892 **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013, article 1(2).

893 **CEX-222**, AEEG, *Memoria 9 gennaio 2014 per l'audizione presso la 6a e la 10a Commissione della Camera dei Deputati* (1/2014/I/COM).

904. In this connection, the Tribunal agrees with the following findings of the majority of the tribunal in *Greentech v. Italy,* with respect to the changes in the minimum guaranteed price regime:

> Regarding the claim based on legitimate expectations, a majority of the Tribunal has not been persuaded that Claimants formed such expectations that, after 2013, they would continue to receive minimum prices at levels similar to those which they received from 2008 to 2013. In the view of a majority of the Tribunal, it was not demonstrated that Italy made any explicit or implicit assurance that would warrant such expectations. Nor, in the majority's view, could the Preamble to Resolution no. 280 of 2007, mentioning prices "to ensure the economic survival of smaller plants, even in case the market prices were to fall significantly", without more, suffice to engender legitimate expectations, given that the power to set prices annually remained with the [Italian Electrical Energy Authority].
>
> As for the second aspect of Claimants' legitimate expectations argument, concerning the limitation on PV plants eligible to receive minimum guaranteed prices and the decision to restrict most plants from obtaining both the *Conto Energia* tariffs and the minimum prices, a majority of the Tribunal also finds that legitimate expectations were not formed. In the view of a majority of the Tribunal, a position need not be taken on whether the stated purpose of the [minimum guaranteed price] Scheme was undermined by the restrictions Italy put into effect in 2014, since the Tribunal majority is not persuaded that limiting the number of plants eligible for the MGP Scheme, in the absence of assurances that a wider applicability would be maintained, contravenes any legitimate expectations of Claimants. Accordingly, the Tribunal finds, by a majority, that Italy's modifications of the [minimum guaranteed price] Scheme, under [Italian Electrical Energy Authority's] Resolution 618 of 19 December 2013 and the *Destinazione Italia* law decree issued on 23 December 2013, did not constitute breaches of legitimate expectations.[894]

905. In light of the above discussed reasons, the Tribunal rejects Claimants' claim that the changes to the minimum guaranteed price regime amounted to a breach of Italy's FET obligation under Article 10(1) ECT, for frustrating Claimants' legitimate expectations.

[894] **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, Dec. 23, 2018, ¶¶ 501-502.

d. Whether Italy Breached its Obligation of Transparency and Consistency

906. Claimants have invoked Respondent's obligation to act in a transparent and consistent manner as an independent tenet of the FET obligation under Article 10(1) ECT. To this end, Claimants contend that Italy's conduct of (i) retroactively imposing an Administrative Management Fee to all photovoltaic plants; (ii) imposing imbalance costs; (iii) remodulating the *Conto Energia* framework with the *Spalma-incentivi* Decree; (iv) reducing the minimum guaranteed prices to EUR 38.9 EUR/MWh, (v) failing to reimburse sums paid under the unconstitutional Robin Hood Tax; and (vi) classifying photovoltaic facilities as immovable property, amounted to a breach of the obligation of transparent and consistent conduct (see ¶¶ 620-622 above).

907. Respondent contests the existence of an independent obligation to act in a transparent and consistent manner under Article 10(1) ECT. Given the overlap between the arguments relating to legitimate expectations as well as the alleged obligation relating to transparent and consistent conduct, Respondent merely refers back to all its submissions on the legitimate expectations issue in order to refute Claimants' allegations of non-transparency and inconsistency (see ¶¶ 662-663 above).

908. The Tribunal makes the following observations with respect to Claimants' invocation of Respondent's alleged breach of the obligation to conduct itself in a transparent and consistent manner under Article 10(1) ECT.

909. At the outset, the Tribunal recalls that the issues relating to the Robin Hood Tax and the classification of photovoltaic plants as immovable property have been found to fall outside the Tribunal's jurisdiction for being "taxation measures" under Article 21 ECT (see ¶ 584 above). Accordingly, Claimants' claims with respect to these issues shall not be determined by the Tribunal in this Section.

910. With respect to the other allegations made by Claimants, the Tribunal recalls its findings relating to the legal standard of the FET obligation under Article 10(1) ECT. Therein, the Tribunal has determined, based on the Parties' positions and a review of investment arbitration case law, that claims relating to non-transparent and inconsistent conduct, while

theoretically distinct, often overlap with claims relating to legitimate expectations. This is on the ground that the notions of transparency and consistency are a subliminal part of the investor's legitimate expectations on most occasions. It is only in exceptional situations, depending on the facts and circumstances of a case, that a host State can be found guilty of having conducted itself in a non-transparent or inconsistent manner, without also having frustrated an investor's legitimate expectations, or vice versa (see ¶¶ 731-733 above).

911. The Tribunal does not consider the current case to present any exceptional situation due to which the claims, and in turn the Tribunal's findings, with respect to legitimate expectations should be dissociated from the claims and findings relating to non-transparent and/or inconsistent conduct. Accordingly, the Tribunal recalls its findings whereby it rejected Claimants' claims relating to frustration of legitimate expectations on all counts, i.e., (i) enactment of the *Spalma-incentivi* Decree (see ¶¶ 841-871 above); (ii) imposition of the Administrative Management Fee and imbalance costs (see ¶¶ 873-886 above); and (iii) changes to the minimum guaranteed prices regime (see ¶¶ 887-905 above). For all the reasons that the Tribunal rejected Claimants' claims relating to legitimate expectations on the above counts, the Tribunal also rejects Claimants' claims relating to the alleged lack of transparency and consistency in Respondent's conduct.

912. In addition, and in any event, the Tribunal notes that Claimants have not demonstrated any additional elements in Italy's conduct with respect to the implicated measures that shows a lack of transparency or consistency.

913. For instance, the *Spalma-incentivi* Decree was not a solitary or unexpected instance of remodulation of the incentive tariff regime. It was preceded by numerous versions of the incentive schemes that Italy had offered to photovoltaic producers starting from the early 1990s (see ¶¶ 95-96 above). More recently, it was preceded by (i) the Fourth *Conto Energia* Decree (see Section IV.B(5) above), which already contained elements of some remodulation, since it indicated an upper limit or a "national indicative installed capacity target" (of 23 GW or a yearly indicative cumulative cost of incentives between EUR 6 to 7 billion), beyond which incentive tariffs shall not be freshly issued;[895] (ii) the Fifth *Conto*

[895] **CEX-161**, Fourth *Conto Energia* Decree, articles 1.2, 12.1 and 12.2.

Energia Decree (see Section IV.B(6) above), which set the national indicative cumulative cost of incentives at EUR 6.7 million;[896] and (iii) the *Destinazione Italia* Decree (see ¶¶ 225-227 and ¶¶ 255-257 above), which had already given photovoltaic producers the option between (a) continuing the existing incentive scheme for the 20 year period without any additional benefits after the expiration of this period; or (b) accepting a reduced percentage of tariff incentives under the *Conto Energia* Decrees, in exchange for an extension in the duration of the incentive period by seven years.[897]

914. Accordingly, the *Spalma-incentivi* Decree was not inconsistent with Italy's prior conduct, nor is there any indication of it having been issued in a non-transparent manner. Indeed, the Decree granted photovoltaic plant operators approximately five months to chose between the three options of remodulation presented by the Decree, as opposed to directly imposing any remodulation scheme that the host State considered fit without consulting producers.

915. Similarly, the imposition of the Administrative Management Fee cannot be characterized as retroactive or inconsistent with Italy's prior conduct. The fact that the Administrative Management Fee, after being imposed, was applicable to all plants that were covered under any of the *Conto Energia* Decrees does not render such imposition retroactive. The Administrative Management Fee was only payable 1 January 2013 onwards, i.e., with prospective application (see ¶ 214 above). Further, Claimants have admitted that costs such as the Administrative Management Fee and imbalance costs are "completely foreseeable costs of a renewable energy support system".[898] However, Claimants' argue that such costs should always have been imposed on the producers, instead of the consumers, in order to ensure consistency in the system. This argument is unconvincing. As has already been determined above and as confirmed by the *Consiglio di Stato*,[899] it falls within a host State's regulatory power to balance the burdens between the producers and the consumers in the interest of a sustainable incentive system. The allocation of the Administrative Management Fee and the imbalance costs onto the producers, thus, was a foreseeable

896 **CEX-188**, Fifth *Conto Energia* Decree, articles 1.1-1.5; *see* SoC, ¶ 121; *see also* SoD, ¶ 250.
897 **CEX262/CEX-221**, Law Decree No. 145/2013, 23 December 2013, article 1(3).
898 SoRy, ¶ 514.
899 **CEX-229**, Decision *Consiglio di Stato*, *Sez.* VI, ruling no. 2936.

exercise of the Italy's regulatory powers, and cannot be characterized as inconsistent conduct (see ¶¶ 881-883 above).

916. Along the same lines, the Tribunal finds that the changes to the minimum guaranteed price regime by Resolution 618 of 2013 were neither non-transparent nor inconsistent with Italy's prior conduct. Not only were the minimum guaranteed prices subject to annual modifications, Resolution 618, which reduced the minimum guaranteed prices to 38.9 EUR/MWh, was preceded by the Italian Electrical Energy Authority's document for public consultation that invited the stakeholders' comments on the reduction of these prices with effect from 2014 (see ¶¶ 221-222 above).[900]

917. In light of the above, the Tribunal finds Italy's conduct to be transparent and consistent with its prior conduct, and therefore not in breach of Article 10(1) ECT.

e. Whether Italy Breached its Obligation of Good Faith Conduct

918. Another additional argument raised by Claimants is that Respondent's conduct, in particular relating to the *Splama-incentivi* Decree and the imposition of the Administrative Management Fee and imbalance costs, was violative of good faith, and thus, in breach of the FET obligation under Article 10(1) ECT (see ¶¶ 623-624 above). Respondent disputes the existence of good faith as an independent tenet of the FET obligation under Article 10(1) ECT, but in any event, argues that Claimants have not met the burden of proving that any of Italy's conduct was directed specifically towards Claimants in a *mala fide* manner. According to Respondent, each of the measures Claimants complain against were aimed at maintaining the sustainability of the electricity sector and drawing a balance between the interests of the end-consumers and the producers (see ¶¶ 664-665 above).

919. In its findings relating to the legal standard of the FET obligation under Article 10(1) ECT, the Tribunal has already found that the requirement of good faith or *bona fide* conduct does not constitute a separate tenet of the FET obligation. This is on the ground that good faith permeates across all other independent tenets of the FET obligation, including the tenets of legitimate expectations as well as transparent and consistent conduct (see ¶¶ 737-739

[900] **CEX-413/REX-042**, AEEG Document for public consultation no. 486, Oct. 31, 2013; *see* SoC, ¶ 186, fn 293; *see also* SoD, ¶¶ 362-363.

above). Accordingly, it is not appropriate or necessary for the Tribunal to independently examine Claimants' distinct claims relating to an alleged breach of good faith conduct. The Tribunal's findings relating to the claims of legitimate expectations as well as transparent and consistent conduct are dispositive of Claimants' claims relating to good faith conduct.

920. In any event, the Tribunal finds that Claimants have not satisfied the high threshold of establishing a lack of good faith on part of Italy (see ¶ 740 above). There is no evidence that any of the Italian authorities wilfully or intentionally committed an unfair or inequitable action vis-à-vis photovoltaic investors such as Claimants. Further, there is no evidence to refute Respondent's argument that its conduct was motivated towards achieving sustainability in the electricity sector by distributing the burdens between consumers and producers.

f. Conclusion

921. In light of the above reasons, the Tribunal rejects Claimants' claims that Italy breached its FET obligation under Article 10(1) ECT. In particular, the Tribunal concludes that Italy did not frustrate any of Claimants' legitimate expectations (see ¶¶ 871, 886 and 905 above), nor does its conduct reflect a lack of transparency, consistency or good faith that would render it in breach of the FET obligation (see ¶¶ 917 and 920 above).

C. ARTICLE 10(1) ECT: UNREASONABLE AND DISCRIMINATORY TREATMENT (IMPAIRMENT CLAUSE)

(1) Claimants' Position

a. The Legal Standard

922. According to Claimants, the "impairment" clause under Article 10(1) of the ECT prescribes a low threshold for the requisite impact on an investment. Relying on investment arbitration case law, Claimants submit that the term "impairment" means "any

negative impact or effect", and includes, both, acts and omissions by the State. As per Claimants, the impairment need not be significant.[901]

923. As per Claimants, a measure is unreasonable if it is taken without due consideration of the potential negative effects it will have on foreign investors. For Claimants, the test for reasonableness of a measure is the parties' expectations at the time of the decision to invest as opposed to what the State might view as reasonable from a policy perspective. In this connection, Claimants rely on the articulation of the unreasonable and discriminatory treatment standard by the tribunals in *BG Group v. Argentina* and *Toto Construzioni v. Lebanon.*[902]

924. Claimants reject Respondent's assertion that Claimants' allegations regarding Respondent's breaches of the impairment clause under Article 10(1) of the ECT overlap with Claimants' FET claim, and in this connection rely on investment arbitration case law and scholarly authority.[903]

b. Italy's Alleged Breach of the Impairment Clause

925. Claimants contend that Respondent's retroactive modifications to the *Conto Energia* Decrees and its support framework were contrary to a host of long-term guarantees and assurances made by Respondent and were, therefore, unreasonable and impaired Claimants' investments in Italy. Claimants argue that Respondent disproportionately saddled photovoltaic investors, and no other renewable energy or traditional energy

901 SoC, ¶ 297-298; SoRy, ¶ 380; *relying, inter alia, on* **CL-78**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award; **CL-79**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 393; **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 281; **CL-67**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, May 12, 2005, ¶ 292; **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006.

902 SoC, ¶ 299; SoRy, ¶¶ 378, 382; *relying on* **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, ¶¶ 158-163; **CL-78**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, ¶¶ 342-346; **CL-153**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, June 7, 2012, ¶ 157

903 SoRy, ¶¶ 377-378; *relying on* **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 281; **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012; **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶¶ 9.3.1-9.3.41,10.3.1-10.3.53; **CL-57**, RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (1st Ed. 2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 195 (2d ed. 2012).

producers, with the burden of its political decision to decrease the overall costs of electricity bills for end consumers, without having any regard of the financial impact on photovoltaic investors such as Claimants. Further, Claimants highlight the lack of a proper procedure to modify contracts, which was done by Italy unilaterally. Claimants rely on the opinion of their regulatory expert, FTI Consulting, to contend that the retroactive measures implemented by Respondent were arbitrary, discriminatory and inefficient.[904]

926. Claimants further argue that the retroactive measures undertaken by Respondent were bereft of any reasons or justification. In this connection, in addition to the *Spalma-incentivi* Decree's unilateral and discriminatory enactment without regard to the investors' contractual rights, Claimants contend that the breach of the impairment clause is "particularly important" for the other measures enacted by Italy, which include (i) imposition of the Administrative Management Fee; (ii) reduction of the minimum guaranteed price; (iii) failure to reimburse sums paid under the unconstitutional Robin Hood Tax; and (iv) the arbitrary classification of photovoltaic facilities as immovable property were unreasonable.[905]

(2) Respondent's Position

a. The Legal Standard

927. Respondent contends that there is a substantial overlap between the FET standard and the "unreasonable or discriminatory measures" provision under Article 10(1) ECT, particularly when the State's measures under challenge are alleged to be unreasonable. Respondent submits that the Tribunal must, therefore, assess each situation individually to examine whether there is an overlap between the unreasonable or discriminatory measures claim and the FET claim.[906]

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904 SoC, ¶ 300; SoRy, ¶¶ 383-384; C-PHB, ¶ 40; *relying on* FTI Regulatory Report, ¶ 7.8; **CL-30**, *Enron Corp. Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case. No. ARB/01/3, Award, May, 22, 2007, ¶ 282; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, Dec. 23, 2018.

905 SoC, ¶ 301; SoRy, ¶¶ 380-385; *see also* Hr. Tr. Day 1, pp. 69:11-69:19 and pp. 95:14-99:17; Hr. Tr. Day 4, pp. 202:18-202:23.

906 SoD, ¶¶ 685-691; R-SoRj, ¶ 433; R-PHB, ¶ 24.

928. Respondent disputes the meaning of "impairment" as proposed by Claimants. According to Respondent, the term "impairment" should be determined by making reference to the legal context of the clause. Respondent contends that claims for marginal negative effects suffered by foreign investors is not covered by Article 10(1) ECT. Respondent relies on the interpretation of the term "impairment" proposed by the *Electrabel v. Hungary* tribunal, which in reference to Article 10(1) ECT, stated that "a breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be significant".[907]

929. Respondent also disputes Claimants' interpretation of the term "unreasonable measure" under Article 10(1) ECT.[908] According to Respondent, the correct interpretation of the term "unreasonable measure" under Article 10(1) ECT was put forth by the *AES v. Hungary* tribunal, which held that "two elements that require to be analysed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy". Accordingly, as per Respondent, the reasonableness of the policy is to be adjudged in terms of the correlation between the measure and the policy.[909]

b. Italy's Alleged Breach of the Impairment Clause

930. Respondent challenges the invocation by Claimants of a separate treaty breach under the impairment clause of Article 10(1) ECT on the grounds that there is substantial overlap between Claimants' allegations of breach of the impairment clause and of the FET standard under Article 10(1) ECT by Respondent. Thus, Respondent, for the most part, recalls its arguments made in respect of the FET standard, especially to justify the reasonableness and non-discriminatory nature of the *Spalma-incentivi* Decree.[910]

931. For the legitimacy of the purpose behind the enactment of the *Spalma-incentivi* Decree, Respondent highlights the technological progress in the photovoltaic energy market, the reduced costs for producing electricity and the detrimental impact on consumers who

907 SoD, ¶ 693, *citing* **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015, ¶ 7.152.

908 SoD, ¶ 694.

909 SoD, ¶¶ 694-696; ; R-SoRj, ¶ 434; *relying on* **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶ 10.3.

910 SoD, ¶¶ 701-702; R-PHB, ¶ 24.

would bear the entire weight of the incentives. In this connection, Respondent also relies on the award in *CEF v. Italy,* and contends that the photovoltaic energy sector need not be treated in absolute parity with other renewable energy sectors.[911]

(3) The Tribunal's Analysis

932. At the outset, the Tribunal considers it appropriate to reproduce Article 10(1) ECT (quoted in its entirety in ¶ 587 above), in its relevant part:

> Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and <u>no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal</u>. (emphasis added)

933. The emphasised part in the above quotation from Article 10(1) ECT has been referred to by the Parties as the "Impairment Clause" in their submissions, and shall accordingly be referred to by the Tribunal similarly in its forthcoming analysis.

934. To determine whether Respondent is in breach of the Impairment Clause, the Tribunal shall first examine the legal standard for a host State's conduct to amount to a breach of the said Impairment Clause, and, based on its findings regarding this legal standard, subsequently determine whether Respondent's conduct, in the present case, qualifies as a breach of the Impairment Clause in Article 10(1) ECT.

a. The Legal Standard

935. The Tribunal notes that the Parties' disagreement with respect to the legal standard concerning the Impairment Clause relates to two related aspects: (i) the meaning of "impairment", i.e., the standard that is required to be satisfied in order to declare that a measure "impairs" the management, maintenance, use, enjoyment or disposal of an investment; and (ii) the meaning of "unreasonable", i.e., the standard that is required to be

911 R-SoRj, ¶¶ 437-440; R-RPHB, ¶ 63; *relying on* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶¶ 239-240.

satisfied in order for a measure to be declared unreasonable. The Tribunal shall examine each of these aspects in turn.

936. With respect to the *first* disputed matter, i.e., concerning the meaning of "impairment", the Tribunal considers it important to clarify, as a preliminary matter, that a determination of impairment of the investment precedes an examination of whether the measure resulting in such impairment was unreasonable or discriminatory. This is apparent from the text of the Impairment Clause in Article 10(1) ECT, which does not implicate every measure that is alleged to be unreasonable or discriminatory, but only such unreasonable or discriminatory measures that "in any way impair . . . [the] management, maintenance, use, enjoyment or disposal" of the investment. In other words, as stated by the tribunal in *AES v. Hungary*, "[a]n analysis of the nature of a state's measures, in order to determine if they are unreasonable or discriminatory, is only necessary when an impairment of the investment took place."[912]

937. Further, concerning the legal standard that the "impairment" is required to satisfy, the Tribunal considers it important understand the Impairment Clause, as per Article 31 VCLT, i.e., within the context offered by Article 10(1) ECT and the overall object and purpose of the ECT. In respect of the context, the Tribunal considers that the Impairment Clause should be understood in the same light as the FET obligation, which precedes the Impairment Clause in Article 10(1) ECT. Similarly, the Tribunal considers that its findings relating to the overall object and purpose of the ECT laid down in the context of the FET obligation are equally applicable to the Impairment Clause (see ¶¶ 678 *se seq.*).

938. To this end, the Tribunal considers it important emphasize two aspects that informed the Tribunal's understanding of the FET obligation, which are also relevant here, i.e., (i) the importance of taking together and balancing all circumstances of a case, and in this connection, the importance of understanding the investor's expectations in light of the host State's sovereignty and its right to regulate, which is recognized in the International Energy Charter (see ¶ 685 above); and (ii) the recognition that that the overall standard to

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[912] **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶ 10.3.3.

establish a breach of the FET obligation is high, which also holds true for the Impairment Clause (see ¶ 688 above).

939. Keeping the above factors in mind, the Tribunal is persuaded by Respondent's submission that not every marginal negative effect suffered by investors will be covered under the Impairment Clause in Article 10(1) ECT (see ¶ 928 above). Setting the standard for "impairment" so low shall not afford the due deference to a host State's regulatory authority and shall run counter to the overall high standard for the FET obligation, which forms part of the same legal provision in the ECT, i.e., Article 10(1) ECT.

940. In this connection, the Tribunal is in agreement with the findings of the tribunal in *Electrabel v. Hungary* that a breach of the Impairment Clause in Article 10(1) ECT "requires the impairment caused by the discriminatory or unreasonable measure to be <u>significant</u>".[913] (emphasis added) Thus, contrary to Claimants' arguments, the threshold of "impairment" under Article 10(1) ECT is not low, and does not cover every negative impact on the investment or every case where "money was withheld".[914] In order for an impact on the investment to qualify as an impairment for the purposes of a breach of the Impairment Clause, the impact needs to be significant in the facts and circumstances of the case.

941. With respect to the *second* disputed matter, i.e., concerning the standard for unreasonableness, the text of Article 10(1) ECT does not offer any specific guidance as to the meaning of the term "unreasonable". Accordingly, pursuant to Article 31 VCLT, the Tribunal interprets the term "unreasonable" according to its ordinary meaning taking into account the context and the object and purpose of the ECT. Again, the Tribunal shall keep in mind the contextual factors emphasised in ¶¶ 937-938 above for this interpretative exercise.

942. In this connection, the Tribunal considers that the case law relied upon by Claimants and Respondent to derive the ordinary meaning of "unreasonableness" are not at variance from each other.

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913 **CL-9**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, Nov. 25, 2015, ¶ 7.152.

914 Hr. Tr. Day 1, pp. 96:14-96:16.

943. Claimants rely on the following finding of *BG Group v. Argentina* to derive the standard for unreasonableness:

> Like the 'fair and equitable treatment' standard, 'reasonableness' should be measured against the expectations of the parties to the bilateral investment treaty, rather than as a function of the means chosen by the State to achieve its goals.[915]

In reliance of the above passage, Claimants argue that "the 'reasonableness' of a measure must be judged from the standpoint of the parties' expectations at the time of the decision to invest".[916] The Tribunal considers Claimants' understanding of the finding of the *BG Group v. Argentina* tribunal to be misplaced. The above quoted finding of the tribunal in *BG Group v. Argentina* underscores the expectations of the States that are party to the investment treaty in question, as opposed to the expectations of the investor while deciding to invest. From this perspective, the only point that the above finding of the tribunal in *BG Group v. Argentina* makes is that the legal standard for "reasonableness" should be understood in light of how it was intended by the all States party to the investment treaty in question, and not as per one State's unilateral understanding.

944. This uncontroversial point is no different from what this Tribunal has already emphasised above, i.e., the importance of objectively understanding the Impairment Clause pursuant to Article 31 VCLT, i.e., as per its ordinary meaning, taking into account the context, object and purpose of the ECT (see ¶¶ 937-938 above). Of course, this understanding cannot be devoid of the assurances or promises made to investors at the time they decided to invest, since the Impairment Clause, like the FET standard, requires a balancing exercise of all relevant circumstances. However, the above quoted findings in *BG Group v. Argentina* cannot be read as excluding the importance of the host State's regulatory powers, which is an important objective that the States party to the ECT desired to protect. In any event, the Tribunal is mindful that the tribunal in *BG Group v. Argentina* was not interpreting the ECT, but was discussing the standard of unreasonableness under another bilateral investment treaty.

915 **CL-78**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, ¶ 342.

916 SoC, ¶ 299; SoRy, ¶ 382.

945. In the context of the ECT, the Tribunal finds the articulation of the legal standard for unreasonableness laid down by the tribunal in *AES v. Hungary* to be appropriate*:*

> There are two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.
>
> A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.
>
> Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.[917]

946. This articulation of the unreasonableness standard, relied upon by Respondent, is not in conflict with the above discussed findings of the tribunal in *BG Group v. Argentina* relied upon by Claimants (see ¶¶ 943-944 above). The Tribunal notes that the *Toto v. Lebanon* tribunal's findings, also relied upon by Claimants, described an unreasonable or discriminatory measure as, *inter alia*, "a measure that inflicts damages on the investor without serving any apparent purpose"; and "a measure taken for reasons that are different from those put forward by the decision maker".[918] This inclusive description of unreasonableness also focuses on the two aspects highlighted by the tribunal in *AES v. Hungary,* i.e., the existence of a rational policy and the reasonableness of the act of the host State in relation to that policy.

947. The Tribunal notes that in their submissions the Parties have not debated the legal standard for a measure to be characterized as "discriminatory". In this connection, the Tribunal again refers to the contextual factors mentioned in ¶¶ 937-938 above, and notes that the concept of discrimination, like unreasonableness, should be understood no differently than its manifestation in the FET standard. To this end, the Tribunal agrees with the comparison drawn between the FET standard and the standard for the Impairment Clause by *BG v.*

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[917] **CL-38**, *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary* (ICSID Case No. ARB/07/22), Award, ¶¶ 10.3.7-10.3.9.

[918] **CL-153**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, June 7, 2012, ¶ 157.

Argentina (see the finding quoted in ¶ 943 above), and also considers it appropriate to extract the following relevant findings of the tribunal in *Saluka v. Czech Republic:*

> The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[919]

948. In light of the above, 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.

b. Whether Italy's Conduct Breached the Impairment Clause

949. As mentioned above, Claimants allege a breach of the Impairment Clause with respect to the following measures: (i) the enactment of the *Spalma-incentivi* Decree; (ii) the imposition of the Administrative Management Fee and imbalance costs; (iii) the reduction of the minimum guaranteed price; (iv) failure to reimburse sums paid under the unconstitutional Robin Hood Tax; and (v) the arbitrary classification of photovoltaic facilities as immovable property were unreasonable (see ¶ 926 above). In response, Respondent, in essence, reverts to its arguments relating to the breach of the FET obligation (see ¶ 930 above).

950. Barring the last two measures, the Tribunal shall examine each of the above measures from the perspective of whether they are in breach of the Impairment Clause in turn. With respect to the last two measures, i.e., relating to the Robin Hood Tax and the classification of photovoltaic facilities as immovable property, the Tribunal has already found above that these claims fall outside the Tribunal's jurisdiction for being "taxation measures" under Article 21 ECT (see ¶ 584 above). Accordingly, Claimants' claims with respect to these

[919] **CL-53**, *Saluka Investments BV v. Czech Republic*, UNCITRAL-PCA, Partial Award, ¶ 460.

issues shall not be determined by the Tribunal in this Section. For the remaining three measures, the Tribunal makes the following observations.

951. With respect to the *first* measure at issue, i.e., the enactment of the *Spalma-inventivi* Decree, the Tribunal does not consider it to have resulted in a breach of the Impairment Clause. This is for the following reasons:

(i) Claimants have not satisfied the pre-requisite for proving a breach of the Impairment Clause, i.e., the existence of a significant enough impact for it to qualify as an impairment under Article 10(1) ECT (see ¶¶ 936-940 above). In this connection, the Tribunal recalls its findings in the previous Section, wherein it was determined that:

(a) the *Spalma-incentivi* Decree effectuated only an 8% reduction in the incentive tariffs for Claimants' power plants (see ¶¶ 851-852 above);

(b) as a result of the *Spalma-incentivi* Decree, by their own calculation, Claimants' investment value fell by 19%, i.e., from EUR 138.3 million to EUR 101 million and their enterprise value fell only by 7%, i.e., from EUR 450.8 million to EUR 419.5 million (see ¶¶ 861-863 above); and

(c) Claimants managed to sell their entire investment portfolio in Italy at EUR 104 million, which was a "strong indicatory of market value" (see ¶ 865 above).

The above factors lead the Tribunal to conclude that the impact of the *Spalma-incentivi* Decree on Claimants' plants was not sufficient for their remuneration to have decreased to anything lesser than a "fair remuneration". In light of the overlap between the legal standard for the FET obligation and the Impairment Clause (see ¶¶ 937-938 above), these same factors lead the Tribunal to also conclude that Claimants' investments did not suffer a significant impairment. Indeed, the reduction in incentive tariffs, and the consequential reduction in investment and enterprise values, does not satisfy the threshold of "significant" impairment. This is especially when juxtaposed against the simultaneous decrease in the O&M Costs for photovoltaic plants (see ¶¶ 856-860 above).

(ii) Claimants have also not established that the *Spalma-incentivi* Decree was unreasonable, inasmuch as it was either bereft of a rational policy, or unrelated to the policy objective that the host State desired to achieve (see ¶ 948 above). Here again, the Tribunal recalls its findings in the previous Section concerning the objectives behind the enactment of the *Spalma-incentivi* Decree, i.e., to offset the increase in the A3 Component of the electricity costs/bills to be paid by the end consumers since 2005 onwards. Claimants neither dispute the increase in this A3 Component, nor do they dispute that such an increase was attributable towards the rise in costs relating to the incentive tariff regime. Claimants only emphasize the foreseeability of this rise, as a natural consequence of socializing incentive tariffs (see ¶¶ 853-855 above).[920]

However, the foreseeability of the rise in the consumers' electricity costs/bills is irrelevant to determine the reasonableness of the measure taken to offset this rise. The Tribunal finds that the objective of reducing the burden on the consumers by reducing the incentive tariffs was a rational policy objective. Further, the reduction of the incentive tariffs for producers was, indeed, related to this policy objective. This is evidenced by the fact that after the *Spalma-incentivi* Decree, the A3 Component, to the extent attributable to the incentive tariffs, witnessed a reduction, as admitted by Claimants' regulatory experts, FTI Consulting.[921]

952. With respect to the *second* set of measures at issue, i.e., the imposition of the Administrative Management Fee and imbalance costs (see ¶ 949 above), the Tribunal does not consider these to have resulted in a breach of the Impairment Clause either. This is for the following reasons:

(i) Claimants have not satisfied the pre-requisite for proving a breach of the Impairment Clause, i.e., the existence of a significant enough impact for it to qualify as an impairment under Article 10(1) ECT (see ¶¶ 936-940 above). In this regard, again, the Tribunal resorts to its findings in the previous Section, wherein the Tribunal concluded that the obtainment of a fair remuneration was not interrupted by (i) the Administrative Management Fee of EUR 0.0005/hWh amounting to a mere 2% of the entire operating costs; and (ii) the imbalance costs also amounting to only 2% of the entire operating costs, as per Claimants' own calculations (see ¶¶ 884-885

920 see also First FTI Regulatory Report, ¶¶ 5.36-6.37.

921 Second FTI Regulatory Report, ¶¶ 7.14-7.16; Hr. Tr. Day 3, pp. 218:21-218:25 (Dr. Moselle Testimony).

above). In light of the overlap between the legal standard for the FET obligation and the Impairment Clause (see ¶¶ 937-938 above), these same factors lead the Tribunal to also conclude that Claimants' investments did not suffer a significant impairment as a result of the imposition of the Administrative Management Fee and the imbalance costs.

(ii) Claimants have also not established that the imposition of any of these costs was unreasonable, inasmuch as it was either bereft of a rational policy, or unrelated to the policy objective that the host State desired to achieve (see ¶ 948 above). The policy objective behind the Administrative Management Fee, as already determined in the previous Section, was to cover the GSE's management costs and its costs for checks and controls. The policy objective behind the imbalance costs was to promote greater accountability with respect to the imbalances created in the grid as a result of non-programmable sources of energy (see ¶¶ 879-880 above). These policy objectives appear to the Tribunal to be rational, and the imposition of the costs do not appear to be unrelated to the objectives behind the imposition. Accordingly, the imposition of the Administrative Management Fee or the imbalance costs do not constitute unreasonable measures.

953. With respect to the *third* measure at issue, i.e., the reduction of the minimum guaranteed price (see ¶ 949 above), the Tribunal similarly does not consider it to have resulted in a breach of the Impairment Clause. This is for the following reasons:

(i) Claimants have not satisfied the pre-requisite for proving a breach of the Impairment Clause, i.e., the existence of a significant enough impact for it to qualify as an impairment under Article 10(1) ECT (see ¶¶ 936-940 above). In particular, the reduction in the minimum guaranteed prices by the Italian Electrical Energy Authority's Resolution 618 to EUR 38.9/MWh did not significantly impact Claimants' investments in the smaller power plants, i.e., Santoro, San Marco, Lenare and Monaci, which were directly affected by the off-take regime.

Firstly, the Tribunal recalls that this reduction of the minimum guaranteed price for 2014 was immediately followed by the *Destinazione Italia* Decree in 2014 itself, which effectively equated the minimum guaranteed prices for all plants with a capacity above 100 kW with the hourly zonal market price. Thus, as determined by the Tribunal in the previous Section, all plants covered under this regime, including Claimants', would receive the hourly zonal market price per unit of electricity (see ¶¶ 901-902 above). According to the Tribunal, this cannot amount to a significant impairment for the purposes of Article 10(1) ECT.

Secondly, taking into account the objective behind the off-take regime, i.e., of ensuring economic survival of smaller power plants, a significant enough impairment would have to inhibit such economic survival (see ¶¶ 896-897 above). Claimants have not established that their smaller power plants were impacted such as to not be able to survive economically.

(ii) Claimants have also not established that the reduction of the minimum guaranteed price was unreasonable, inasmuch as it was either bereft of a rational policy, or unrelated to the policy objective that the host State desired to achieve (see ¶ 948 above). In this connection, Claimants' submission is that this reduction was "sudden" and was "not tied to any decrease in operating costs".[922] The Tribunal is not persuaded that the reduction of the minimum guaranteed price or the alterations to the eligibility criteria for this regime was sudden.

The Tribunal recalls its findings in the previous Section that the minimum guaranteed prices were revised by the Italian Electrical Energy Authority on a yearly basis (see ¶ 895 above). Moreover, the particular reduction brought about by Resolution 618 was preceded by Politecnico's 2013 report, concluding that operating costs for producing photovoltaic electricity was reducing over time. Given Claimants' acceptance regarding the reduction in the O&M Costs, notwithstanding the mathematical divergences between the Parties' calculations, the Tribunal finds Claimants' submission that the reduction in minimum guaranteed price was not tied to any decrease in operating costs to be unconvincing (see ¶¶ 898-900 above). The reduction in O&M Costs was a justifiable motivation to implement a corresponding

922 Hr. Tr. Day 1, pp. 96:19-97:18.

reduction in the minimum guaranteed prices. Consequently, the Tribunal finds this reduction to be reasonable within the purview of the Impairment Clause in Article 10(1) ECT.

954. Lastly, the Tribunal also notes that the aspects of discrimination that Claimants point to with respect to all of the above discussed measures is that they singled out photovoltaic energy producers from all other renewable and traditional energy producers (see ¶ 925 above). With respect to the minimum guaranteed price, Claimants also emphasise the discrimination between smaller plants with capacity under 100 kW and other medium sized plants between 100 kW and 1 MW, which were later excluded from the off-set regime.[923]

955. The Tribunal is not convinced that any of the measures were discriminatory for singling out photovoltaic plants from other renewable and traditional energy plants. In this regard, the Tribunal recalls that the standard for establishing discriminatory treatment requires showing that there was no rational justification of any differential treatment of a foreign investor (see ¶ 947 above). Treating photovoltaic energy differently from other renewable or traditional energy sources does not satisfy this standard. The situation with respect to the photovoltaic energy market was distinct from other sources of energy in many respects, for instance, (i) the significant increase in capacity since 2005 compared to other forms of energy; (ii) the resultant increase in the A3 Component of the electricity bills/costs of end consumers, which was primarily attributable to the incentive scheme for photovoltaic energy (see ¶¶ 853-855 above); and (iii) the simultaneous reduction in operating costs (see ¶¶ 856-860 above). The above factors, especially the first two, set photovoltaic energy at variance from the other sources of energy, and these differences are also admitted by Claimants.[924] Accordingly, the Tribunal finds that the differential treatment of photovoltaic energy investors from other investors was backed by rational justifications relating to the prevailing market and commercial conditions.

956. With respect to the reduction in the minimum guaranteed price and the limitations included in the eligibility criteria, the Tribunal does not consider that the differential treatment between smaller plants below 100 kW capacity and medium sized plants between 100 kW

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923 SoRy, ¶¶ 462 *et seq.*

924 SoRy, ¶¶ 284-285.

and 1 MW capacity was discriminatory. In this connection, the Tribunal quotes with agreement the following findings of the Tribunal in *Belenergia v. Italy*:

> Italy's differentiation between smaller plants, on the one hand, and medium and big power plants with nominal capacity in excess of 200kW, on the other, is not discriminatory because it is based on objective and legitimate grounds. This differentiated treatment is by no means based on the national or foreign origin of producers, but on their capacity, size, economic and commercial dimension. Thus, differentiated treatment based on legitimate grounds leading to special protection of smaller plants is easily justifiable so far as it seeks to guarantee free competition in the energy sector.[925]

957. Claimants' allegations against the calculations of operating costs made by Politecnico prior to the alterations in the minimum guaranteed price regime, specifically relating to the alleged incompleteness of the data considered or the alleged inaccuracies in the costs calculation,[926] do not render these measures discriminatory. Indeed, notwithstanding the specificities of the calculations reported by Politecnico, the differential treatment of smaller plants was backed by a rational justification relating to economic and commercial realities, especially keeping in mind the objective of achieving economic survival of these smaller plants (see ¶¶ 896-897 above). Thus, the Tribunal finds that none of the measures Claimants complain against were discriminatory under the Impairment Clause in Article 10(1) ECT.

958. In light of the above findings, the Tribunal rejects Claimants' claim that Italy breached its obligations under the Impairment Clause in Article 10(1) ECT.

D. ARTICLE 10(1) ECT: UMBRELLA CLAUSE

(1) Claimants' Position

a. The Legal Standard

959. According to Claimants, the Umbrella Clause under Article 10(1) of the ECT is broadly worded to include (i) obligations of the host State, both, towards the "Investor" and the "Investment" of an Investor of any other Contracting Party to the ECT, regardless of the

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925 **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶631.

926 SoRy, ¶¶ 455-463; Second FTI Regulatory Report, ¶¶ 5.18-5.26.

timing of the Investment in the host State; and (ii) both, contractual obligations and legislative or regulatory undertakings by the host State.[927]

960. Claimants rely on Article 31 VCLT to contend that the phrase "any obligations" in the Umbrella Clause clearly indicates that the Umbrella Clause was not intended to be limited to contractual obligations. Claimants refute Respondent's interpretation that the phrase "entered into" in the Umbrella Clause limits the scope of "any obligations" to only contractual obligations.[928] In this connection, to support their assertion, Claimants rely on scholarly opinions,[929] and decisions of other arbitral tribunals,[930] rendered in relation to Article 10(1) ECT or other similarly worded Umbrella Clauses.[931] Claimants also criticize the findings of the *CEF v. Italy* and *Belenergia v. Italy* tribunals in this regard, arguing that these tribunals wrongly interpreted the Umbrella Clause to cover only contractual obligations as distinct from other obligations arising out of the legislative and regulatory framework. Claimants consider the *Greentech v. Italy* award to be more analogous to the present case.[932]

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927 SoC, ¶¶ 302, 304; C-PHB, ¶ 123; *relying on* **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 466.

928 SoRy, ¶¶ 387-397; Hr. Tr. Day 1, pp. 73:3-74:12; *relying on* **CL-88**, *Limited Liability Company Amto v. Ukraine*, Arbitration No. 080/2005, Final Award.

929 SoC, ¶ 303; *relying on*, **CL-80**, T. W. Wälde, ENERGY CHARTER TREATY-BASED INVESTMENT ARBITRATION, Transnational Dispute Management (TDM), Vol. 1, issue 3, (2004), at 7; **CL-81**, J. Billiet, A PRACTICAL HANDBOOK – INTERNATIONAL INVESTMENT ARBITRATION, Maklu, 2016, at 128.

930 SoC, ¶¶ 305-307; C-PHB, ¶ 114; C-RPHBm ¶ 51; *relying, inter alia, on* **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, ¶ 187*;* **CL-87**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, Sept. 2, 2009, ¶ 257; **CL-89**, *Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*, (PCA Case No. 2011-09), Award, March 2, 2015, ¶ 366; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 464.

931 SoC, ¶¶ 308-309, *citing*, **CL-61**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006*;* **CL-91**, *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2012.

932 Claimants' Comments on *CEF Energia B.V. v. Italy* (SCC Arb. No. 2015/158), 20 March 2019, ¶¶ 40-42; Claimants' Comments on the *Belenergia S.A. v. Italy* Award, 13 September 2019, ¶¶ 17-18; *criticizing* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 249; ; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award; *relying on* **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 466.

961. Additionally, Claimants state that Respondent's argument regarding the limited nature of the Umbrella Clause under the ECT is particularly unavailing in view of the fact that the ECT explicitly gives States the right to opt out of the Umbrella Clause.[933]

962. With respect to the role played by Italian law to determine the obligations entered into for the purposes of Article 10(1) ECT, Claimants' primary argument is that Italian law, as it existed prior to the legal dispute having arisen, is relevant to determine the existence of an obligation. In this connection, Claimants contend that Italian law, in its evolved and current state, cannot *ex post* bestow validity to a wrongful act that was committed earlier in time. Claimants support their argument by relying on Article 3 of the International Law Commission's ("**ILC**") Articles on State Responsibility and Article 27 VCLT, which prohibit the use of internal law to justify a breach of international law. Along these lines, Claimants again criticize the *CEF v. Italy* tribunal's findings relating to the Umbrella Clause, arguing that the role of domestic law in an Umbrella Clause analysis is limited to determining the existence of an obligation.[934]

b. Italy's alleged breach of the Umbrella Clause

963. Claimants contend that Respondent breached the Umbrella Clause by breaching its obligation to provide incentive tariff rates to Claimants for a period of 20 years, as was undertaken by it. According to Claimants, Respondent's obligation covered by Article 10(1) ECT arose from three different types of commitments made by Italy, i.e., legislative commitments under the *Conto Energia* Decree, administrative commitments made in GSE's tariff confirmation letters and contractual commitments made in the GSE contracts. As per Claimants, these three commitments should not be viewed in isolation, and the

[933] SoRy, ¶ 399.

[934] C-PHB, ¶¶ 98-102; C-RPHB, ¶¶ 54-55; Hr. Tr. Day 1, pp. 71:12-71:24; Hr. Tr. Day 4, pp. 215:13-221:15; Claimants' Comments on *CEF Energia B.V. v. Italy* (SCC Arb. No. 2015/158), 20 March 2019, ¶¶ 34-38; *relying on* **CL-157**, ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts; **CL-186**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, Apr. 15, 2016, ¶ 254; *criticizing* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶ 255.

legally relevant date when these commitments entered into effect is the date of entry into operation of the plant in question.[935]

964. In this regard, Claimants argue that (i) the enactment of the *Spalma-incentivi* Decree; (ii) the imposition of a retroactive Administrative Management Fee on photovoltaic facilities; (iii) the alteration to the minimum guaranteed price regime; and (iv) requiring photovoltaic producers to pay imbalance costs were each breaches of Respondent's obligations under the *Conto Energia* Decrees and the GSE contracts.[936]

965. Claimants dispute Respondent's assertion that the GSE contracts did not create bilateral contractual obligations as they were executed in accordance with the legislative and regulatory framework of the State. In support of this, Claimants rely on (i) Respondent's statements prior to the commencement of the arbitration; (ii) the Romani Decree; (iii) the text of the GSE contracts; (iv) the opinion of Italy's Procurer General before the Italian Court of Cassation confirming that GSE contracts were private law agreements; and (v) the pending cases before Italian courts concerning GSE's obligation to pay the *Conto Energia* tariffs.[937]

966. With respect to the Italian Constitutional Court Decision No. 16/2017 in relation to the *Spalma-incentivi* Decree (see Section IV.G(2) above), Claimants' primary submission, as mentioned above, is that Italian law post-dating the occurrence of a legal dispute is irrelevant to the characterization of an obligation under Article 10(1) ECT. Accordingly, Claimants dispute Respondent's reliance on this Decision No. 16/2017 to argue that GSE contracts were accessory in nature, and thus unilaterally modifiable. Claimants, in any event, submit that the Constitutional Court Decision No. 16/2017 was neither unequivocal in its finding that GSE contracts were accessory in nature, nor did it consider any GSE contracts other than those executed pursuant to the Fifth *Conto Energia* Decree. Under the Fifth *Conto Energia* Decree, the model GSE contract had been altered to include a specific

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935 C-PHB, ¶¶ 115-122; Hr. Tr. Day 1, pp. 75:1-77:5; *relying on* **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 466.

936 SoC, ¶¶ 311-312.

937 SoRy, ¶¶ 400-406; C-PHB, ¶¶ 103-104; C-RPHB, ¶ 54; *relying on* Hr. Tr. Day 2, pp. 157:14-158:2 and pp. 170:14-170:25 (Bacchiocchi Testimony); **CEX-384**, Italian Procurer General's Brief, Sept. 20, 2016.

clause that permitted unilateral modification of the contract by GSE. None of Claimants' SPV's contracts with GSE contained such a clause or were executed pursuant to the Fifth *Conto Energia*. In light of the above, Claimants dispute the relevant of the Italian Constitutional Court Decision No. 16/2017, and Italian law as it stands currently in general.[938]

967. Concerning the minimum guaranteed prices, Claimants rely on separate contracts that were automatically renewed each year, as another source of Respondent's obligations. According to Claimants, Respondent undermined its obligations in law, regulation and contract when it (i) decreased the minimum guaranteed prices by more than 50%, resulting in a price that was approximately 60% of the market price; and (ii) eliminated the possibility of most plants (including Claimants' plants) to benefit from the regime at all.[939]

(2) Respondent's Position

a. The Legal Standard

968. Without prejudice to its objections to the jurisdiction and/or admissibility of Claimants' claims under the Umbrella Clause under Article 10(1) ECT (see Section VII.C(2)b above), Respondent disputes the legal standard advocated by Claimants in relation to the Umbrella Clause under Article 10(1) ECT.

969. In particular, Respondent disputes that the Umbrella Clause under the ECT is broadly worded and that it covers statutory obligations of the State. According to Respondent, the usage of the phrase "entered into" after "any obligations" in Article 10(1) limits the State's obligations to only contractual undertakings entered into with the specific investor.[940] In

[938] C-PHB, ¶¶ 104-111; Hr. Tr. Day 1, pp. 70:16-71:3; Hr. Tr. Day 4, pp. 210:12-213:18; *relying on* **REX-032**, Italian Constitutional Court Decision No. 16/2017 of 7 December 2016, ¶¶ 8.3 and 11; **CL-181**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy*, SCC Arbitration V (2015/095), Award, ¶ 465; **CEX-466**, Order from the TAR Lazio 11124-2018.

[939] SoC, ¶¶ 313-314.

[940] SoD, ¶¶ 713-723; R-PHB, ¶¶ 130-134; *relying, inter alia, on* **CL-85**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct. 12, 2005.

this regard, Respondent disputes Claimants' selective reading of certain international arbitration case law,[941] and distinguish others.[942]

970. Respondent maintains that a literal interpretation of the Umbrella Clause under the ECT, specifically the qualification of the phrase "any obligations" by "entered into", clearly indicates that the Umbrella Clause was intended to extend only to a State's contractual obligations. Respondent contends that if the intention of the Contracting Parties to the ECT was to attribute to the Umbrella Clause a broad meaning as contended by Claimants, the text would have stated "obligations toward an Investor" or "obligations due to an Investor".[943]

971. Respondent contends that a contextual interpretation of the Umbrella Clause under Article 10(1) ECT also supports Respondent's position that statutory obligations of the State are excluded. Respondent contends that adherence by a State to its statutory obligations is covered by the FET standard and, therefore, cannot be covered by the Umbrella Clause, which by Claimants' own admission "is specifically intended to expand the reach of the Treaty's protections to obligations that otherwise might not be covered by the Treaty's other substantive provisions".[944]

972. Respondent further argues that the legitimacy of the "obligations" under the Umbrella Clause is determined based on Italian domestic law, as opposed to international law. In particular, in this connection, Italy disputes Claimants' submission that the Constitutional Court Decision No. 16/2017 is irrelevant to this Tribunal's Umbrella Clause analysis for having been rendered subsequent to the dispute between the Parties. In support of its argument, Italy relies on the tribunal's findings in *CEF v. Italy*.[945]

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[941] SoD, ¶¶ 709-710; **CL-82**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, ¶ 187*;* **CL-87**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, Sept. 2, 2009, ¶ 257.

[942] SoD, ¶ 713; ; **CL-89**, *Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd*, (PCA Case No. 2011-09), Award, March 2, 2015.

[943] SoD, ¶¶ 718-723.

[944] SoD, ¶¶ 724-726.

[945] R-PHB, ¶ 137; Hr. Tr. Day 4, pp. 237:23-238:17; *relying on* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158), 16 January 2019.

b. Italy's alleged breach of the Umbrella Clause

973. At the outset, Respondent argues that the GSE contracts are outside the scope of the Umbrella Clause as they do not qualify as actual contracts. In this connection, Respondent recalls its submissions made in the context of Claimants' claims of legitimate expectations (see ¶ 638 above). According to Respondent, the GSE contracts were in the nature of accessory contracts, "a sort of appendix of legislative or regulatory provisions", which merely transpose legal provisions, and are, therefore, not covered within the ambit of the Umbrella Clause. Respondent contends that the parties have no autonomy in relation to determining the essential terms of the GSE contracts, and the relationship between the investor and GSE was not synallagmatic or reciprocal. In support of its submissions, Respondent relies on the *CEF v. Italy* and *Belenergia v. Italy* awards, and on the Italian Constitutional Court Decision No. 16/2017. In particular, according to Respondents, the Italian Constitutional Court in this Decision (see Section IV.G(2) above) confirmed the legitimacy of the *Spalma-incentivi* Decree and characterized the GSE contracts as accessory contracts.[946]

974. Notwithstanding the above, Respondent contends that even if the Tribunal were minded to find that the GSE contracts were covered by the Umbrella Clause, Claimants have failed to prove any infringement of these contracts by the GSE, the counter-party to the contracts. Respondent submits that Claimants' claim regarding a breach of the GSE contracts is premised on an authoritative measure leading to an automatic modification of the GSE contracts, rather than any specific conduct by the GSE. In this regard, Respondent's argument is that the duty to observe contractual obligations lies on the parties to the contract and not on third parties. For these reasons, Respondent contends that Claimants have failed to establish a breach of the Umbrella Clause of the ECT.[947]

[946] SoD, ¶¶ 729-734; R-PHB, ¶¶ 135-137; R-RPHB, ¶ 66; Hr. Tr. Day 1, pp. 220:4-220:12; Respondent's Brief Comments on the *Belenergia Award* and its Consequence on this Case, 13 September 2019, ¶¶ 20-24; *relying on* **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158), 16 January 2019, ¶¶ 250-255; **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 579-581, 615-616; **REX-032**, Italian Constitutional Court Decision No. 16/2017 of 7 December 2016.

[947] SoD, ¶¶ 735-743.

(3) The Tribunal's Analysis

975. The Tribunal shall commence its analysis by reproducing Article 10(1) ECT (quoted in its entirety in ¶ 587 above), in its relevant part:

> Each Contracting Party shall observe <u>any obligations it has entered into</u> with an Investor or an Investment of an Investor of any other Contracting Party. (emphasis added)

976. The emphasised part in the above quotation from Article 10(1) ECT has been referred to by the Parties as the "Umbrella Clause" in their submissions, and shall accordingly be referred to by the Tribunal similarly in its forthcoming analysis.

977. To determine whether Respondent is in breach of the Umbrella Clause, the Tribunal shall first examine the Parties' dispute about the constituents of the legal standard to be satisfied to find a breach of the said Umbrella Clause. Thereafter, based on its findings regarding this legal standard, the Tribunal shall determine whether Respondent's conduct, in the present case, qualifies as a breach of the Umbrella Clause in Article 10(1) ECT.

a. The Legal Standard

978. The Parties are in disagreement about two aspects about the legal standard of the Umbrella Clause, i.e., (i) the relevance of the domestic law of the host State in determining the existence of the "obligations" in the emphasised Article 10(1) ECT; and (ii) whether the Umbrella Clause, in particular the emphasised part in ¶ 975 above, covers only contractual obligations or also covers obligations arising out of legislative or regulatory undertakings. The Tribunal shall examine these two aspects in turn.

979. With respect to the *first* issue, i.e., the relevance of the domestic law of the host State, the Tribunal notes that neither Claimants nor Respondent exclude the role of domestic law altogether. According to Claimants, Italian law, as it existed prior to the legal dispute having arisen, is relevant to determine the existence of an obligation, but any evolutions in Italian law after the legal dispute cannot *ex post* render an otherwise unlawful act valid (see ¶ 962 above). According to Respondent, the legitimacy of the obligations under the Umbrella Clause is determined based on Italian domestic law, as opposed to international law, and there are no temporal restrictions on this role of domestic law (see ¶ 972 above).

980. Although Claimants use the term "existence" of obligations to delineate the role of domestic law within the Umbrella Clause, while Respondents use the term "legitimacy" of obligations, the Tribunal does not consider it necessary to resolve this linguistic or conceptual disparity between the Parties. The existence of an obligation is a corollary to, and indispensable for, its legitimacy. Thus, it suffices to state that both Parties are in agreement that for the purposes of Article 10(1) ECT, obligations can arise under Italian domestic law, and when that occurs, the question of whether and to what extent these obligations exist is to be answered on the basis of Italian law. The Parties are, however, not in agreement about the temporal significance of Italian law, i.e., whether an evolution in Italian law after the dispute arose is relevant to determine the existence of obligations. With respect to this disputed issue, the Tribunal makes the following observations.

981. *Firstly,* the Tribunal notes that, in support of their arguments, Claimants have relied on Article 3 of the ILC Articles on State Responsibility and Article 27 VCLT, to argue that these provisions prohibit the use of domestic law to justify a breach of international law. Article 3 of the ILC Articles on State Responsibility provides:

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Similarly, Article 27 VCLT provides:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

982. The Tribunal understands the above provisions to codify the principles that a State cannot invoke its domestic law to either (i) influence or affect the characterization of an internationally wrongful act; or (ii) justify its failure to perform a treaty obligation. Thus, the Tribunal agrees with the proposition advanced by Claimants that domestic law cannot be relied upon by Italy to excuse itself from or to justify a breach of international law. However, none of the above provisions, i.e., Article 3 of the ILC Articles on State Responsibility or Article 27 VCLT, restricts the temporal scope of the domestic law that can be considered by an international court or a tribunal in its determinations. In other words, these provisions do not entail the consequence that domestic law, as it has evolved

after the dispute between an investor and the State arose, cannot be considered in a determination of an international law breach.

983. *Secondly*, Claimants rely on investment arbitration case law to draw a comparison between the role of domestic law to determine the proper ownership of property in cases of expropriation and the role of domestic law to determine the existence of an obligation for the purposes of the Umbrella Clause.[948] According to Claimants, since the role of domestic law in the former situation is temporally restricted to the time "just prior to" the expropriation dispute, the same temporal restriction should also apply vis-à-vis the role of domestic law under the Umbrella Clause.[949]

984. However, the comparison that Claimants attempt to draw to invoke a temporal restriction for the role of domestic law is not convincing. The motivation behind relying on the domestic legal situation as it existed immediately prior to an expropriation is that the ownership of the property in question cannot be appropriately determined after that property was allegedly expropriated. This is acknowledged by the case law relied upon by Claimants, which states that "[i]f one were to set the date of assessment of the investor's ownership any later than the date of the first contested measure, a state could adopt a law making it impossible for a private owner to prove ownership and thereby circumvent the Treaty guarantee."[950] Moreover, setting this "date of assessment" prior to the expropriation assists in the valuation of the property in question prior to its expropriation.

985. These motivations behind temporally restricting the role of domestic law for questions of property ownership are specific to cases of expropriation. The Tribunal does not see a similar temporal restriction being required or warranted for the role of domestic law under the Umbrella Clause. As the question to be answered here is whether and to what extent an obligation exists under domestic law, the whole legal situation about the existence of that obligation in the host State is relevant, regardless of when the investor-State dispute arose. Thus, for a holistic examination of whether the Umbrella Clause was breached, there is no

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948 **CL-186**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, Apr. 15, 2016.

949 C-PHB, ¶¶ 101-102.

950 **CL-186**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, Apr. 15, 2016, ¶ 254.

basis to set a cut-off date for the role of domestic law or to freeze domestic law as it existed prior to the dispute.

986. Of course, in the event that a host State were to extinguish an obligation that existed earlier by unreasonably or arbitrarily altering *ex post* its domestic law, such an invocation of domestic law can be challenged by an investor, and would then have to be examined in light of the principles emanating from Article 3 of the ILC Articles on State Responsibility or Article 27 VCLT (see ¶¶ 981-982 above). However, if the domestic legal situation vis-à-vis the existence or scope of an obligation develops or evolves in time, for instance by virtue of a domestic court's decision, that factual development should be taken into account while determining whether and to what extent an obligation exists for the purposes of the Umbrella Clause.

987. In light of the above, the Tribunal is not persuaded by Claimants' argument that Italian law is relevant to determine the existence of an obligation only in the form that existed prior to the legal dispute having arisen.

988. With respect to the *second* disputed issue mentioned in ¶ 978 above, i.e., the scope of phrase "any obligations it has entered into" in the Umbrella Clause, Claimants argue that such obligations need not necessarily be contractual in nature and can also cover regulatory or legislative undertakings (see ¶¶ 960-961 above). Respondent considers that the phrase "entered into" limits the "obligations" covered in the Umbrella Clause to only contractual undertakings entered into with the specific investor (see ¶¶ 968-971 above).

989. The Tribunal notes that the phrase "any obligations" appears to be broad in its reach, as has been pointed out by Claimants. However, in order to interpret the phrase "any obligations" according to Article 31 VCLT, its ordinary meaning should be understood in light of the qualifying phrase "has entered to". This latter phrase adds the appropriate context in order to interpret the scope of the "obligations" covered by the Umbrella Clause. In the Tribunal's view, the requirement in Article 10(1) ECT that "obligations" be "entered into" with an investor or an investment of an investor makes clear that privity is required between the Contracting Party and the investor or investment in question. As such, the

Umbrella Clause in Article 10(1) ECT covers only specific obligations directed at a particular investor or investment and not general legislative or regulatory frameworks.

990. This proposition is not disputed by Claimants, who submit that the privity or specificity requirement entails the exclusion of "general obligations", but does not exclude legislative or regulatory acts that are "targeted [at] specific classes of . . . investors".[951] On the contrary, according to Respondent, the privity or specificity of obligations requires that these obligations be preceded by an "activity of negotiation" between the host State and the investors or investments in question, and thereby includes only contractual obligations.[952]

991. The Tribunal does not consider the Parties' positions to be far removed from each other. The condition of privity of obligations for the purpose of the Umbrella Clause requires that obligations be specifically directed at, and accepted or relied upon by, the investor or investment in question. This requirement would, in most circumstances, involve discussions between the host State and the investors or investments in question, resulting in consensual arrangements. While, in certain circumstances, unilateral legislative or regulatory acts can theoretically create "obligations" covered by the Umbrella Clause, the requirement of privity or specificity still remains. In order for any legislative or regulatory acts to create obligations for the purpose of the Umbrella Clause in Article 10(1) ECT, such obligations would have to be directed at a small and well-defined class of investors and/or investments. In other words, not every unilateral legislative or regulatory act directed at investors and/or investments generally can source obligations for the purpose of Article 10(1) ECT, but only those that are directed at a small and well-defined class of investors and/or investments.

992. The above articulation of the legal standard for the scope of obligations covered by the phrase "obligations . . . entered into" in Article 10(1) ECT is in line with the case law relied upon by the Parties. For instance, in *Al Bahloul v. Tajikistan*, relied upon by Claimants, the tribunal found that "it is clear that the obligation must have been entered into 'with' an Investor or an Investment of an Investor. Therefore, this provision does not

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951 SoRy, ¶ 395.

952 R-SoRj, ¶ 449.

refer to general obligations of the State arising as a matter of law."[953] Similarly, the award in *Noble Ventures v. Romania*, relied upon by Respondent, although dealing with the Umbrella Clause of another investment treaty, interpreted the phrase "entered into" therein in the following manner:

> The employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts. Accordingly, the wording of Article II(2)(c) provides substantial support for an interpretation of Art. II (2)(c) as a real Umbrella Clause.[954]

993. With respect to the requirement of a small and well-defined class of investors, which forms part of the privity or specificity requirement for legislative or regulatory acts, the Tribunal agrees with the following findings of the tribunal in *Isolux v. Spain*, which were quoted with approval in *Belenergia v. Italy:*

> The Arbitral Tribunal accepts that, in special cases, the laws and administrative acts may contain commitments, in particular when they are specifically addressed to foreign investors . . . Yet, a rule addressing national and foreign investors cannot, because of its general character, create only obligations only vis-à-vis the former, including when they are investors of a Contracting Party.[955]

994. Thus, a legislative or regulatory framework directed equally at foreign and domestic investors cannot create specific enough obligations in order to satisfy the requirement. Accordingly, such legislative or regulatory acts cannot create "obligations" that can be considered as having been "entered into" with investors or investments for the purposes of the Umbrella Clause in Article 10(1) ECT.

995. In light of the above, the Tribunal finds that in order for "obligations" to be covered within the Umbrella Clause in Article 10(1) ECT, there needs to be privity between the host State and the investors or investments in question. This privity requirement can be satisfied either by specific consensual or contractual arrangements between the host State and the

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953 **CL-87**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, Sept. 2, 2009, ¶ 257.

954 **CL-85**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, Oct. 12, 2005, ¶ 51.

955 **CL-122**, *Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain*, SCC V2013/153, July 17, 2016, ¶ 771; *see* **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶ 617.

particular investors or investments in question, or by unilateral legislative or regulatory acts directed at a small and well-defined class of investors.

b. Whether Italy's Conduct Breached the Umbrella Clause

996. In order to examine whether Italy's conduct breached the Umbrella Clause, the Tribunal shall first examine there were any "obligations" within the meaning of Article 10(1) ECT that Italy entered into with Claimants or their investments. Second, subject to the existence of any such "obligations", the Tribunal shall examine whether any such obligations were breached by Italy.

997. With respect to the *first* issue, i.e., pertaining to the existence of the obligations, Claimants submit that Respondent entered into obligations of a legislative, administrative and contractual nature with Claimants and their investments. For the legislative obligations, Claimants rely on the *Conto Energia* Decrees and their alleged guarantees of a fixed incentive tariff for 20 years. For the administrative obligations, they rely on GSE's tariff confirmation letters, and for the contractual obligations, they rely on the GSE contracts, including the off-take agreements promising a minimum guaranteed price (see ¶¶ 963-967 above). Respondent disputes the existence of any obligations entered into with Claimants and or investments, primarily on the ground that the GSE contracts were in the nature of accessory contracts, which merely transpose or supplement legislative acts. According to Respondent, these contracts were therefore unilaterally modifiable and could not have sourced any obligations for the purposes of the Umbrella Clause (see ¶ 973 above).

998. The Tribunal considers that none of the measures relied upon by Claimants could create "obligations" that would fall within the understanding of that term in the Umbrella Clause in Article 10(1) ECT. This is for the following two reasons.

999. *Firstly,* with respect to the legislative acts that Claimants rely upon, i.e., the Second and the Third *Conto Energia* Decrees, the Tribunal considers that these acts do not satisfy the legal standard for privity between the host State and the investors or investments in question. As mentioned above, in order for the privity requirement to be satisfied for legislative and/or regulatory acts, these acts have to be directed at a small and well-defined class of investors or investments (see ¶ 991 above). In this connection, legislative and/or regulatory measures

that are directed equally at foreign and domestic investors, as opposed to being directed specifically at foreign investors, cannot be considered as targeting such a small and well-defined class of investors. Instead, they qualify as more general legislative measures that are not covered by the Umbrella Clause in Article 10(1) ECT (see ¶ 993 above).

1000. The Tribunal notes that the Second and the Third *Conto Energia* Decrees, like the other *Conto Energia* Decrees and the underlying Legislative Decree No. 287/2003 or the Romani Decree, were not directly solely at foreign investors. Instead, they were generally directed towards all producers of electricity through the photovoltaic conversion of solar energy, be it domestic producers or foreign investors. Therefore, these legislative and/or regulatory enactments could not create any obligations that would qualify for protection under the Umbrella Clause due to the absence of privity between the host State and Claimants or their investments. In this connection, the Tribunal agrees with the following findings of the tribunal in *Belenergia v. Italy:*

> The Italian legal and regulatory framework before the *Spalma Incentivi* Decree and the *Destinazione Italia* Decree was clearly addressed to national and foreign investors and thus could not be interpreted as creating obligations specifically "entered into with" [the investors].[956]

1001. In light of the above finding, the Tribunal does not consider it appropriate or necessary to make any further remarks on the scope of the commitments made in these legislative and/or regulatory enactments, i.e., whether the commitments amounted to a guaranteed incentive tariff for 20 years or whether these commitments also insulated photovoltaic producers from the imposition of additional costs, such as the Administrative Management Fee or imbalance costs. Given that these legislative and/or regulatory acts did not, in the first place, create specific enough obligations in order to be covered within the Umbrella Clause in Article 10(1) ECT, the scope and extent of the alleged commitments made in these acts need not be separately examined. Thus, Claimants' claims relating to the breach of Umbrella Clause, to the extent they are based on the *Conto Energia* Decrees, fail for the lack of a specific enough obligation entered into vis-à-vis the investors or investments in question.

956 **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶ 618.

1002. *Secondly*, with respect to Claimants' claims relating to the administrative and contractual obligations allegedly arising out of the GSE tariff confirmation letters and the GSE contracts, the Tribunal is persuaded by Respondent's characterization of these documents as "accessory" in nature. The Tribunal has already discussed the motivations behind this characterization of the GSE letters and contracts in its determinations pertaining to Claimants' alleged legitimate expectations (see ¶¶ 821-830 above). Although those motivations were discussed particularly in the context of Claimants' Fiumicino power plant, they apply equally to all of Claimants' other power plants.

1003. As already determined above, the consequence of this accessory nature of the GSE instruments was that they could not create any commitments above and beyond the primary legislative and/or regulatory acts that they were sourced in, i.e., the Legislative Decree No. 387/2003 or the Second and Third *Conto Energia* Decrees in the present case (see ¶ 823 above). Given that the Tribunal has found that these legislative and/or regulatory acts did not create any obligations for the purposes of the Umbrella Clause in Article 10(1) ECT, the GSE tariff confirmation letters or contracts also could not create any such obligations.

1004. Another consequence of the accessory nature of the GSE instruments that the Tribunal determined above was that, as a matter of Italian law, they could be unilaterally modified by the public authority in question, i.e., GSE (see ¶ 827 above). In this regard, the Tribunal also found that it was persuaded by Respondent's reliance on the Italian Constitutional Court's Decision No. 16/2017, and was, in turn, not convinced by Claimants' criticisms of the said Decision (see ¶ 829 above).

1005. To recall, the Constitutional Court Decision No. 16/2017 had confirmed that the GSE contracts were "accessory to the provisions granting the incentives", and were not "private law contracts".[957] The Tribunal has determined in the previous sub-Section that Italian domestic law is relevant to examine the existence of "obligations" for the purposes of the Umbrella Clause, and for such an examination, any evolutions in domestic law after the dispute between the investors and the host State has arisen should also be considered (see ¶¶ 985 and 987 above). Accordingly, the Tribunal does not exclude the Italian

957 **REX-032**, Italian Constitutional Court Decision No. 16/2017 of 7 December 2016, ¶ 11.

Constitutional Court Decision No. 16/2017 from the purview of its considerations merely because it was rendered after the dispute between Claimants and Respondent arose. The Constitutional Court's Decision No. 16/2017, instead, presents an authoritative understanding of the GSE instruments, and therefore informs the Tribunal's determinations of the nature of the obligations created by the GSE tariff confirmation letters and/or contracts.

1006. Furthermore, the Tribunal has already rejected Claimants' arguments discrediting the Constitutional Court Decision No. 16/2017 based on various factors such as (i) the language of the Romani Decree; (ii) the text of the GSE contracts; and (iii) the opinion of Italy's Procurer General before the Italian Constitutional Court and the *Cour de Cassazione* confirming that GSE contracts were private law agreements (see ¶ 829 above). These factors, in the Tribunal's view, could not interfere with the accessory nature of the GSE letters and contracts, since the context in which these GSE instruments were issued evidence such an accessory nature clearly. For the same reasons, the fact that various cases pertaining to the alleged breaches of other GSE contracts are pending before Italian courts (see ¶ 965 above) is also irrelevant for the considerations relating to the nature of the GSE letters or contracts.

1007. The Tribunal has found the Italian Constitutional Court's findings in Decision No. 16/2017 concerning the accessory nature of the GSE instruments to be clear. In the face of the Italian Constitutional Court's clear findings, the Tribunal considers that the GSE tariff confirmation letters and/or the GSE contracts could not have created any obligations under Italian law for a fixed incentive tariff for a period of 20 years. In turn, there are no obligations that exist in order for them to be covered by the Umbrella Clause in Article 10(1) ECT. The Tribunal notes that these clear findings of the Italian Constitutional Court Decision No. 16/2017 have similarly influenced the determinations of other investment arbitration tribunals in relation to the Umbrella Clause in Article 10(1) ECT, for instance, the tribunals in *Belenergia v. Italy*[958] and *CEF v. Italy* (see ¶¶ 827 and 829 above). In this regard, the Tribunal endorses Respondent's reliance on the following passages of the award in *CEF v. Italy:*

958 **CL-195**, *Belenergia S.A. v. Italy*, ICSID Case No. ARB/15/40, Award, ¶¶ 579-580

> The Tribunal is, therefore, compelled to the conclusion that the obligations which Respondent entered into with Claimant's Investments . . . were, as a matter of Italian law subject to unilateral modification by Respondent. The GSE Agreements are all subject to Italian law, and the awards which Claimant cite do not have the effect of overriding a choice of governing law made by the parties thereto. The obligations of Respondent which it owed to Claimant's Investments were delineated by Italian law, which (when revealed by the Italian Constitutional Court to be accessory in nature) allowed it to unilaterally modify such obligations.
>
> In such circumstances, the Tribunal dismisses Claimant's Umbrella Clause claims as argued for by it and summarised in its Opening Presentation at the hearing.[959]

1008. In light of the above, the Tribunal finds that the GSE tariff confirmation letters and/or the GSE contracts also did not create any obligations under Italian law that the incentive tariffs granted to Claimants' power plants would be fixed for a period of 20 years. Any commitments under these instruments were unilaterally modifiable, and were subject to subsequent changes in the Italian legislative and/or regulatory regime.

1009. The Tribunal finds that the same holds true for the off-take agreements that were entered into by GSE with respect to the minimum guaranteed prices for Claimants' smaller power plants. As mentioned above, these agreements were also created as accessories to the legislative and/or regulatory regime created by Legislative Decree No. 387/2003 and the Italian Electrical Energy Authority's Resolution 280/2007. Further, these off-take agreements, in fact, specifically provided that the GSE could unilaterally terminate or modify them (see ¶ 894 above). Thus, Respondent was not obligated to maintain the minimum guaranteed price at a particular rate or within a particular range further to these off-take agreements, nor did the underlying legislative and/or regulatory regime obligate Respondent to do so.

1010. Therefore, the Tribunal concludes that Respondent did not have any obligations that it had entered into with Claimants or their investments for the purposes of the Umbrella Clause in Article 10(1) ECT, either in respect of the *Conto Energia* Decrees' incentive tariff regime

[959] **RLA-018**, *CEF v. Italian Republic*, SCC Arbitration V (2015/158) , 16 January 2019, ¶¶ 254-255.

or in respect of the off-take regime. Consequently, Claimants' claims relating to breach of the Umbrella Clause fails.

1011. In light of the above findings, it is no longer necessary for the Tribunal to independently determine the *second* issue mentioned in ¶ 996 above, i.e., whether Respondent breached any of its obligations resulting in a violation of the Umbrella Clause. In this connection, Claimants have invoked (i) the enactment of the *Spalma-incentivi* Decree; (ii) the imposition of a Administrative Management Fee and the imbalance costs on photovoltaic facilities; or (iii) the alteration to the minimum guaranteed price regime (see ¶ 964), as instances of breaches of the Umbrella Clause. Since it has been found that there were no obligations, in the first place, that were entered into between Italy and Claimants or their investments for the purposes of the Umbrella Clause, there could not have been any breaches of obligations that would in turn violate the Umbrella Clause.

IX. **QUANTUM**

1012. The Tribunal notes that Claimants have claimed compensation in the amount of EUR 40.89 million arising as a result of Respondent's alleged breaches of the FET obligation, the Impairment Clause and the Umbrella Clause (see ¶ 280 above). Respondent has disputed Claimants' entitlement to compensation in this amount. In this connection, the Parties have made submissions, and filed their respective quantum expert reports, relating to the financial impact of the various measures at issue and the quantification of Claimants' alleged damages and the resulting compensation.

1013. Given that the Tribunal has rejected all of Claimants' claims relating to Respondent's alleged breaches of the FET obligation, the Impairment Clause and the Umbrella Clause, the Tribunal finds that Respondent is not liable to pay any compensation to Claimants. Accordingly, since Claimants have failed to establish Respondent's liability under the ECT, the Tribunal does not consider it necessary to examine the Parties' respective submissions relating to the financial impact of the various measures at issue and the quantification of Claimants' alleged damages and the resulting compensation in this regard.

X. COSTS

1014. With respect to the costs incurred in the arbitration proceedings, the SCC Rules distinguish between "Costs of the Arbitration" and "Costs incurred by a party". With respect to the costs of the arbitration, Article 43 SCC Rules provides:

> **Article 43 Costs of the Arbitration**
>
> (1) The Costs of the Arbitration consist of:
>
> (i) the Fees of the Arbitral Tribunal;
>
> (ii) the Administrative Fee; and
>
> (iii) the expenses of the Arbitral Tribunal and the SCC.
>
> (2) Before making the final award, the Arbitral Tribunal shall request the Board to finally determine the Costs of the Arbitration. The Board shall finally determine the Costs of the Arbitration in accordance with the Schedule of Costs (Appendix III) in force on the date of commencement of the arbitration pursuant to Article 4.
>
> (3) If the arbitration is terminated before the final award is made pursuant to Article 39, the Board shall finally determine the Costs of the Arbitration having regard to when the arbitration terminates, the work performed by the Arbitral Tribunal and other relevant circumstances.
>
> (4) The Arbitral Tribunal shall include in the final award the Costs of the Arbitration as finally determined by the Board and specify the individual fees and expenses of each member of the Arbitral Tribunal and the SCC.
>
> (5) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.
>
> (6) The parties are jointly and severally liable to the arbitrator(s) and to the SCC for the Costs of the Arbitration.

1015. With respect to the costs incurred by a party, Article 44 SCC Rules provides:

> **Article 44 Costs incurred by a party**
>
> Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs

> incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

1016. Both, Claimants and Respondent, have claimed that the other side should bear their costs of the arbitration and the reasonable costs incurred by them, *inter alia,* for legal representation.

A. CLAIMANTS' POSITION

1017. Claimants claim that they are entitled to recover all costs, fees and expenses incurred in this arbitration on the basis of the so-called "loser pays" principle. According to Claimants, since they should prevail in this arbitration due to the harm caused to their investments by Italy's breaches of the ECT and international law, they should also, in turn, be entitled to all the costs incurred in this arbitration. With respect to the "loser pays" principle, Claimants also submit that it is not necessary for them to have prevailed on all of their claims or to have been awarded all the full amount of the claimed damges.[960]

1018. In light of the above, Claimants claim costs, fees and expenses incurred in connection with this arbitration in the amounts of USD 3,895,283.80 plus EUR 1,274,072.33, together with post-award compound interest at a rate to be determined by the Tribunal. These amounts are categorized under the following heads by Claimants:[961]

[960] Claimants' Submission on Costs, ¶¶ 2-5; *relying on* **CL-94**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 533; **CL-68**, *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, ¶ 352.

[961] Claimants' Submission on Costs, ¶ 7 and Annex A.

CATEGORY	AMOUNT
Legal Fees[8]	
• King & Spalding	US$ 2,324,216.00
• Orrick, Herrington & Sutcliffe	US$ 1,396,031.25
Expert Fees & Expenses	
• FTI Consulting	€ 723,594.99
• Prof. Antonio D'Atena	€ 35,000.00
Claimants' Costs & Expenses	US$ 174,991.55 and € 15,977.34
SCC Payments	€ 499,500.00
TOTAL	**US$ 3,895,238.80 AND € 1,274,072.33**

1019. Claimants submit that these costs are reasonable in light of the duration of the proceedings, the complexity of the case, the amount in dispute and the efficiency with which the case was conducted. In this connection, Claimants also highlight that Italy has repeatedly failed to pay its portion of the costs of this arbitration, including the hearing expenses, all of which had to be covered in their entirety by Claimants.[962]

B. RESPONDENT'S POSITION

1020. Respondent also claims that it is entitled to recover "the expenses incurred by the Italian Republic in connection with these proceedings, including professional fees and disbursements, and . . . the fees and expenses of the Members of the Tribunal and the charges for the use of the facilities of the S[C]C, in accordance with Articles 43 and 44 of SCC 2010 Arbitration Rules."[963]

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962 Claimants' Submission on Costs, ¶¶ 6-9; *relying on* **CL-101**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 623-28.

963 SoD, ¶ 779(k); *see also* R-SoRj, ¶ 635.

1021. Respondent requests for costs in the amount of EUR 990,000 or USD 1,136,351. These costs are particularized under the following categories:

Attendances (personal attendances, telephone, letters out/e-mail)	€ 400.000,00	$ 459.132,00
Legal fees	€ 500.000,00	$573.914,00
Costs (traslation, expertize, other expenses)	€ 70.000,00	$ 80.348,00
Attendance at hearing (travel, hotel, others: traslation, meats)	€ 20.000,00	$ 22.957,00
TOTAL	**€ 990.000,00**	**$ 1.136.351**

1022. Respondent makes no submissions to justify the reasonableness of the above claimed costs.

C. THE TRIBUNAL'S ANALYSIS

1023. As mentioned in ¶ 1014 above, the SCC Rules distinguish between "Costs of the Arbitration" and "Costs incurred by a party". The Parties are in dispute with respect to the allocation or apportionment of both these aspects of the costs of the proceedings. The Tribunal shall examine both aspects, in turn.

(1) Costs of the Arbitration

1024. As per Article 43(1) SCC Rules, the "Costs of the Arbitration" consist of (i) the fees of the Tribunal; (ii) the administrative fee; and (iii) the expenses of the Tribunal and the SCC.

1025. Article 43(2) SCC Rules requires the Tribunal to request the SCC Board to finally determine the costs of the arbitration. As mentioned in ¶ 89 above, the Tribunal made such a request to the SCC Board on 10 March 2020. Based on this, the SCC Board, finally determined the costs of the arbitration in the amount of EUR 393,169.44 (plus VAT). This includes the fees and expenses of each member of the Tribunal, expenses for the Tribunal Secretary and the administrative fee of the SCC in the following amounts (exclusive of VAT):

Name	**Fees (EUR)**	**Expenses (EUR)**	***Per Diem* Allowance (EUR)**
Prof. Albert Jan van den Berg	176,500	1,162.72	2,500
Prof. Klaus Sachs	80,000	2,865.06	--
Prof. Andrea Giardina	80,000	3,878.68	--
Arbitral Secretary	--	1,662.98	--
SCC	44,600	--	--

1026. On the above amounts, the following VAT rates shall be applicable:

(i) The fees, expenses and *per diem* allowance of Prof. Albert Jan van den Berg: 21%;

(ii) The fees and expenses of Prof. Klaus Sachs: 19%;

(iii) The fees and expenses of Prof. Andrea Giardina: 22%. In addition to the VAT, the fees and expenses of Prof. Giardina are also subjected to the Italian Mandatory Contribution to the Lawyer’s Fund at 4%.

(iv) The expenses of the Arbitral Secretary: 21%;

(v) The fees of SCC: 25%.

1027. It is not disputed between the Parties that Claimants had advanced the costs for these proceedings in their entirety, further to Articles 45(3) and 45(4) SCC Rules. The costs advanced by Claimants, in this connection, amounted to EUR 499,500. Claimants request the Tribunal to take this factor into account while apportioning the costs of the arbitration.

In addition, Claimants also rely on the loser pays principle to claim their entitlement to these costs, since they believe they should prevail in this arbitration due to the harm caused to their investments by Italy's breaches of the ECT and international law (see ¶ 1017 above). Respondent contends that it is Claimants that should bear the costs of the arbitration in the entirety.

1028. The Tribunal notes that Article 43(5) SCC Rules authorizes the Tribunal to "apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances." Thus, the factors to be considered while apportioning the costs of the arbitration include the outcome of the case and other relevant circumstances.

1029. In light of the Tribunal's determinations in the previous Sections of this Award, the Tribunal considers that Respondent has prevailed partially with respect to its jurisdictional and/or admissibility objections, and has prevailed entirely on the merits of the case, i.e., on issues pertaining to liability under the ECT and international law. Although Claimants have prevailed on the majority of the jurisdictional and/or admissibility issues, the Tribunal does not consider that this outcome warrants allocating the costs of the arbitration to Respondent.

1030. Further, the Tribunal is not persuaded by Claimants' submission that Respondent should bear the costs of the arbitration since it has not paid any advances on costs. The Tribunal does not consider Respondent's conduct in the course of these proceedings to have been prejudicial to the conduct of the proceedings in a smooth and efficient manner.

1031. Consequently, taking into account the outcome and overall circumstances of the case, the Tribunal concludes that Claimants should bear the costs of the arbitration in their entirety (plus VAT at the rates mentioned in ¶ 1026 above).[964]

[964] Although, pursuant to Article 43(6) SCC Rules, the Parties are jointly and severally liable to the arbitrators and to the SCC for the costs of the arbitration, as between the Parties, it is Claimants that shall bear the costs of the arbitration in their entirety.

(2) Costs Incurred by the Parties

1032. With respect to the costs incurred by a party, Article 44 SCC Rules authorizes the Tribunal to "order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances."

1033. There are two aspects to be determined with respect to the costs incurred by the Parties: (a) the allocation or apportionment of these costs; and (b) whether these costs are reasonable.

a. Allocation of Costs Incurred by the Parties

1034. Both, Claimants and Respondent, claim that the other side should bear their costs incurred in these proceedings. In addition to the loser pays principle, Claimants highlight "other relevant circumsntaces" in this connection, i.e., the duration of the proceedings, the complexity of the case, the amount in dispute, and the efficiency with which the case was conducted (see ¶ 1019 above). Further, Claimants also specifically submit that the loser pays principle does not require them to have prevailed on all of their claims (see ¶ 1017 above).

1035. The Tribunal notes that Article 44 SCC Rules enlists the same factors to be considered while allocating the costs incurred by the Parties as the factors that were considered while allocating the costs of the arbitration, i.e., the outcome of the case and other relevant circumstances.

1036. The Tribunal has already observed in ¶ 1029 above that the outcome of the case was entirely in favour of Respondent insofar as the merits of the case, i.e., the issues of liability under the ECT and international law, are concerned. On the issues pertaining to the Tribunal's jurisdiction and/or admissibility, Respondent prevailed in part, whereas Claimants prevailed on the majority of these issues.

1037. The Tribunal is persuaded by Claimants' argument that the loser pays principle does not require them to have succeeded in respect of all of their claims.[965] The Tribunal notes that

[965] **CL-68**, *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, ¶ 352.

the only jurisdiction and/or admissibility issues on which Respondent prevailed were the claims relating to the Robin Hood Tax and the classification of photovoltaic plants as immovable property. On all other jurisdiction and/or admissibility issues, Claimants were the prevailing party. Thus, even though Claimants were the losing party overall, the Tribunal is mindful that they did prevail on some of the jurisdiction and/or admissibility issues.

1038. Moreover, the Tribunal is also convinced by Claimants' reliance on other circumstances, in particular the complexity of the case and the efficiency with which the case was conducted. Keeping in mind these other circumstances, together with the outcome of the case, the Tribunal considers that despite having lost their claims in this arbitration, Claimants should not bear the entirety of Respondent's costs incurred in the course of these proceedings.

1039. In light of the above, the Tribunal determines that Claimants shall bear 75% of Respondent's costs incurred in the course of these proceedings, to the extent that such costs are considered by the Tribunal to be reasonable.

b. Reasonableness of Costs Incurred by Respondent

1040. Respondent has claimed an amount of EUR 990,000 or USD 1,136,351 as costs incurred in these proceedings (see ¶ 1021 above). In the interest of consistency with respect to currency, the Tribunal's determinations shall only use the amounts in Euros, and not the amounts in United States dollars.

1041. Of the EUR 990,000 claimed by Respondent, EUR 70,000 is claimed as expenses, whereas the remaining amount is attributable to legal fees and/or attendance at the Hearing and telephone or other correspondences in the course of the proceedings.

1042. The Tribunal notes that Claimants have not challenged the reasonableness of the costs claimed by Respondent, or vice versa. This is, in particular, in light of the Parties' agreement during the Hearing to not have a second round of cost submissions.[966] In any event, the Tribunal finds the costs claimed by Respondent in the amount of EUR 990,000 to be reasonable, taking into account the duration and complexity of these proceedings.

966 Hr. Tr. Day 4, pp. 222:23-222:25.

XI. DECISION

1043. FOR THE FOREGOING REASONS, the Tribunal renders the following decisions:

(i) DECLARES that the Tribunal has jurisdiction over all of Claimants' claims, except the claims relating to (a) the Robin Hood Tax; and (b) the classification of photovoltaic plants as immovable property;

(ii) DECLARES that the Italian Republic has not breached its obligations under Part III of the ECT and/or under international law with respect to Claimants' investments;

(iii) REJECTS Claimants' request for compensation and for pre- and post-award compound interest from the Date of Assessment until the Italian Republic's full and final satisfaction of the Tribunal's Award;

(iv) ORDERS Claimants to pay to the Italian Republic all costs of this arbitration, including the fees of the Tribunal, the SCC's administrative fees, and the expenses of the Tribunal and the Arbitral Secretary, in the amount of EUR 393,169.44 (plus VAT);

(v) ORDERS Claimants to pay to the Italian Republic 75% of the costs incurred by the Italian Republic in this arbitration, including costs for legal representation, in the amount of EUR 990,000;

(vi) REJECTS all other claims and reliefs.

1044. The Parties are reminded that they may bring an action against the Award regarding the decision on the fee(s) of the arbitrator(s) within three months from the date when the party received the Award. This action should be brought before the Stockholm District Court.

1045. The Parties are also reminded that they may bring an action to amend the Award within three months from the date when the party received the Award. This action should be brought before the Svea Court of Appeal in Stockholm.

Seat of the Arbitration: Stockholm, Sweden

Date: 25-MARCH-2020

Professor Dr. Klaus SACHS
Arbitrator

Professor Andrea GIARDINA
Arbitrator

Professor Dr. Albert Jan VAN DEN BERG
Chairperson